STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2011-187273
Lower Court Case No. 2007-CP-40-4259

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DUSHUN STATEN, #282328,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

**I.**

Whether the lower court erred in finding that defense counsel was not ineffective for failing to object to testimony that the Petitioner had pointed a gun at the victim in the days prior to the shooting death of the victim?

**II.**

Whether the lower court erred in finding that defense counsel was not ineffective for failing to object to the State's unconstitutional closing argument when the State bolstered its case by arguing to the jury that Maurice Sanders was properly charged as an accessory instead of a principal because of "evidence that you all didn't hear about"?

## STATEMENT OF THE CASE

The Petitioner, Dushun Staten, was indicted in Richland County for murder and lynching in the first degree. On February 25-March 1, 2002, the Petitioner proceeded to trial by jury on these charges. He was represented at this proceeding by David Taylor, Esquire.[1] At the conclusion of the trial, the Petitioner was found guilty as charged. The Honorable L. Henry McKellar, presiding circuit judge, sentenced the Petitioner to thirty years' imprisonment for the murder conviction and to ten years' imprisonment for the lynching conviction, with the sentences to run concurrently.

The Petitioner timely appealed his convictions and sentence to the South Carolina Court of Appeals. Robert M. Dudek, then Assistant Appellate Defender with the South Carolina Office of Appellate Defense, represented the Petitioner on appeal. In a published opinion filed March 7, 2005, the Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005). The Petitioner then appealed to this Court, which vacated the Court of Appeals' opinion in part and dismissed the writ of certiorari in a published opinion. State v. Staten, 374 S.C. 9, 647 S.E.2d 207 (2007). The Remittitur was issued on June 27, 2007.

On July 12, 2007, the Petitioner filed an Application for Post-Conviction Relief with the Richland County Clerk of Court, which was amended on March 30, 2009. The State made its Return on February 14, 2008. An evidentiary hearing into the matter was convened on April 1, 2009, before the Honorable L. Casey Manning, presiding circuit judge. On July 23, 2009, the PCR court filed an Order of Dismissal denying the Petitioner's application on all issues. The Petitioner then timely filed a Rule 59(e), SCRCP, Motion to Alter or Amend on August 10, 2009.

[1] The Petitioner's brother, Lucius Staten, was jointly tried with the Petitioner for the same charges. He was represented at the trial by Douglas Strickler, Esquire.

Judge Manning denied the Rule 59(e) motion by written order filed February 17, 2011. On March 8, 2011, the Petitioner timely served a Notice of Appeal indicating his intent to appeal the orders issued by Judge Manning in this case. The Notice of Appeal was filed with this Court on March 9, 2011.

Notice of appeal was timely served and filed. The Petitioner now seeks a writ of certiorari.

## STATEMENT OF FACTS

The Petitioner is aware that this Court had a full opportunity to review the facts of his case on direct appeal. See State v. Staten, 374 S.C. 9, 647 S.E.2d 207 (2007). Therefore, the Petitioner will contain his recitation of the facts of the case to what is relevant to the issues presented below. On January 15, 2001, the victim in this case, Phillip Lee, was shot and killed during an altercation near Benedict College in Columbia, South Carolina. The shooting occurred after an apparent gang-related argument broke out between multiple individuals. Neither the Petitioner nor his brother and co-defendant, Lucius Staten, shot the victim. At trial, the evidence presented centered on the level of the Petitioner's and his brother's assistance with the individual who did shoot the victim. The State's theory of the case was that an individual named Limel Sims shot the victim after being given a firearm by the Petitioner. See App. p. 519, line 19-p. 522, line 21; p. 599, lines 1-19.

The Petitioner and his brother presented a strong defense. They presented testimony that another individual, Maurice Sanders, acted alone and fired the shots that killed the victim. See App. p. 905, line 19-p. 906, line 25. This version of events was substantiated by the Petitioner's statement to the police. See App. p. 743, lines 10-18. Furthermore, the Petitioner's brother testified that he was with the Petitioner during the argument and that the Petitioner did not give anyone a firearm. See App. p. 991, line 11-p. 993, line 19. Additionally, they presented testimony that conclusively established that they did not leave the scene of the shooting with Sims or Sanders. See App. p. 1093, line 16-p. 1095, line 20.

Ultimately, five individuals were charged in connection with this case: Limel Sims, the Petitioner, Lucius Staten, Maurice Sanders, and the Petitioner's cousin Shakeem Wilson. Sims, Lucius, and the Petitioner were all charged with murder and lynching in the first degree while

Sanders and Wilson were charged with accessory after the fact to murder and lynching in the first degree. The Petitioner and his brother were tried together and the Petitioner was found guilty on both counts while his brother was found guilty of lynching. The jury hung on the murder charge for the Petitioner's brother and the charge was ultimately dismissed by the State.

## ARGUMENT

### Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

## I. The PCR court erred in failing to find defense counsel ineffective for failing to object to testimony that the Petitioner pointed a gun at the victim in the days prior to the shooting death of the victim.

A. How the Issue Arose Below

At trial, Andrew Britt, the victim's cousin, testified that the Petitioner and his brother had gotten into an argument with the victim two days prior to the shooting death of the victim over the fact that the victim was wearing a blue bandanna on his head. App. p. 383, line 21-p. 385, line 16. Although the argument subsided and both sides shook hands, Britt testified that the Petitioner's brother told them that he was "going to start remembering faces" right before he left. App. p. 386, lines 4-25.

Britt then testified that the Petitioner and the victim got into a subsequent argument when he was not with the victim. Britt testified that the victim came to him and stated that

> "[Y]ou know, Drew"; I was like, "what?" "They just pulled a fucking gun on me." So I said, "damn, who did that?" And he was like, "the niggers we had a – "the niggers we had a argument with on Saturday."

App. p. 399, lines 9-13. Britt clarified that the Petitioner, and not the Petitioner's brother, was the individual who had pointed a gun at the victim. App. p. 427, lines 14-25.

Defense counsel objected to this testimony on the basis of hearsay, which was overruled. See App. p. 398, line 20-p. 399, line 2. Defense counsel did not object to the testimony on prior bad act grounds. On appeal, appellate counsel argued that the testimony was improperly admitted on hearsay and prior bad act grounds. See App. pp. 1322-1324. The Court of Appeals affirmed on the hearsay argument. See App. pp. 1406-1409. However, the Court of Appeals found that the prior bad act argument was not preserved for appellate review. See App. p. 1409 (footnote 4). This Court affirmed the relevant portions of this ruling. See App. pp. 1416-1417.

During the PCR hearing, the Petitioner alleged that defense counsel was ineffective for failing to object to Britt's testimony regarding the Petitioner's pointing of a firearm at the victim. See App. p. 1530, line 18-p. 1531, line 2. Defense counsel testified that he did not consider objecting to the evidence on prior bad act grounds. App. p. 1485, lines 10-13. Defense counsel explained that he did not believe the evidence was objectionable because the "State's going to say, all this does is prove that [the Petitioner] is willing to do such a thing, a state of mind." App. p. 1488, lines 4-6.

The PCR court denied relief on this issue, finding that "[t]he caselaw amply supports introduction of prior confrontations, threats, and fights between the parties, even when they are not so temporally connected with the ultimate murder as they were in this case, by a day or two." App. p. 1554. The PCR court also found that the pointing of a gun at the victim was "part of the *res gestae* of the crime." App. p. 1555. Consequently, the PCR court found that "the Applicant failed to satisfy his burden of proof and demonstrate how trial counsel's purported inactions were deficient within our professional norms – or how the Applicant was ultimately prejudiced." The Petitioner now contends that the PCR court's rulings were in error.

B. Discussion

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Such evidence, however, may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

The Petitioner asserts that this Court need look no further than the PCR court's citation of this Court's prior decisions on this issue to discover how the PCR court's ruling was unmistakably erroneous:

> Our appellate courts have flatly stated that "[i]n homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor." State v. Taylor, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998).

App. p. 1554. If the quotation from Taylor was the only statement of law contained in that decision, the PCR court's decision would be correct. In making its ruling, though, the PCR court completely ignored the *very next sentence* of Taylor, which states that "[t]he general details of the difficulty, however, are inadmissible." 333 S.C. at 168, 508 S.E.2d at 874.

Therefore, pursuant to Taylor, evidence of the argument between the Petitioner and victim was admissible, but evidence of the Petitioner's pointing a firearm at the victim was not. Despite this Court's clear prohibition against such evidence, the details of the "difficulty" were presented to the jury. See State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957) (finding that evidence that a husband had shot his wife prior to her death was inadmissible). Accordingly, defense counsel was deficient in failing to object to the evidence on Rule 404(b), SCRE, grounds in addition to his hearsay argument, and the PCR court's ruling to the contrary is unsupported by any probative evidence.

The PCR court also found that evidence that the Petitioner pointed a gun at the victim was a part of the *res gestae* of the crime. *Res gestae*, however, requires that the prior acts "be so intimately connected to the crimes charged that their introduction is appropriate to complete the story of the crime charged." State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) (footnote 3) (citing State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990)). Evidence that the

Petitioner pointed a gun at the victim days prior to the shooting, when the Petitioner was not the individual who shot the victim, does not qualify as evidence that must be presented for the State's case to make sense. Therefore, the PCR court's ruling on this basis is also unsupported by any probative evidence.

The Petitioner was unquestionably prejudiced by defense counsel's failure to object to the evidence of that he had pointed a firearm at the victim prior to the shooting. The State's entire case was contingent on the jury believing that the Petitioner acted in conjunction with Sims to shoot the victim. The State's intent in presenting this evidence was to make it more likely that the Petitioner had provided a firearm to Sims to shoot the victim because the Petitioner had pointed a gun at the victim before. In other words, "[t]his case fundamentally demonstrates why certain prior bad act testimony is inadmissible, i.e., it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial." Fletcher, *supra*, at 26, 664 S.E.2d at 484. The prejudice to the Petitioner from the admission of this testimony is undeniably overwhelming. The Petitioner respectfully submits that this Court should reverse the PCR court's decision and grant the Petitioner a new trial.

## II. The PCR court erred in failing to find defense counsel ineffective for failing to object to the State's assurances to the jury that Maurice Sanders was properly not charged with murder "based on evidence that you all didn't hear about because it's not relevant to this case."

A. How the Issue Arose Below

As explained above, the State's theory of the case was that Limel Sims acted in conjunction with the Petitioner to shoot the victim. The defense argued that Maurice Sanders, who was charged as an accessory to the murder, was actually the shooter and that he acted alone. During closing argument, the State argued that Sanders was properly charged as an accessory because of evidence that the jury did not hear:

> Ladies and gentlemen, the idea or the premise that Mo Sanders is the shooter is not corroborated by any evidence. In fact, all of the evidence contradicts, all of it.
>
> First, you've got three eyewitnesses, three people that were facing. Remember, I asked that question? They're here facing the shooter, not standing back here. They're facing the shooter in this well-lit area. Three eyewitnesses. Three eyewitnesses facing the shooter in a well-lit area that say the shooter had a black Northface jacket on. Nothing obstructing their view.
>
> Ladies and gentlemen, less than two minutes after these shots were fired, he's apprehended. The people with dark clothing are the people that were hanging up here and if you remember the testimony of Rashon and Tony Kennedy, is that he was hanging back out, hanging back. So was Shakeem Wilson, their cousin. They were hanging back. That's why they're not charged with murder but accessory after the fact *based on evidence that you all didn't hear about because it's not relevant to this case, certain things are done after the fact that you didn't hear about because it's not relevant.*

App. p. 1253, line 18-p. 1254, line 14 (emphasis added). Defense counsel did not object to this portion of the State's closing argument.

Prior to the PCR, in his amended PCR, the Petitioner argued that defense counsel was ineffective for failing to object to the State's closing argument. App. p. 1443. Defense counsel testified that he did not believe there was anything objectionable in the closing argument because he didn't think the prosecutor was talking about Sanders:

> Q: And you disagree that the portion of the argument I've been referring to on 1238 refers to prosecution decisions being made about him, at least in part based on matters not on the record?
>
> A: I—I—I don't know how to interpret that as I sit here looking at this—the dry record now. But at the time that I heard it, I didn't think there was anything wrong with what he said. And Mr. Strickler who was there, a very qualified lawyer as well, didn't see anything wrong with it. Neither of us raised an objection because it just didn't seem objectionable.
>
> Q: And your theory that Maurice Sanders—your theory for the defense, at least in significant part, was that Maurice Sanders was the shooter?
>
> A: Yes.
>
> Q: And you disagree that this portion of the closing argument strongly infers that the reason Maurice Sanders was not being prosecuted was due in part to matters not before the jury?
>
> A: I don't know that he's talking about Moe Sanders here. He doesn't mention his name anywhere.

App. p. 1506, line 10-p. 1507, line 6. Defense counsel also testified that he didn't want to make any objection to the closing argument because of the possibility that the prosecutor would "have you eat your words." App. p. 1492, lines 16-17.

The PCR court denied relief on this issue, finding that defense counsel provided a valid strategy because he did not want to "make questionable objections during closing argument." The PCR court also found that

> The content of the Solicitor's closing argument were issues addressed earlier in the trial; and there were no allegations of

> ineffective assistance of counsel concerning the earlier instances and references of *accessory after the fact*. Attorneys for either party are permitted to comment on and reference what is already in the record. The reference to the other evidence and things done *after* the fact was merely an explanation as to why "they" were (unlike the defendants) charged with accessory after the fact-0charges that were referenced earlier in the trial. (Trial transcript p. 250, 832, and 1193, etc.).

App. p. 1557 (emphasis in original). The Petitioner now contends that the PCR court's ruling was in error.

B. Discussion

"[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). The critical inquiry in evaluating the propriety of a prosecutor's closing argument is "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting a conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. Dechristoforo, 416 U.S. 637, 643 (1974)).

A prosecutor's closing argument must not "manipulate or misstate the evidence." Darden at 182. Furthermore, a prosecutor's closing argument must be limited to the "evidence in the record and the reasonable inferences that may be drawn from the evidence." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). The prosecutor may violate these principles by vouching for his witnesses or bolstering his case. "Vouching occurs when a prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury." United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997).

There can be no question that the State impermissibly bolstered its case by arguing that "information not presented to the jury supports the testimony," State v. Shuler, 304 S.C. 604, 630, 545 S.E.2d 805, 818 (2001), of its witnesses that Maurice Sanders was not the shooter:

> Ladies and gentlemen, the idea or the premise that Mo Sanders is the shooter is not corroborated by any evidence. In fact, all of the evidence contradicts, all of it.
>
> ...
>
> Ladies and gentlemen, less than two minutes after these shots were fired, he's apprehended. The people with dark clothing are the people that were hanging up here and if you remember the testimony of Rashon and Tony Kennedy, is that he was hanging back out, hanging back. So was Shakeem Wilson, their cousin. They were hanging back. That's why they're not charged with murder but accessory after the fact *based on evidence that you all didn't hear about because it's not relevant to this case, certain things are done after the fact that you didn't hear about because it's not relevant.*

App. p. 1253, line 18-p. 1254, line 14 (emphasis added). The State's explicit argument to the jury was that Maurice Sanders was not the shooter—and was therefore properly charged as an accessory after the fact—because of "evidence that you all didn't hear about." App. p. 1254, lines 11-12. The Petitioner submits that it is difficult to fathom a more blatant example of arguing that "information not presented to the jury supports the testimony" of the State's witnesses. Id.[2]

The importance of this argument cannot be understated. The Petitioner's entire defense was based on the premise that Maurice Sanders acted alone in shooting the victim. In this closing argument, however, the prosecutor is telling the jury that Sanders was an accessory

[2] Although the State and defense counsel attempted to argue that it was not clear who the prosecutor was referring to in this portion of the closing argument, see App. p. 1500, lines 7-15, this contention is baseless. There were only two individuals charged with accessory after the fact to murder in this case: Maurice Sanders and Shakeem Wilson. By stating that "they're not charged with murder but accessory after the fact," the prosecutor is clearly referring to Sanders and Wilson by the use of the pronoun "they." Any argument that the prosecutor's argument is unclear should be rejected.

because of information that he possesses and that they didn't need to hear about. In other words, the prosecutor's argument to the jury is the following: don't believe their witnesses because *I* know the truth.

It is clear that the prosecutor's closing argument was highly improper and prejudicial. Despite the clear impact of the argument, the PCR court found that defense counsel was not deficient because it was his strategy to not make "questionable objections during closing argument." App. p. 1556. Under normal circumstances, this is a perfectly reasonable strategy. However, an objection that the solicitor was arguing to the jury that his personal knowledge of the facts of the case completely obliterates the defense's case does not qualify as a "questionable objection." The objection had to be made, and defense counsel as deficient for failing to make it.

The PCR court also denied relief on this ground because it found that the prosecutor was arguing evidence that was presented during the trial. This ruling is completely devoid of any probative evidence because the prosecutor's closing argument clearly referred to evidence that the jury "didn't hear about." App. p. 1254, line 13. It was incumbent upon defense counsel to make the proper objection, and he failed to do so. The PCR court's reasoning should be rejected by this Court.

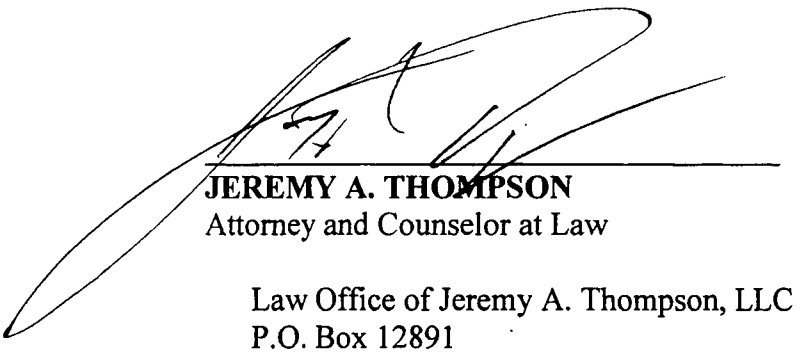
As a final matter, the Petitioner was clearly prejudiced by defense counsel's failure to object to the solicitor's closing argument. The Petitioner's entire defense was predicated on the jury's belief that Sanders acted alone when he shot the victim. The solicitor's closing argument instructed the jury that Sanders was properly charged as an accessory, and not with murder, because of evidence solely in the possession of the solicitor. The prejudice that flowed from this argument cannot be understated. The PCR court's ruling to the contrary is unsupported by any

probative evidence and the Petitioner respectfully submits that this Court should grant him a new trial.

## CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



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This 17th day of October, 2011.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that one copy of the Petition for a Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Brian T. Petrano, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 17th day of October, 2011.

**JEREMY A. THOMPSON**
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 17th day of October, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 2/18

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

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Case No. 2007CP404259

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF AUTHORITIES

## STATEMENT OF ISSUES ON APPEAL

WHETHER ANY SUFFICIENT EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S DENIAL OF PCR?

## STATEMENT OF THE CASE

The Respondent agrees with Petitioner's statement of the case for purposes of this Return.

The Petitioner, Dushun Staten, was indicted in Richland County for murder and lynching in the first degree. On February 25-March 1, 2002, the Petitioner proceeded to trial by jury on these charges. He was represented at this proceeding by David Taylor, Esquire.[1] At the conclusion of the trial, the Petitioner was found guilty as charged. The Honorable L. Henry McKellar, presiding circuit judge, sentenced the Petitioner to thirty years' imprisonment for the murder conviction and to ten years' imprisonment for the lynching conviction, with the sentences to run concurrently.

The Petitioner timely appealed his convictions and sentence to the South Carolina Court of Appeals. Robert M. Dudek, then Assistant Appellate Defender with the South Carolina Office of Appellate Defense, represented the Petitioner on appeal. In a published opinion filed March 7, 2005, the Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005). The Petitioner then appealed to this Court, which vacated the Court of Appeals' opinion in part and dismissed the writ of certiorari in a published opinion. State v. Staten, 374 S.C. 9, 647 S.E.2d 207 (2007). The Remittitur was issued on June 27,

[1] The Petitioner's brother, Lucius Staten, was jointly tried with the Petitioner for the same charges. He was represented at the trial by Douglas Strickler, Esquire.

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On July 12, 2007, the Petitioner filed an Application for Post-Conviction Relief with the Richland County Clerk of Court, which was amended on March 30, 2009. The State made its Return on February 14, 2008. An evidentiary hearing into the matter was convened on April 1, 2009, before the Honorable L. Casey Manning, presiding circuit judge. On July 23, 2009, the PCR court filed an Order of Dismissal denying the Petitioner's application on all issues. The Petitioner then timely filed a Rule 59(e), SCRCP, Motion to Alter or Amend on August 10, 2009. Judge Manning denied the Rule 59(e) motion by written order filed February 17, 2011.

The Petitioner filed a Petition for Writ of Certiorari on October 17, 2011. This return follows.

## STANDARD OF REVIEW

The proper standard of review of a post conviction relief 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, 386 S.E.2d 624 (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, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for 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 v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State,

300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

## ARGUMENT 1

## SUFFICIENT EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S DENIAL OF PCR

*The Supposed Prior Bad Act*

"Therefore, pursuant to Taylor, evidence of the argument between the Petitioner and victim was admissible, but evidence of the Petitioner's pointing a firearm at the victim was not." (PWOC, p. 10). This concession by the Petitioner is a completely different argument than he made at the PCR hearing. At the PCR hearing, the Petitioner generically argued that the evidence of the prior altercation was "evidence of prior bad acts" as a "theory for its inadmissibility."[2] (App. p. 1485 L. 12, 15). For the first time, he now claims that yes it was admissible, but not in such detail. The Petitioner's actual specific arguments regarding the supposed prior bad act evidence was at the end of the PCR hearing. (App. p. 1530 – 1531). The Petitioner claimed that the prior bad act evidence was wholly inadmissible. The Petitioner never once argued that evidence of prior altercations was indeed admissible – as he does now. Similarly, the Petitioner's Rule 59(e), SCRCP motion never articulated this position, nor did it articulate his criticism of the PCR Court's

[2] The Petitioner never explained to the PCR Court, and still has not done so, what the specific nature of the "prior bad act" was, such as pointing and presenting. If the specific nature of the supposed prior bad act was manifested it could be explored within the context of the record, perhaps there was evidence that the Petitioner presented a gun during the prior altercation in an effort to diffuse aggression by the victim, i.e. self-defense, which may not technically be a "bad act." *See also*, Rule 404(a)(2); 404(b). Note that the co-defendant completely denied the prior animosity, including the gun incident. (App. p. 977).

use of Taylor as to the case at hand.[3]

At the PCR hearing, the Petitioner's entire questioning of trial counsel regarding the prior altercation was premised on German v. State, 325 S.C. 25 (1996). (App. p. 1487 – 1488). "Prior bad act" is never mentioned within German, the issue in German is limited to generic reputation type character evidence that the officer had received about Mr. German. The claims made at the PCR hearing were not the nuanced argument now presented to this Court.

The very nature of PCR requires some speculation. For example, the Petitioner claims that counsel should have objected to the supposed prior bad act evidence. To analyze the claim one has to speculate how the trial court would conduct the relevant Rule 403, SCRE analysis when considering whether to admit the supposed prior bad act evidence had the theoretical objection been made. There was no prejudicial analysis presented to the PCR court because the Petitioner's argument was that it was simply inadmissible. Presumably, the Petitioner will present a more detailed prejudicial analysis in his reply. The Respondent submits that the prior altercation evidence was highly relevant and probative regarding an observation of a gun in Petitioner's possession prior to the shooting. State v. Holland, 385 S.C. 159 (S.C. App. 2009).[4] The malice component of the case was related to a

[3] The evidence at trial was that the Petitioner and the victim had escalating confrontations every time their paths crossed which ultimately evolved into gun play.

[4] Once again, the technical nature of the supposed prior bad act was never explained. *Supra*, note 2.

continuing confrontation between the Petitioner and the victim regarding the color of fabric.[5]

This Petitioner cannot assert a new argument on certiorari that he never bothered to specifically assert before the PCR court. Marlar v. State, 375 S.C. 407 (2007); Humbert v. State, 345 S.C. 332 (2001). The PCR Court properly explained why the Petitioner's argument – as presented at the PCR hearing – was insufficient to demonstrate ineffective assistance of counsel, i.e. deficient performance and prejudice. (App. p. 1553 – 1555).

*Closing Argument*

The PCR Court evaluated the credibility of trial counsel and agreed with his explanation as to why he did not object to the State's closing arguments – "any evidence" therefore exists to support the PCR Court. (App. p. 1556 – 1557). The appropriate scope of review of this Court is that "any evidence" of probative value is sufficient to uphold the PCR judge's findings. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). As the PCR, and the Court of Appeals, explained, the Petitioner's focus on who shot the victim is not relevant.

The PCR Court evaluated the closing argument issue presented at the PCR hearing, which was a vouching issue. The PCR Court correctly

[5] While the co-defendant denied it at trial, a number of witnesses testified that Petitioner was a member of the Bloods and wore red bandanas or red clothing. (App. p. 388 – 389; 505 – 507; 592 – 593; 922 – 924; 1033 – 1038).

explained, based on trial counsel's testimony, that it was not perfectly clear from the cold transcript who the Solicitor was pointing at when he said, "[t]hat's why **they**'re not charged with murder...." (App. p. 1254; 1556 – 1557). The Solicitor could have been pointing at anyone in the room when he said that, i.e. Rashon, Tony, Shakeem (the actual names mentioned in that portion of the argument).[6] As trial counsel correctly explained, there was no mention of Maurice Sanders' name anywhere during that portion of the Solicitor's closing argument. (App. p. 1507).

For the sake of argument, even assuming the Petitioner's statement is correct that the Solicitor did improperly comment on matters outside of the record as to what Maurice did, there is no prejudice because it does not matter if Maurice Sanders was the shooter as the defense was arguing. The PCR Court's Order explains: "[a]s the Court of Appeals reasoned in its opinion, "showing Sanders as opposed to Sims was the shooter did nothing to aid the jury in its decision". Staten, 364 S.C. at 40, 610 S.E.2d at 840." (App. p. 1551).

[6] Similarly, the PCR court explained that either party is entitled to comment on evidence in the record and that the jury had been told on more than one occasions that some people were simply charged with accessory. (App. p. 1557).

## CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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JOHN W. McINTOSH
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Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

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By: _____
ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
December 17, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal From Richland County
Honorable L. Casey Manning, Circuit Court Judge

---

Dushon Staten, 282328,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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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, Jeremy A. Thompson by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 19th day of December, 2011.

BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 19th
day of December, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: My Commission Expires
January 30, 2013

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

---

Case No. 2007-CP-40-4259

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DUSHUN STATEN, #282328,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

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

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## ARGUMENT IN REPLY

In its Return, the Respondent argues that it is unclear which prior bad acts the Petitioner asserts should have been objected to by trial counsel. See Return at 6-8. The Petitioner asserts that the record and the certiorari petition make it clear what defense counsel should have objected to at trial: the testimony of Andrew Britt that the Petitioner pointed a gun at the victim during a prior altercation. However, in an effort to dispel any confusion regarding this issue, the Petitioner will undertake to show exactly how this issue is preserved for this Court's review.

At trial, Andrew Britt testified that the victim told him that the Petitioner had pointed a gun at him during an altercation with the Petitioner, the Petitioner's brother, and the victim. See App. p. 399, lines 9-13; p. 427, lines 14-25. Defense counsel did not make an objection that the pointing and presenting of the firearm was inadmissible pursuant to Rule 404(b), SCRE.

During the PCR hearing, PCR counsel questioned defense counsel about his failure to make an objection pursuant to Rule 404(b), SCRE:

> Q: Well, let me interrupt you there. *Pulling a gun on someone and pointing and presenting a firearm would be a separate and independent crime, would it not?*
>
> A: It would, yet.
>
> Q: And the Court of Appeals in Footnote 4 of the decision found that that issue was not [p]reserved for appellate review?
>
> A: *The issue of prior bad acts?*
>
> Q: *Correct.*

App. p. 1486, lines 10-19 (emphasis added). PCR counsel then argued to the judge that defense counsel "was ineffective for failing to argue that the testimony of Andrew Britt concerning comments made by the decedent prior to his death ... impacted the character evidence rule and were improper evidence of prior bad acts." App. p. 1530, lines 10-14. Given the questions by

PCR counsel posed to defense counsel and PCR counsel's comments during closing, it is clear that the Petitioner's argument during the PCR hearing was that defense counsel was ineffective for failing to object to testimony about a prior incident of "pointing and presenting a firearm." App. p. 1486, line 11.

While the PCR court made a comment that the issue was presented "[w]ithout any specificity," the PCR court clearly understood the allegation raised at the PCR hearing because it noted that the challenged testimony was about "the Applicant pulling a gun on [the victim]." App. pp. 1553-1554. The PCR court then denied the allegation by citing State v. Sawtell, 872 A.2d 1013 (N.H. 2005), and cited it for the proposition that "evidence of defendant's prior threats to victim *with a gun* months before murder was admissible as the threats involved the same victim, the same weapon, and similar circumstances." App. p. 1554 (emphasis added). Therefore, the PCR court ruled directly on the allegation presented to it: whether or not defense counsel was ineffective for failing to object to testimony that the Petitioner "pull[ed] a gun" on the victim. App. p. 1554.

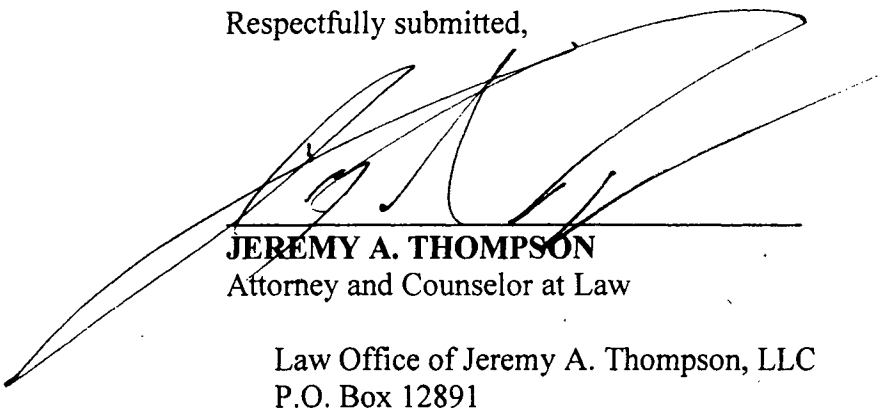
This issue was also presented in the certiorari petition by arguing that "evidence of the Petitioner's pointing a firearm at the victim was not" admissible at trial. Certiorari Petition at 10. The Petitioner then goes on to mention the testimony that the Petitioner pointed a firearm at the victim no less than four times. See Certiorari Petition at 10-11. This argument presents, and builds upon, the same argument presented below. The allegation is preserved for this Court's review, and the Respondent's argument that this issue is barred by Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), is completely meritless.

With regard to the other arguments advanced by the Respondent as to why this certiorari should be denied with regard to this issue, or with regard to the Petitioner's other issue presented on appeal, the Petitioner would rely upon his arguments advanced in his certiorari petition.

## CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



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**ATTORNEY FOR PETITIONER.**

This 9th day of January, 2012.



1610

STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

---

Case No. 2007-CP-40-4259

---



DUSHUN STATEN, #282328,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

**CERTIFICATE OF SERVICE**

---

The undersigned hereby certifies that one copy of the Reply to Return to Petition for a Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Brian T. Petrano, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 9th day of ~~January,~~ 2012.

**JEREMY A. THOMPSON**
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 9th day of January, 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: 2/16

# The South Carolina Court of Appeals

Dushun Staten, Petitioner,

v.

State of South Carolina, Respondent.

~~Appellate Case No. 2011-187273~~

RECEIVED 3/13/14

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ORDER

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This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

Paul E. Short, Jr. J.

J.

J.

Columbia, South Carolina

cc: Brian T. Petrano
Jeremy Adam Thompson

FILED
March 12, 2014

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2011-187273
Lower Court Case No. 2007-CP-40-4259

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DUSHUN STATEN, #282328,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

# BRIEF OF PETITIONER

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**CASES**

**CONSTITUTIONAL PROVISIONS**



**COURT RULES**



**STATUTES**

## STATEMENT OF ISSUES ON APPEAL

**I.**

Whether defense counsel was ineffective for failing to object to testimony that the Petitioner pointed a firearm at the victim two days prior to the shooting death of the victim?

**II.**

Whether defense counsel was ineffective for failing to object to the State's improper closing argument wherein the State argued that Maurice Sanders, the individual the Petitioner claimed shot the victim, was properly charged as an accessory instead of a principal because of "evidence that you all didn't hear about"?

## STATEMENT OF THE CASE

The Petitioner, Dushun Staten, was indicted in Richland County for one count of murder and one count of lynching in the first degree. On February 25 through March 1, 2002, the Petitioner proceeded to trial by jury on these charges. He was represented at this proceeding by David Taylor, Esquire. The Petitioner's brother and co-defendant, Lucius Staten, was jointly tried with the Petitioner on the same charges. At the conclusion of the trial, the Petitioner was found guilty as charged.[1] The Honorable L. Henry McKellar, presiding circuit judge, sentenced the Petitioner to thirty years' imprisonment for the murder conviction and to ten years' imprisonment for the lynching conviction, with the sentences to run concurrently.

The Petitioner timely appealed his convictions and sentences to this Court. Robert M. Dudek, Assistant Appellate Defender with the South Carolina Office of Appellate Defense, represented the Petitioner on appeal. In a published opinion filed March 7, 2005, this Court affirmed the Petitioner's convictions and sentences. State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005). The Petitioner then appealed to the Supreme Court of South Carolina, which issued a published decision vacating this Court's opinion in part and dismissing the certiorari petition in part. State v. Staten, 374 S.C. 9, 647 S.E.2d 207 (2007). The Remittitur was issued on June 27, 2007.

On July 12, 2007, the Petitioner filed an Application for Post-Conviction Relief with the Richland County Clerk of Court's Office, which was amended on March 30, 2009. The State served its Return on February 14, 2008. An evidentiary hearing into the matter was convened on April 1, 2009, before the Honorable L. Casey Manning, presiding circuit judge. On July 23, 2009, the PCR court filed an Order of Dismissal denying the Petitioner's application on all issues. The Petitioner then timely served a Rule 59(e), SCRCP, Motion to Alter or Amend on

[1] The jury convicted the Petitioner's co-defendant of lynching but hung on the charge of murder.

August 10, 2009. The PCR court denied the Rule 59(e) motion by written order filed February 17, 2011. On March 8, 2011, the Petitioner timely served a Notice of Appeal indicating his intent to appeal the orders issued by the PCR court in this case. The Notice of Appeal was received by the Supreme Court on March 9, 2011.

The Petitioner filed a Petition for a Writ of Certiorari with the Supreme Court on October 17, 2011. The State served its Return on December 19, 2011. The Petitioner filed a Reply to the State's Return on January 9, 2012. The Supreme Court subsequently transferred the appeal to this Court. By order filed March 12, 2014, this Court granted the certiorari petition. The Petitioner now submits this Brief in support of his argument that the PCR court improperly denied his Application for Post-Conviction Relief.

## STATEMENT OF FACTS

On January 15, 2001, the victim, Phillip Lee, was shot and killed during an altercation between two large groups of individuals near Benedict College in Columbia, South Carolina. The State presented evidence that the altercation was gang-related. At trial, the State conceded that neither the Petitioner nor his brother, Lucius Staten, shot the victim. Instead, the State presented testimony that another individual named Limel Sims shot the victim after being given a firearm by the Petitioner that he retrieved from a Mitsubishi Galant. See generally App. p. 519, line 19-p. 522, line 21; p. 599, lines 1-19. The State prosecuted the Petitioner and his brother on an accomplice liability basis.[2]

The Petitioner and his brother presented a strong defense that another individual, Maurice Sanders, fired the shots that killed the victim and that he acted alone in doing so. This defense was established through several sources. First, the Petitioner's statement to the police identified Sanders as the shooter. See App. p. 743, lines 15-18. Second, a Benedict student named Brandon McCants, who had no substantive connection to the Petitioner or to Lucius,[3] testified that Lucius told everyone to stop fighting and told the Petitioner to leave. App. p. 904, line 25-p. 906, line 20. McCants further testified that when Lucius turned to leave, Sanders opened fire and fired two shots. App. p. 906 lines 18-25; p. 910, line 13-p. 911, line 23. He also testified that no one got a firearm out of the Galant. App. p. 914, line 23-p. 915, line 11. Third, Lucius testified that he was with the Petitioner during the argument, that he told the Petitioner to get in the car, and that he did not see a firearm prior to the shots being fired. App. p. 990, line 18-p. 995, line 25. Moreover, he testified that both he and the Petitioner had withdrawn from the

[2] As to Lucius' involvement, the State presented evidence that Lucius told the Petitioner to "get the hammer"—the firearm—and that he nodded at Sims immediately prior to shots being fired. App. p. 522, lines 8-16; p. 599, lines 1-11.

[3] McCants testified that he met the Petitioner and Lucius the first week of January 2001 and had only seen them a few times by the date of the incident. App. p. 890, line 5-p. 891, line 19.

argument before any shots were fired. App. p. 1015, lines 1-18. Fourth, the defense presented the testimony of Garrett Copeland, an Allen University student and ordained minister at the time of the incident, who testified that he gave the Petitioner and Lucius a ride from the area immediately following the shooting. App. p. 1092, line 23-p. 1097, line 13. This testimony demonstrated that the Petitioner and Lucius did not leave the scene with either Sims or Sanders.

Five individuals were ultimately charged in this case: Sims, the Petitioner, Lucius, Sanders, and the Petitioner's cousin Shakeem Wilson. Sims, Lucius, and the Petitioner were all charged with murder and lynching in the first degree whereas Sanders and Wilson were only charged with accessory after the fact to murder and to lynching in the first degree. The Petitioner was found guilty as charged of both offenses, but Lucius was only found guilty of the lynching offense as the jury was hung on the murder charge.

## ARGUMENT

### Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that defense counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

### I. The PCR court's finding that defense counsel was not ineffective for failing to object to testimony that the Petitioner pointed a firearm at the victim in the days prior to the victim's death is not supported by any probative evidence.

A. How the Issue Arose Below

At trial, the State sought to admit evidence that the Petitioner and Lucius quarreled with the victim in the days prior to the victim's death. To that end, the State presented the testimony of Andrew Britt, the victim's cousin and roommate, who testified about two altercations. With regard to the first altercation, Britt testified that he witnessed an argument on Saturday, January

13, 2001, between the Petitioner, Lucius, and the victim that began because the victim wore a blue bandanna. App. p. 383, line 21-p. 386, line 13. He further testified that the argument died down and both sides shook hands; however, Lucius stated "[w]e're going to start remembering faces" as he drove away. App. p. 386, lines 14-25.

With regard to the second altercation, Britt testified that he was in his room on Sunday, January 14, 2001, when the victim came in with a very angry demeanor. App. p. 396, line 4-p. 398, line 16. Britt testified that he and the victim had the following conversation after another altercation with the Petitioner and Lucius:

> He was like, "You know, Drew"; I was like, "What?" "They just pulled a fucking gun on me." So I said, "Damn, who did that?" And he was like, "The niggers we had a – "The niggers we had a argument with on Saturday." So I took it as, "You know what, forget it. I don't think they're going to come back. Just forget about it." He was like, "I bet." "So just forget about it."

App. p. 399, lines 9-16. Britt later testified that the Petitioner was the individual who had pointed a gun at the victim. App. p. 427, lines 14-25.

Defense counsel objected to Britt's testimony regarding the second altercation solely on the basis of hearsay, which was overruled by the trial court as an excited utterance. App. p. 398, line 20-p. 399, line 2. On appeal, appellate counsel argued that the testimony was improperly admitted as both an excited utterance *and* as a prior bad act. See App. pp. 1322-1324. This Court affirmed the trial court's ruling regarding hearsay. See State v. Staten, *supra*, 364 S.C. at 34-36, 610 S.E.2d at 837-838; App. pp. 1406-1409. This Court found that the prior bad act claim was not preserved for appeal, however, as "this objection was not made at trial, and the trial court did not have an opportunity to rule on the objection." Id. at 36, 610 S.E.2d at 838 (footnote 4).

At the PCR hearing, the Petitioner argued that defense counsel "was ineffective for failing to argue that the testimony of Andrew Britt concerning comments made by the decent prior to his death ... impacted the character evidence rule and were improper evidence of prior bad acts." App p. 1530, lines 10-14. In support of this allegation, the Petitioner questioned defense counsel about his failure to make an objection to Britt's testimony regarding the second altercation pursuant to Rule 404(b), SCRE:

> Q: Okay. You objected to Andrew Britt being able to testify to what he had allegedly been told by Lee prior to his death?
>
> A: Yes.
>
> Q: And you objected to that on hearsay grounds?
>
> A: That's correct.
>
> Q: Did you consider objecting to that evidence also on the ground that it violated the character evidence rule as evidence of prior bad acts?
>
> A: *No.*
>
> Q: Are you aware that it was argued on that basis as an alternative theory for its inadmissibility on direct appeal?
>
> A: I am aware that Mr. Dudek combined that argument with my argument that it was a violation of the hearsay rule to let it in. To be very honest with you, I did not perceive that to be the grounds for objection that should have been raised to that. I raised the objection that I thought was particular and to the point, and that was it was a violation of the hearsay rule. Prior bad acts, as I understand them, generally you would object to those if those prior bad acts have no real relationship to the events about what you're trying your case.
>
> But if they are related to the events trying your case such as to show motive or a willingness to do something or a state of mind or something like which is what we had here, *prior bad acts just didn't even—didn't even strike me as the argument.* It simply was that this is hearsay. This man said, that he pulled a gun on me.

> Q: Well, let me interrupt you there. *Pulling a gun on someone and pointing it and presenting a firearm would be a separate and independent crime, would it not?*
>
> A: It would, yes.
>
> Q: And the Court of Appeals in Footnote 4 of the decision found that that issue was not [p]reserved for appellate review?
>
> A: *The issue of prior bad acts?*
>
> Q: Correct.
>
> A: *Well, I didn't make the argument so certainly I didn't preserve it.*

App. p. 1485, line 4-p. 1486, line 21 (emphasis added). Defense counsel further testified that the evidence would have been admissible pursuant to Rule 404, SCRE, because "[t]he State's going to say, all this does is prove that he is willing to do such a thing, a state of mind," so "I didn't make the argument and I wouldn't make it, I don't think, today either." App. p. 1488, lines 4-8.

The PCR court denied relief on this claim, finding that

> The substance of the statement was admissible for various purposes listed in Rule 404(b), SCRE. The caselaw amply supports introduction of prior confrontations, threats, and fights between the parties, even when they are not so temporally connected with the ultimate murder as they were in this case, by a day or two. Our appellate courts have flatly stated that "[i]n homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor." State v. Taylor, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998).

App. p. 1554. The PCR court further concluded that "the prior confrontations, including the one at the heart of this case, are part of the *res gestae* of the crime, in that they are such a part of the fabric of explaining to the jury how and why confrontations escalated into a senseless murder in the parking lot of a local college." App. p. 1555. The PCR court ultimately found "that the

Applicant failed to satisfy his burden of proof and demonstrate how trial counsel's purported inactions were deficient within our professional norms – or how the Applicant was ultimately prejudiced." App. p. 1554. The Petitioner now contends that the PCR court's rulings were erroneous and that they should be reversed by this Court.

B. Discussion

The Petitioner contends that there is no probative evidence to support the PCR court's conclusion that defense counsel was not ineffective for failing to object to Britt's testimony regarding the Petitioner's pointing and presenting a firearm at the victim the day prior to the shooting. As with any allegation of ineffective assistance of counsel, the Petitioner must show that the defense counsel's performance was deficient and that defense counsel's deficient performance prejudiced the Petitioner. See Strickland, *supra*. Accordingly, the Petitioner will address Strickland's performance prong before turning to Strickland's prejudice prong. Since the Respondent raised a preservation claim in its Return to this issue, however, see Return at 6-8, the Petitioner will first address how this issue is preserved for this Court's review.

*1. This Issue Is Preserved for Appeal*

In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the Supreme Court held that a PCR applicant fails to preserve for appeal any issue that is presented to a PCR court but is not directly ruled upon by the PCR judge. In order to constitute a "sufficient ruling" for appeal, the order must "set forth specific findings of fact and conclusions of law" regarding the issue presented. Id. at 409, 653 S.E.2d at 266. The "ruling" that the PCR judge had made in Marlar that was not sufficient to preserve the claim for appeal read as follows:

> As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his

> burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.

Id. Based on Marlar, this issue is clearly preserved for this Court's review.

During the PCR hearing, the Petitioner clearly asked defense counsel if pointing and presenting a firearm constituted a bad act that would fall under the purview of Rule 404(b), SCRE. See App. p. 1486, lines 10-14. The Petitioner specifically argued to the PCR court that defense counsel "was ineffective for failing to argue that the testimony of Andrew Britt concerning comments made by the decedent prior to his death ... impacted the character evidence rule and were improper evidence of prior bad acts." App. p. 1530, lines 10-14. Consequently, the PCR court was well aware of the nature of the Petitioner's allegation.

Unlike the order at issue in Marlar, the PCR court directly ruled on the Petitioner's Rule 404(b), SCRE, claim. The PCR court's explanation for how Britt's testimony was properly admitted pursuant to Rule 404(b), SCRE, consists of approximately two-and-a-half pages of text and unequivocally concludes that the Petitioner failed to meet his burden of proof with regard to the issue. See App. pp. 1553-1555. The PCR court even identifies the exact testimony the Petitioner claimed defense counsel should have raised an objection to: "The victim's statement related to the event that caused it – the Applicant pulling a gun on him." App. p. 1154. This order constitutes a "sufficient ruling" pursuant to Marlar. 375 S.C. at 409, 653 S.E.2d at 266.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "Imposing such a requirement on the appellant 'is meant to enable the lower court

to rule properly after it has considered all relevant facts, law, and arguments.'" Id. (quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Here, the PCR court has provided this Court with an ample platform for reviewing this claim. Accordingly, this Court should reach the merits of the Petitioner's arguments.[4]

*2. Defense Counsel's Performance Was Deficient*

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Such evidence, however, may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). An allegation that an individual has pointed a firearm at another individual constitutes an "other act" within the ambit of Rule 404(b), SCRE. See generally State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992).

As noted above, the PCR court found that Britt's testimony regarding the pointing and presenting a firearm was admissible because

> Our appellate courts have flatly stated that "[i]n homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor." State v. Taylor, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998).

App. p. 1554. The PCR court critically erred in its analysis of this issue because it failed to realize the impact of Taylor's very next sentence in the quoted portion of the opinion, which states that "[t]he general details of the difficulty, however, are inadmissible." 333 S.C. at 168,

[4] Although the Petitioner does not believe there is any doubt that his claim is preserved for appeal, the Petitioner would note that "any doubt concerning whether [this] argument was preserved for review should be resolved in favor of finding the argument preserved," and that this principle weighs in favor of consideration of his claim. State v. Jenkins, Op. No. 5232 (S.C. Ct. App. refiled July 9, 2014) (Shearouse Adv. Sh. No. 27 at 55) (footnote 7).

508 S.E.2d at 874. Pursuant to Taylor, therefore, the detail that the Petitioner pointed a firearm at the victim should have been excluded, not admitted.

Numerous Supreme Court decisions bear this argument out. In Taylor itself, the defense sought to introduce evidence that the defendant had been attacked by the victim, his wife, on a prior occasion where

> [Appellant] and [the victim] got in an argument ... [a]nd [the victim] hit him in the head with the [beer] bottle about three times. It never broke but she hit him pretty hard and he staggered back, and she went and got in the car and left him at my house in Orangeburg.

333 S.C. at 168, 508 S.E.2d at 874. The Supreme Court held that this evidence was properly excluded because

> Appellant's brother testified the decedent hit appellant on the head with a bottle on a prior occasion. This testimony supported appellant's contention the decedent was the aggressor at the time of her death. The trial judge properly admitted this testimony and properly excluded the specifics of the incident.

Id., 508 S.E.2d at 875. Similarly, in this case, the evidence that the Petitioner and the decedent had gotten into an altercation the day prior to the shooting was admissible, but the specifics of the incident—the fact that the Petitioner pointed a firearm at the victim—should have been excluded.

In State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001), the Supreme Court was presented with a case where the defendant's friend, Tony Berry, testified that

> [T]he evening before the murder, he, appellant, appellant's brother Stephen, and their brother Ricco were playing cards. Appellant and Stephen began arguing. When appellant "went in the back room in the back part of the house, and reached down," Berry ran out of the house. Berry testified he knew appellant had a nine millimeter gun and he thought appellant was going to get it.

343 S.C. at 633, 541 S.E.2d at 835. The Supreme Court held that evidence that Berry knew the defendant owned a pistol was relevant, but that he "could have testified he knew appellant possessed a nine millimeter pistol without describing the argument between appellant and his brother." Id. at 634, 541 S.E.2d at 836. The Supreme Court further held that it was clear that "the State wanted Berry to testify about the argument between appellant and his brother on the evening before the murder to establish appellant was clearly a violent person and quick to draw his pistol. This testimony regarding appellant's character was inadmissible." Id. at 635. Braxton is analogous to this case because the details of the arguments in both cases were inadmissible inasmuch as they were intended to demonstrate the violent propensity of the defendant. In this case, as in Braxton, the specific details of this incident—the pointing and presenting of a firearm—should have been excluded.

Finally, in State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957), the Supreme Court dealt with a factual scenario where the murder defendant "had approximately six or seven weeks prior to the slaying shot his wife in the back with a shotgun." 231 S.C. at 654, 99 S.E.2d at 665. The Supreme Court held that the details of the incident were inadmissible because

> [E]vidence of a previous difficulty [are] competent *only to show the animus of the parties*, and thus aid the jury in reaching the conclusion as to who probably was the aggressor, and what demeanor each party had reason to expect from the other when they met and the fatal difficulty occurred. *The general details of the previous trouble should be excluded.*

Id. (emphasis added). If it was inadmissible to show that a defendant had previously shot at the individual he ultimately killed, then it is certainly improper to admit evidence that a defendant had pointed a firearm at the individual he helped to kill.

Consequently, it is clear from these decisions that the State could have introduced evidence to show that the Petitioner and the victim quarreled the day prior to the shooting;

however, the specific details of that incident are inadmissible pursuant to Rule 404(b), SCRE. The PCR court's conclusion to the contrary is unsupported by any probative evidence, as it is unsupported by any decision on point, and should be reversed by this Court.

Having established that it was improper for the State to introduce evidence that the Petitioner pointed a firearm at the victim the day prior to the fatal shooting, the Petitioner now turns to the question of defense counsel's conduct. Defense counsel testified that he did not believe that there was anything objectionable in Britt's testimony. This testimony demonstrates defense counsel's deficiency, since Britt's testimony was clearly objectionable on prior bad act grounds. Defense counsel, however, went further than merely stating that it was not objectionable and proffered a reason as to why the testimony was not objectionable: "[t]he State's going to say, all this does is prove that he is willing to do such a thing, a state of mind." App. p. 1488, lines 4-6. This testimony demonstrates a fundamental misunderstanding of character evidence, as the reason stated by defense counsel as to why he should not have raised an objection is the very reason the testimony was inadmissible. If Britt's testimony was introduced to show that the Petitioner was capable of perpetrating this terrible crime, then this testimony "fundamentally demonstrates why certain prior bad act testimony is inadmissible, i.e., it is used by the jury to infer that the defendant did in fact commit the crime for which he is on trial." State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008). Defense counsel's deficient conduct is stark and clear, and the PCR court erred in concluding that his performance was not deficient.

As a final matter, the PCR court also concluded that Britt's testimony was necessary to establish the *res gestae* of the crime. See App. p. 1555. The *res gestae* doctrine, however, requires that the prior bad acts "be so intimately connected to the crimes charged that their

introduction is appropriate to complete the story of the crime charged." State v. Fletcher, *supra*, 379 S.C. at 25, 664 S.E.2d at 484 (footnote 3) (citing State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990)). As this Court has recognized, "arguing an event is part of the *res gestae* is equivalent to arguing the evidence is not an 'other' act under Rule 404(b), but rather is integral to the crime or event." State v. Gilmore, 396 S.C. 72, 83, 719 S.E.2d 688, 694 (Ct. App. 2011) (footnote 9). Here, the Petitioner's alleged act of pointing a firearm at the victim the night before the fatal shooting was not a part of the crime of the victim's murder. The Petitioner did not shoot the victim and the prior presentation of a firearm played no role whatsoever in the actual death of the victim. Stated differently, there is no indication that anything that transpired after the presentation of the firearm was directly related to that specific incident. The two incidents are separate and distinct, and thus the pointing and presenting incident is a prior bad act within the meaning of Rule 404(b), SCRE. Accordingly, the PCR court unmistakably erred in concluding that the evidence was admissible as the *res gestae* of the crime as well. Consequently, the Petitioner respectfully submits that he has met his burden of proof with regard to Strickland's deficiency prong.

*3. Defense Counsel's Deficient Performance Was Prejudicial*

Having satisfied Strickland's deficiency prong, the Petitioner now turns to the issue of prejudice. Initially, the Petitioner would note that the PCR court's ruling on this issue is focused far more intently on the admissibility of the prior incident than it is about the impact of that testimony on the jury's verdict. Accordingly, the Petitioner's arguments regarding prejudice will be made with purpose of rebutting the PCR court's general finding that the Petitioner "has failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance," rather than rebutting any specific finding made by the PCR court on this issue. App. p. 1550.

It is clear that the Petitioner was prejudiced by the admission of Britt's testimony regarding the altercation with the victim the day before the fatal shooting. The crucial fact that the jury needed to believe in order to convict the Petitioner was to find that the Petitioner acted in concert with Sims in shooting the victim *by handing Sims the firearm that killed the victim.* It is likely that the jury made the leap explicitly prohibited by Rule 404(b), SCRE, and found that the Petitioner was acting together with Sims because he had pointed a firearm at the victim the day prior to the fatal altercation. Indeed, the State asked the jury to make that connection in its closing argument:

> I mean, if somebody pulls a gun out at you and you tell somebody, you're not gonna make up somebody else. So you heard from the victim. And who is pointing a gun at Phillip Lee or pulling a gun out at Phillip Lee on Sunday night, twenty-four hours before he's killed? Dushun Staten. That puts the gun in Dushun Staten's hand at least that Sunday night.
>
> That's what you heard from Phillip Lee. *That's corroboration.* By putting the gun in his hand on Sunday night, that means he had possession of it. Does that mean he – does that automatically mean he had possession of it the next day when handed it [sic]? No. But it's evidence that you can use that he had possession of a gun. *That's corroboration.*

App. p. 1238, lines 8-21 (emphasis added).

Furthermore, Britt's testimony was unique amongst all of the accounts of the difficulties between the Petitioner and the victim in that this altercation was of a different degree than their prior confrontations. Whereas only words had been exchanged prior to the pointing and presenting incident, Britt's testimony raised the stakes to actual threatened harm. Stated differently, the Petitioner could not have been charged with a crime for any interaction he was alleged to have had with the victim aside from this incident. See S.C. Code Ann. § 16-23-410 ("It is unlawful for a person to present or point at another person a loaded or unloaded firearm.")

When viewed in this light, the testimony admitted by Britt was extremely damaging, and there is a reasonable likelihood that the result of the trial would have been different had it not been admitted. This is particularly true given the jury's failure to reach a verdict on Lucius' murder charge—one of the only significant distinctions between the two defendants was the Petitioner's alleged prior pointing of a firearm at the victim. Britt's testimony may very well have swung the pendulum towards the State instead of towards an acquittal. Accordingly, the Petitioner respectfully submits that he has met Strickland's prejudice prong on this issue, and that the PCR court's ruling to the contrary is unsupported by any probative evidence. This Court should grant the Petitioner a new trial.

## II. The PCR court's finding that defense counsel was not ineffective for failing to object to the prosecutor's improper closing argument is not supported by any probative evidence.

A. How the Issue Arose Below

At trial, there were two central disputes: (1) whether Sims or Sanders shot the victim; and (2) if Sims shot the victim, whether or not the Petitioner and Lucius acted in concert with Sims in that action. If the jury concluded that Sanders shot the victim, then the result at trial would have been an acquittal. During closing argument, the State sought to defuse this defense by arguing that Sanders was properly charged as an accessory due to evidence that the jury was not privy to:

> Ladies and gentlemen, the idea or the premise that Mo Sanders is the shooter is not corroborated by any evidence. In fact, all of the evidence contradicts, all of it.
>
> First, you've got three eyewitnesses, three people that were facing. Remember, I asked that question? They're here facing the shooter, not standing back here. They're facing the shooter in this well-lit area. Three eyewitnesses. Three eyewitnesses facing the shooter in a well-lit area that say the shooter had a black Northface jacket on. Nothing obstructing their view.
>
> Ladies and gentlemen, less than two minutes after these shots were fired, he's apprehended. The people with dark clothing are the people that were hanging up here and if you remember the testimony of Rashon and Tony Kennedy, is that he was hanging back out, hanging back. So was Shakeem Wilson, their cousin. They were hanging back. That's why they're not charged with murder but accessory after the fact *based on evidence that you all didn't hear about because it's not relevant to this case, certain things are done after the fact that you didn't hear about because it's not relevant.*

App. p. 1253, line 18-p. 1254, line 14 (emphasis added). Defense counsel raised no objection to this portion of the State's closing argument.

In his Amended Application for Post-Conviction Relief, the Petitioner alleged that "[d]efense counsel was ineffective for failing to object to the solicitor's closing argument where the solicitor referred to facts not in the record." App. p. 1443. In response to this allegation, defense counsel testified that he thought the prosecutor's closing argument was proper and that he didn't "know why he said, you all didn't hear about it, because I am almost positive they did." App. p. 1491, lines 23-24. Defense counsel further testified that he did not believe that the prosecutor referred to Sanders in his closing argument:

> Q: And you disagree that this portion of the closing argument strongly infers that the reason Maurice Sanders was not being prosecuted was due in part to matters not before the jury?
>
> A: I don't know that he's talking about Moe Sanders here. He doesn't mention his name anywhere.

App. p. 1507, lines 1-6. Finally, defense counsel testified that he wouldn't have made an objection because of the possibility that the prosecutor would "have you eat your words." App. p. 1492, lines 16-17.

The PCR court denied relief on this claim, finding that defense counsel articulated a valid trial strategy "to not make questionable objections during closing argument because doing so can and often does backfire." App. p. 1556. The PCR court further found that there was nothing objectionable in the closing argument because

> The content of the Solicitor's closing argument were issues addressed earlier in the trial; and there were no allegations of ineffective assistance of counsel concerning the earlier instances and references of *accessory after the fact.* Attorneys for either party are permitted to comment on and reference what is already in the record. The reference to the other evidence and things done *after* the fact was merely an explanation as to why "they" were (unlike the defendants) charged with accessory after the fact – charges that were referenced earlier in the trial. Trial transcript p. 250, 832, and 1993, etc.).

App. p. 1557. The Petitioner now respectfully asserts that these findings were clearly erroneous and that they should be reversed by this Court.

B. Discussion

Since this issue raises an allegation of ineffective assistance of counsel, the Petitioner must meet both prongs of Strickland in order to receive relief: (1) that defense counsel's performance was deficient; and (2) that defense counsel's deficient performance prejudiced the Petitioner. The Petitioner respectfully asserts that each prong is readily satisfied in this case. The Petitioner will address each prong of Strickland in turn.

*1. Defense Counsel's Performance Was Deficient*

"[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88 (1935). The critical inquiry in evaluating the propriety of a prosecutor's closing argument is "whether the prosecutors' comments so infected the trial with unfairness as to make the resulting a conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. Dechristoforo, 416 U.S. 637, 643 (1974)).

"A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). "Vouching 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." Id. Stated differently, "[a] prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by

making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The Petitioner contends that the closing argument made by the prosecutor was objectionable and that defense counsel was deficient for failing to raise a proper objection to the argument. The prosecutor's closing argument explicitly informed the jury that Sanders was not the shooter—and thus that the defense's case held no weight—because *he* knew the facts that proved that Sanders was an accessory after the fact instead of the perpetrator:

> Ladies and gentlemen, less than two minutes after these shots were fired, he's apprehended. The people with dark clothing are the people that were hanging up here and if you remember the testimony of Rashon and Tony Kennedy, is that he was hanging back out, hanging back. So was Shakeem Wilson, their cousin. They were hanging back. *That's why they're not charged with murder but accessory after the fact based on evidence that you all didn't hear about because it's not relevant to this case, certain things are done after the fact that you didn't hear about because it's not relevant.*

App. p. 1254, lines 4-14 (emphasis added). There is no other reasonable way to interpret this argument. A statement that a prosecutor made a charging decision "based on evidence that you all didn't hear about" is an unambiguous instance of bolstering.[5] This argument was objectionable and the PCR court's conclusion to the contrary is unsupported by any probative evidence.

[5] The Petitioner uses the term "bolstering" instead of the term "vouching" to describe the type of impropriety engaged in by the prosecutor based on the distinction drawn by other courts between the two terms. See generally United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997) ("Vouching occurs when a prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury.") Our courts seem to prefer the term "vouching" to describe this activity, though the term "bolstering" has been used as well. Compare Matthews, *supra*, with State v. New, 338 S.C. 313, 320, 526 S.E.2d 237, 240 (Ct. App. 1999) ("For the same reasons, New's claim that the Solicitor's remarks constituted impermissible bolstering is without merit.") Whatever the term used, it is clear that the prosecutor personally assured the jury that evidence outside of its knowledge supported his charging decisions, and that this argument was improper.

For similar reasons, the PCR court's finding that defense counsel articulated a valid trial strategy in not objecting to this closing argument is not supported by any probative evidence. Defense counsel's testimony that he didn't object to the closing argument is predicated on his belief that the closing argument was not objectionable. As that belief was clearly incorrect, defense counsel's strategy was not valid. Cf. Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.")[6] Most importantly, the 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, *supra*, 350 S.C. at 276, 565 S.E.2d at 768. Consequently, the aegis of trial strategy provides no protection for defense counsel's performance with regard to this issue, and the PCR court's ruling should be reversed.

The Petitioner draws support for this argument from the Supreme Court's decision in Matthews. In Matthews, the prosecutor made the following closing argument to the jury:

> Now, you may not have liked Bimbo Hudson. I didn't like Bimbo Hudson. I don't have to like him. All I have to do is determine whether or not he is a credible witness. I don't trust any of these people **until I corroborate their testimony.** And **once I corroborate their testimony,** yes, I put them on the witness stand because they were the ones that were there, they were the ones that can tell it.

350 S.C. at 275, 565 S.E.2d at 768 (emphasis in original). The Supreme Court held that this portion of the closing argument was improper, and that defense counsel was ineffective for failing to object to the argument, because

[6] The Petitioner would also note that defense counsel's testimony that he made a strategic decision not to object during the prosecutor's closing argument because the prosecutor could "have you eat your words" is belied by the fact that defense counsel actually objected to another portion of the prosecutor's closing argument. See App. p. 1221, lines 20-22.

> The solicitor's summation led the jury to believe the government corroborated the witness' testimony before trial and found it credible. The solicitor did not support this vouching with anything within the record, such as corroboration by other witnesses or physical evidence. The solicitor improperly vouched for the witness.

Id. at 276-277, 565 S.E.2d at 768.

A very similar argument occurred here. The prosecutor's closing argument informed the jury that the information that only he knew about proved that Sanders was properly charged as an accessory instead of the principal. He explicitly stated twice that there was evidence "that you all didn't hear about" that justified the charges in this matter. App. p. 1254, lines 11-14. In other words, there was evidence that he had in his possession that corroborated his witnesses' testimony that Sims was the shooter, and that Sanders was merely an accessory, which would necessarily lead "the jury to believe the government corroborated the witness[es]' testimony before trial and found it credible." Matthews, *supra*, 350 S.C. at 276, 565 S.E.2d at 768. Accordingly, the Petitioner respectfully submits that this Court should reach the same conclusion as that reached by the Supreme Court in Matthews and find that defense counsel's performance was deficient when he failed to object to the prosecutor's improper closing argument.

*2. Defense Counsel's Deficient Performance Was Prejudicial*

Having met his burden with regard to Strickland's performance prong, the Petitioner now turns to Strickland's prejudice prong. As with the prior issue raised on appeal, the PCR court's ruling on this claim was focused far more intently on the propriety of the closing argument than it was on the prejudicial impact of the closing argument. Consequently, the Petitioner's arguments regarding prejudice will again be made with purpose of refuting the PCR court's general finding that the Petitioner "has failed to prove the second prong of Strickland – that he

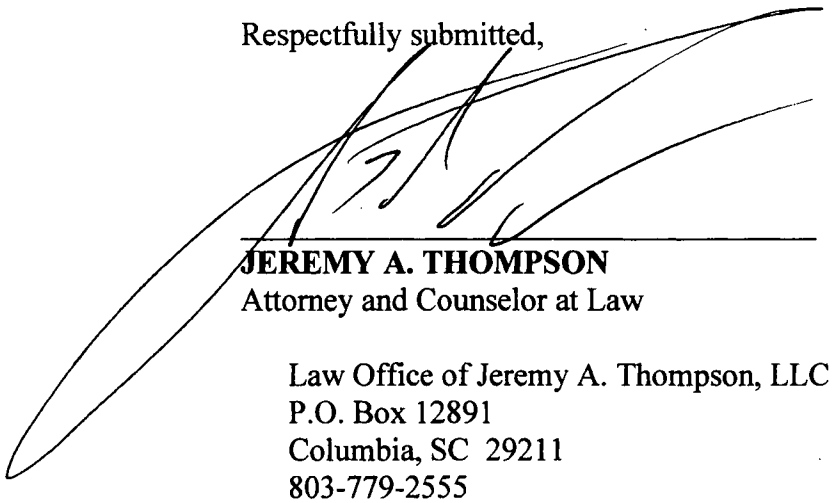
was prejudiced by counsel's performance," rather than refuting any specific finding made by the PCR court on this issue. App. p. 1550.

The central thrust of the defense's case was that Sanders was the sole perpetrator of the crime, and that the Petitioner and Lucius had nothing to do with his independent shooting of the victim. This defense hinged on the jury's belief that Sanders shot the victim. The prosecutor's closing argument singlehandedly defused that defense by explicitly informing the jury that Sanders did not shoot the victim "based on evidence that you all didn't hear about." App. p. 1254, lines 11-12. This closing argument, therefore, was extremely prejudicial inasmuch as it defeated the Petitioner's primary defense to the charges against him. Accordingly, the Petitioner respectfully submits that he has met Strickland's prejudice prong on this issue, and that the PCR court's ruling to the contrary is unsupported by any probative evidence. See Matthews, *supra*, 350 S.C. at 277, 565 S.E.2d at 769 ("Counsel's failure to object prejudiced his client by allowing the solicitor to vouch for the credibility of a key State's witness"); Vaughn, *supra*, 362 S.C. at 170, 607 S.E.2d at 75-76 ("[T]he solicitor's response was unfair and prejudiced the petitioner, in light of the lack of evidence of his guilt on the PWID charge.") This Court should grant the Petitioner a new trial.

## CONCLUSION

The lower court's decision denying Post-Conviction Relief should be reversed. The Petitioner's convictions for murder and lynching in the first degree should be vacated, and this case should be remanded to the Richland County Court of General Sessions for a new trial.

Respectfully submitted,



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**ATTORNEY FOR PETITIONER.**

This 11th day of July, 2014.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2011-187273
Lower Court Case No. 2007-CP-40-4259

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DUSHUN STATEN, #282328,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that two copies of the Brief of Petitioner in the above-entitled case have been served upon opposing counsel, Megan E. Harrigan, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by hand-delivery, this 11th day of July, 2014.

**JEREMY A. THOMPSON**
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 11th day of July, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 7/10/2022

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Henry McKellar, Trial Judge
The Honorable L. Casey Manning, Post-Conviction Relief Judge

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Appellate Case No. 2011-187273
Trial Court Case No. 2007-CP-40-4259

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Dushun Staten, #282328, ..... Petitioner,

v.

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

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# BRIEF OF RESPONDENT

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## PETITIONER'S STATEMENT OF ISSUES ON APPEAL

I. Whether defense counsel was ineffective for failing to object to testimony that the Petitioner pointed a firearm at the victim two days prior to the shooting death of the victim?

II. Whether defense counsel was ineffective for failing to object to the State's improper closing argument wherein the State argued that Maurice Sanders, the individual the Petitioner claimed shot the victim, was properly charges as an accessory instead of a principal because of "evidence that you all didn't hear about"?

## RESPONDENTS' STATEMENT OF ISSUES ON APPEAL

I. Whether there is evidence of probative value to support the PCR Court's finding that trial counsel was not ineffective in failing to object to testimony of prior altercations between Petitioner and the victim days before the murder, including testimony that Petitioner pointed a firearm at the victim a day prior to his murder.

II. Whether there is evidence of probative value to support the PCR Court's finding that trial counsel was not ineffective in not objecting to the State's closing argument.

## STATEMENT OF THE CASE

The Richland County Grand Jury indicted Petitioner at the January 2002 term of General Sessions for Murder (2002-GS-40-1148) and Lynching (2002-GS-40-0786). (App. pp. 1431-37). David Taylor, Esquire represented Petitioner. Petitioner and his brother, Lucius Staten, were tried jointly on the same charges.

After the State called the case to trial, Petitioner was found guilty. On March 4, 2002, the Honorable L. Henry McKellar sentenced Petitioner to thirty (30) years imprisonment for Murder and to ten (10) yeas imprisonment for Lynching, with the sentences to be served concurrently. Id.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. (App. pp. 1308–34). The court of appeals affirmed Petitioner's convictions and sentences on March 7, 2005. State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005). (App. pp. 1386–1417). Petitioner then appealed to the Supreme Court of South Carolina which vacated the court of appeals' opinion in part and dismissed the writ of certiorari in a published opinion. State v. Staten, 374 S.C. 9, 647 S.E.2d 207 (2007). The remittitur was issued on June 27, 2007.

Petitioner filed an application for post-conviction relief (PCR) on July 12, 2007 (2007-CP-40-4259). (App. pp. 1419-25). A hearing was held at the Richland County Courthouse on April 1, 2009. (App. pp. 1542-59). Petitioner was present and represented by Tara Dawn Shurling, Esquire. Brian T. Petrano, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable L. Casey Manning

denied relief in an order filed June 25, 2012. Id.

Petitioner filed a Petition for Writ of Certiorari on October 17, 2011. Respondent filed a Return to Petition for Writ of Certiorari on December 17, 2011. This Court granted the petition by Order filed March 12, 2014. Petitioner filed a Brief of Petitioner on July 11, 2014. This Brief of Respondent follows.

## STATEMENT OF THE FACTS

It was undisputed at trial that someone *other* than Petitioner and his brother shot and killed the victim, Phillip Lee, at Benedict College on January 15, 2001. The brothers were present when the murder occurred, and the State proved that Petitioner and his brother were heavily involved in the events and assisted the shooter. Petitioner was one of five (5) individuals charged in this case.

Phillip Lee was a 20-year student at Benedict College who belonged to or was associated with the Crips gang. (App. p. 925). He often wore or carried a blue bandana. (App. p. 384; 387; 452). While Lucius denied it at trial, a number of witnesses testified that Petitioner was a member of the Bloods gang and wore red bandanas and red clothing. (App. p. 506; 451-52). Neither Petitioner nor Lucius were enrolled at Benedict College, but the two were often seen hanging out in the Haskell dorm parking lot at various times during the day and night. (App. p. 389; 502-03). On Friday, January 12, 2001, the first altercation between the victim and Petitioner occurred where Petitioner became upset when the victim stated that he was not familiar with Petitioner's gang chapter, the "49 Brim" or "49 Bullets." (App. p. 504-09). This argument escalated and Petitioner's brother, Lucius eventually jumped in to argue on behalf of his brother. Id. The next day, Saturday, January 13, 2001, Petitioner again instigated an altercation by referring to the color bandana that the victim was wearing. (App. p. 382-87). Petitioner made gang signs with his hands in the victim's direction. Id. This situation was defused for the time being. Id. Sunday, January 14, 2001, the victim told his roommate and cousin, Andrew Britt, "They just pulled a fucking gun on me. . . the n****** we had an argument with on

Saturday." (App. p. 399). When further discussed it was clear the victim was referring to Petitioner brandishing a gun. Id.

On Monday, January 15, 2001, Martin Luther King, Jr. Day, another altercation ensued between Petitioner and the victim which resulted in the victim's murder. (App. p. 513- 528). This argument arose over the blue bandana that victim had in his back pocket. Id. Petitioner and his associates were wearing red bandanas and took great issue with the victim's blue bandana. Id. As the argument went on, Petitioner walked back to the seat of his brother's car and retrieved a silver revolver with a red bandana wrapped around its grip. Id. Petitioner handed the firearm to one of his friends. Id. Petitioner then nodded to that friend, who in turn raised the gun and shot the victim in the back of the head. Id.

## 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. There is evidence of probative value to support the PCR Court's finding that trial counsel was not ineffective in failing to object to testimony of prior altercations between Petitioner and the victim days before the murder including testimony that Petitioner pointed a firearm at the victim a day prior to his murder.**

Petitioner argues trial counsel was ineffective in failing to object to the testimony of Andrew Britt, victim's cousin and roommate, on the grounds that the testimony was violative of Rule 404(b), SCRE. (Brief of Petitioner 9-19). This argument is without merit.

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). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a

probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Britt, the victim's roommate and cousin, testified at trial that on Sunday, January 14, 2001, the victim came back to their dorm room and was "hysterical" and "scared." (App. p. 396-97). Counsel Taylor objected to this testimony as inadmissible hearsay. The trial court overruled this objection, so Britt was allowed to testify to the events that occurred the night before the murder.

Petitioner argues that part of this testimony was inadmissible under Rule 404(b), SCRE, and that counsel was ineffective in failing to object under this rule. Petitioner concedes that Britt's testimony regarding the incident where Petitioner threatened victim the night before the murder was admissible, but argues the detail that Petitioner pointed a firearm at the victim should have been excluded. (Brief of Petitioner p. 15-16). At the PCR hearing, Counsel Taylor testified that he objected to this testimony as inadmissible hearsay. (App. p. 1485). Counsel Taylor testified that he considered that to be the stronger, more proper objection. Id. Counsel Taylor also stated that he did not believe the issue of prior bad acts was preserved for the record because he did not object under Rule 404(b), SCRE. Id. He also testified that he did not believe an objection under Rule 404(b), SCRE to be proper because many Lyle exceptions would be applicable and because these events that occurred the day before were important in understanding the circumstances of the murder. (App. p. 1486-88). Petitioner's PCR counsel made a point to argue that German v. State, 325 S.C. 25, 478 S.E.2d 687 (1996) was applicable to this case, but Counsel Taylor flatly rejected that argument stating that the case at bar is clearly

distinguishable from German. Id. Counsel Taylor emphasized that the State accused Petitioner of handing the gun to the shooter and that Petitioner pulled a gun on the victim just the day before.

The PCR Court ruled that Petition failed to satisfy his burden of proving that counsel was ineffective in not objecting to Britt's testimony under Rule 404(b), SCRE. (App. p. 1553-55). The PCR Court ruled that a prior bad act objection was not the correct argument since the victim's statement related to events that caused the murder. Id. The court also ruled that the substance of the statement was admissible for the various purposes listed in Rule 404(b), SCRE, and noted that there is case law to support the introduction of prior confrontations, threats, and fights between parties. The PCR Court also ruled that the prior confrontations between the victim and Petitioner are part of the *res gestae* of the crime, "in that they are such a part of the fabric of explaining to the jury how and why the confrontations escalated into a senseless murder in the parking lot of a local college." (App. p. 1555).

**Rule 404(b), SCRE**

The PCR Court did not err in holding that counsel was not ineffective in failing to object to Britt's testimony under Rule 404(b) because the testimony is admissible under that rule to show Petitioner's intent, motive, absence of mistake, and identity. Petitioner failed to meet his burden of proving trial counsel's representation was deficient. Petitioner failed to demonstrate trial counsel did not render reasonable assistance under prevailing professional norms. See Strickland v. Washington, 466 U.S. at 688, 104 S. Ct. at 2064. Petitioner concedes that this testimony is admissible and only challenges the

amount of details presented through the testimony, specifically that Petitioner pulled a gun on the victim the night before he was murdered. Petitioner focuses on a single sentence in State v. Taylor, 333 S.C. 159, 508 S.E.2d 874 (1998), and ignores a plenary of other more applicable authorities in making his argument. Petitioner is splitting hairs. Respondent submits that this testimony is clearly admissible in full and that there was no basis for an objection under Rule 404(b), SCRE.

"The State cannot attack the character of the defendant unless the defendant himself first places his character in issue." Rule 404(a), SCRE; Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). "Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 682 (1999). Evidence of prior bad acts to prove the defendant's guilt for the crime charged is admissible to establish "(1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." Id (citing Rule 404(b), SCRE, State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).). Evidence of prior bad acts must be clear and convincing to be admissible. Lyle, 125 S.C. at 416, 118 S.E. at 807. The court must then make a determination of whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice to the defendant. See Rule 403, SCRE; Adams, 332 S.C. 114 at 118, 470 S.E.2d at 368-69. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008).

Here, Britt's testimony is admissible pursuant to multiple exceptions to Rule

404(b), SCRE. The testimony is logically relevant as the incident was a precursor to the final altercation where the victim was murdered. First, the testimony is admissible to show Petitioner's motive in killing the victim, as the two were part of rival gangs and had an altercation the evening before the victim was murdered. There were also other altercations which escalated upon each other. Next, the testimony is also admissible to show Petitioner's intent and absence of mistake. Finally, the testimony is admissible to show that Petitioner was involved in the murder. Petitioner initially gave statements that he was not present at the time of the murder but soon after changed that story and admitted to investigators that he was at the scene. This testimony supports the State's position that Petitioner was present and was correctly identified by eyewitnesses.

Petitioner also emphasizes Counsel Taylor's statement that "[t]he State's going to say, all this does is prove that he is willing to do such a thing, a state of mind," is "a fundamental misunderstanding of the law." Respondent submits that Counsel Taylor made a valid point in his response. Counsel Taylor was referring to Rule 803(3), SCRE when responding to an argumentative question posed by PCR Counsel. Rule 803(3), SCRE, articulates the "Then-Existing Mental, Emotional, or Physical Condition" exception to the rule against hearsay. Counsel Taylor simply pointed out another exception to the hearsay rule that shows the testimony would be admissible. Rule 404(b) and Rule 803(3), SCRE, share a number of exceptions such as intent and motive which are applicable to a Rule 404(b) analysis. Counsel Taylor testified that those exceptions would be on point in the analysis and would make an objection under Rule 404(b), SCRE futile.

**Res Gestae**

The testimony of Britt is also admissible and would have been properly admitted as part of the *res gestae* of the murder.

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the settling of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is so linked together in point and time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

Adams, 332 S.C. 114 at 122, 470 S.E.2d at 370-71 (parentheticals in original).

Here, Britt's testimony is clearly admissible to give the jury a full presentation of the case and the surrounding circumstances which led to the murder. The events are also very intimately connected to the crime as to give the jury an understanding of the escalating events that occurred over the weekend. The Court in Adams held that if a complete account of the event is necessary for a full understanding of events, then the evidence shall be admitted. It was imperative for the State to show the details of the prior altercations, including the testimony regarding Petitioner brandishing a firearm in an attempt to threaten and intimidate the victim.

Britt's testimony is undoubtedly admissible on a number of exceptions to Rule 404(b). The testimony was also an integral part of the *res gestae*. Counsel Taylor was not ineffective in failing to object to the testimony under Rule 404(b), SCRE.

Regardless, Petitioner also failed to meet his burden of proving prejudice. See Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068. Petitioner failed to demonstrate that, but for trial counsel's performance, there was a reasonable probability the outcome of his trial would have been different. Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. Even assuming, arguendo, this Court determines Counsel Taylor was ineffective, his performance cannot be found to have prejudiced Petitioner. Petitioner cannot demonstrate that a successful objection would have changed the result of the trial. The State presented overwhelming evidence of guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). As noted, there were a number of eyewitnesses to the shooting and all implicated Petitioner in the events that caused the death of the victim.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

**II. There is evidence of probative value to support the PCR**

**Court's finding that trial counsel was not ineffective in not objecting to the State's closing argument.**

Petitioner argues that Counsel Taylor was ineffective in failing to object to a portion of the State's closing argument. Petitioner specifically points to the following as objectionable:

> Ladies and gentleman, less than two minutes after these shots were fired, he's apprehended. The people with dark clothing are the people that were hanging up here and if you remember the testimony of Rashon and Tony Kennedy, is that he was hanging back out, hanging back. That's why they're not charged with murder, but accessory after the fact based on evidence that you all didn't hear about because it's not relevant to this case, certain things are done after the fact that you didn't hear about because it's not relevant.

(App. p. 1254, lines 4-14). Petitioner argues that this is somehow bolstering or vouching. Respondent submits that this selected portion of the State's closing argument is in no way bolstering or vouching. It is also clear that the State is referring to facts presented in the record.

Counsel Taylor testified at the PCR hearing that he did not object to this portion of the State's closing because there was evidence presented in the record that support's those comments. (App. p. 1491, lines 4-7). He also testified, "that's a very ambiguous statement, certain things are done after the fact that you didn't hear about because it's not relevant. I mean that -- doesn't say anything." (App. p. 1491, lines 15-18). Counsel Taylor also testified that objecting during closing can backfire because if the objection is overruled, then the opposing side can focus on that issue and "stuff it right down you." (App. p. 1492, lines 12-19). He also emphasized that he did not find this portion of the State's closing to be objectionable on any grounds.

The PCR Court ruled that Petitioner failed to satisfy his burden of proving that counsel's performance was deficient and that he was prejudiced by counsel's failure to object during the State's closing arguments. The court ruled that Counsel Taylor employed a reasonable strategy by choosing not to object during the closing because it can often backfire. The court ruled that "Solicitor Gasser did not give personal assurances about the witness' credibility." Further, the court ruled that a party is permitted to comment on and reference what is already in the record.

Respondent submits that the PCR Court did not err in finding Counsel Taylor not ineffective in failing to object during the State's closing argument. "The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996).). "A prosecutor cannot vouch for a witness' credibility." Id. A prosecutor improperly vouches for a witness' credibility by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony. Id. A prosecutor can make a fair response to a claim made by defendant or his counsel in closing arguments. State v. McClure, 342 S.C. 403, 407, 537 S.E.2d 273, 274 (2000). "The appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

There is ample evidence of probative value to support the PCR Court's finding that counsel was not deficient. Counsel Taylor was correct in recalling that there was evidence presented at trial relating to other individuals charged in this incident. The State

specifically solicited testimony from Officer Paul Mead as to the charges that Shakeem Wilson and Maurice Sanders were facing at the time. (App. p. 848, lines 8-15). Officer Mead testified that both individuals were charged with Accessory After the Fact to Murder and First Degree Lynching. It is clear that these are facts present in the record. Counsel Taylor testified that he did not find that portion of the State's closing argument objectionable. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). See Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000) (finding counsel was not ineffective where counsel reasoned he did not request a curative instruction because they tend to bring into focus precisely the item the objector has kept out). It was reasonable for Counsel Taylor to have not objected to this portion of the State's closing as it was not objectionable. The defense argued that Maurice Sanders was the triggerman and that Petitioner and his brother should be found not guilty as they did not fire the gun that killed the victim. The defense argued mere presence. The State in responding to that assertion made by trial counsel, argued that there were others charged, but those others were not charged with murder. The State is clearly within its bounds to respond to the defense's argument by discussing that Petitioner and his brother were charged with murder and that Sanders and Wilson were charged with accessory after the fact to murder.

Petitioner has also failed to show any resulting prejudice from this alleged

ineffectiveness in not objecting to the State's closing. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "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." Id. This trial lasted five (5) days and thirty-two (32) witnesses testified. When examining the record as a whole, these isolated comments by the State at closing have in no way denied Petitioner due process. Respondent submits that even if Petitioner can show that the PCR Court erred in not finding Counsel Taylor ineffective with regards to the failure to object during the State's closing, Petitioner cannot show any prejudice.

## CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

ALAN WILSON
Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General
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By: _____
ATTORNEYS FOR RESPONDENT

November 10, 2014

STATE OF SOUTH CAROLINA
In Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2011-187273

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Dushon Staten,.....Petitioner,

v.

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

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

**Jeremy A. Thompson, Esquire**
**Post Office Box 12891**
**Columbia, South Carolina 29211**

This 10th day of November, 2014.

J. CLAYTON MITCHELL, SC Bar #101443
ATTORNEY FOR RESPONDENT

**SWORN to before me this 10th day of November, 2014.**

**Notary Public for South Carolina**
**My Commission Expires:** 5/14/2024

2007-CP-40-4259

**THE STATE OF SOUTH CAROLINA**
**In The Court of Appeals**

Dushun Staten, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-187273

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**ON WRIT OF CERTIORARI**

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Appeal From Richland County
L. Henry McKellar, Trial Court Judge
L. Casey Manning, Post-Conviction Relief Judge

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Unpublished Opinion No. 2015-UP-465
Heard April 13, 2015 – Filed September 30, 2015

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**AFFIRMED**

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Jeremy Adam Thompson, of Law Office of Jeremy A. Thompson, LLC, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General James Clayton Mitchell, III, of Columbia, for Respondent.

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**PER CURIAM:** Dushun Staten was convicted of murder and first-degree lynching. He appeals from the denial and dismissal of his application for post-conviction relief (PCR), arguing his trial counsel was ineffective for failing to object to (1) testimony that he pointed a gun at the victim in the days prior to the murder as improper prior bad act evidence, and (2) the State's improper closing argument. We affirm.

## FACTS

The victim in this case was shot and killed in a parking lot on Monday, January 15, 2001. Witnesses stated that on the day of the shooting, Petitioner retrieved a gun from a car and handed it to the shooter, who wore a black Northface jacket.[1] Multiple witnesses also testified that on the Friday before the shooting they observed Petitioner and the victim get into an altercation concerning what color clothing each man wore.[2] Andrew Britt, the victim's cousin and roommate, testified he and the victim had another altercation with Petitioner and Petitioner's brother on the Saturday before the murder. Britt further testified that on the Sunday night before the murder, the victim came into Britt's room "hysterical" and "scared" and reported that the people they argued with on Saturday pulled a gun on him. Trial counsel objected based on hearsay, but the objection was overruled after the State laid the necessary foundation concerning the victim's demeanor to show the statement was an excited utterance. During cross-examination, Britt clarified that the victim said Petitioner pulled a gun on him.

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[1] The man in the black jacket was identified as Limel Sims, and at trial, an investigator testified Sims was wanted for murder.

[2] Petitioner was reputedly a member of the Bloods street gang, while the victim was reputedly a member of the Crips street gang.

During closing arguments, the State attempted to discredit trial counsel's theory that a man named Maurice Sanders was the shooter and that Sanders acted alone. The State argued three witnesses identified the shooter as the man who wore the black Northface jacket, and two witnesses testified Sanders and a man named Shakeem Wilson were "hanging back" from the fatal argument. The State asserted, "They were hanging back. That's why they're not charged with murder but accessory after the fact based on evidence that you all didn't hear about because it's not relevant to this case, certain things are done after the fact that you didn't hear about because it's not relevant."

During the PCR hearing, trial counsel admitted he did not consider making a prior bad acts objection to Britt's testimony because he felt the evidence was related to the case and would have shown "motive or a willingness to do something or a state of mind." Concerning the comments from the State's closing argument, trial counsel testified he saw no reason to object because he felt the information referenced by the State came out during trial and it was not apparent who the word "they" referenced. Trial counsel also stated he was hesitant to object during a closing argument for fear the other attorney would "have you eat your words and watch him stuff it right down you."

**STANDARD OF REVIEW**

"In a PCR proceeding, the burden is on the applicant to prove the allegations in his application." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "Any evidence of probative value to support the PCR court's factual findings is sufficient to uphold those findings on appeal." *Lee v. State*, 396 S.C. 314, 320, 721 S.E.2d 442, 446 (Ct. App. 2011). Thus, "[an appellate court] gives great deference to the PCR court's findings of fact and conclusions of law." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). "If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses." *Lee*, 396 S.C. at 319, 721 S.E.2d at 445.

Trial counsel must provide "reasonably effective assistance" under "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Reviewing courts presume counsel was effective. *Id.* at 690. Therefore, to receive relief, the applicant must show (1) counsel departed from professional norms (2) resulting in prejudice. *Id.* at 691-92. Prejudice is defined as 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.* "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

**LAW/ANALYSIS**

Staten argues his trial counsel was ineffective for failing to object to testimony that he pointed a gun at the victim in the days prior to the murder as improper prior bad act evidence. We disagree. We find trial counsel was not deficient in failing to make a prior bad acts objection because Britt's testimony about the gun-pointing incident was admissible under Rule 404(b), SCRE, to show Petitioner's motive or intent. *See* Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); *see also Blakely v. State*, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) (holding evidence of prior threats against a defendant's girlfriend was admissible to show intent); *State v. Atkins*, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990) (finding evidence of a defendant's prior difficulties with a victim's family concerning racial differences was relevant to prove motive); *State v. Plyler*, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980) (holding evidence of a verbal argument between the defendant and victim that occurred three days before the murder was admissible to show motive). Additionally, we find the testimony's probative value was not substantially outweighed by the danger of unfair prejudice because the incident occurred on the day before the shooting and showed the escalating nature of the confrontations between Petitioner and the victim. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *State v. Sweat*, 362 S.C. 117, 132, 606 S.E.2d 508, 516 (Ct. App. 2004) ("The determination of prejudice depends upon the unique circumstances of each case.").

To the extent Petitioner argues under *State v. Taylor* that the details of the gun-pointing incident were inadmissible, we note that Britt did not testify about additional details of the incident. *See* 333 S.C. 159, 168, 508 S.E.2d 870, 874

(1998) (holding a trial court properly admitted a husband's testimony about a prior incident when his wife struck him on the head with a beer bottle but properly excluded the specifics of the incident). Accordingly, we find trial counsel was not deficient for failing to make a prior bad acts objection to Britt's testimony. *See Strickland*, 466 U.S. at 700 ("Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

Staten also argues his trial counsel was ineffective for failing to object to the State's improper closing argument. We find the State's comments were improper and trial counsel was deficient in failing to object. Specifically, the State referenced "evidence that [the jury] didn't hear about" to explain why Sanders and Wilson were not charged with murder, improperly suggesting the State had other evidence at its disposal that exonerated the pair of murder. *See Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (stating the State's closing argument and its content should stay within the record and reasonable inferences to it); *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration.").

However, given the record as a whole, we find there was not a reasonable probability that but for trial counsel's failure to object to the State's comments, the result of the trial would have been different. *See Strickland*, 466 U.S. at 694 (defining prejudice in the context of a PCR claim as a reasonable probability that but for trial counsel's errors the result of the proceeding would have been different). Specifically, we do not believe the comments were such that they infected the trial with unfairness. *See Simmons*, 331 S.C. at 338, 503 S.E.2d at 166 ("Improper comments do not automatically require reversal if they are not prejudicial to the defendant."); *id.* at 338, 503 S.E.2d at 166-67 ("The relevant question is whether the [State's] comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."). Notably, the State did not repeat the comments, and the comments occurred during a lengthy closing argument that spanned fifty-seven pages of the record. *See Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (holding the State's improper argument did not infect the trial with unfairness and result in prejudice when the argument "came at the very end of [its] closing argument and [was] limited in duration"). Therefore, we hold Petitioner has not demonstrated trial counsel was ineffective with regards to this issue. *See Strickland*, 466 U.S. at 700 ("Failure to make the

required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.").

## CONCLUSION

Accordingly, the circuit court's dismissal of Petitioner's application for post-conviction relief is

**AFFIRMED.**

**SHORT, LOCKEMY, and MCDONALD, JJ., concur.**

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2011-187273
Lower Court Case No. 2007-CP-40-4259

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DUSHUN STATEN, #282328,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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# PETITION FOR REHEARING

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**ATTORNEY FOR PETITIONER.**

NOW COMES the Petitioner in the above-captioned action, acting by and through undersigned counsel, respectfully petitioning this Court to rehear his appeal and reconsider its decision in Staten v. State, Op. No. 2015-UP-465 (S.C. Ct. App. filed September 30, 2015). The Petitioner would assert that the following critical matters of fact and law were overlooked or misapprehended by the Court in its decision:

The Petitioner raised two grounds on appeal: (1) defense counsel was ineffective for failing to object to testimony that the Petitioner pointed a firearm at the victim two days prior to the fatal shooting; and (2) defense counsel was ineffective for failing to object to the State's closing argument wherein the prosecutor argued that co-defendants who were charged as accessories after the fact were properly charged due to evidence that the jury did not hear about. With regard to the first issue, this Court found that the challenged testimony was admissible and that defense counsel was not ineffective. Staten, *supra*. With regard to the second issue, this Court found that the argument was improper and that defense counsel's performance was deficient, but that the Petitioner could not demonstrate prejudice. Id. The Petitioner respectfully contends that this Court overlooked the clear merit of the Petitioner's allegations and that this Court should rehear this matter.[1]

**A. Ground One: Failure to Object to Prior Bad Act Testimony**

During his testimony at the trial, Andrew Britt testified that the victim told him that he had been involved in an altercation with the Petitioner, and that the Petitioner had pointed a firearm at him during the altercation. See App. p. 399, lines 9-16; p. 427, lines 14-25. At his PCR hearing, the Petitioner alleged that defense counsel was ineffective for failing to object to this testimony

[1] Inasmuch as this Court has now heard this case on direct appeal and on PCR appeal, and has reviewed several rounds of briefing with regard to this case, the Petitioner intends to keep this petition for rehearing brief and will not belabor the petition with numerous superfluous citations to the record or to prior decisions, all of which have been fully argued in the briefs and during the oral argument in this matter.

pursuant to Rule 404(b), SCRE. In its opinion, this Court held that this testimony was admissible pursuant to State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998), because "Britt did not testify about additional details of the incident." Staten, *supra*. The Petitioner respectfully petitions for rehearing on the basis that this Court has misapprehended Taylor's standard.

Taylor held that

> In homicide cases, evidence that the accused and the decedent had previous difficulty is admissible. The evidence is admissible to show the animus of the parties and to aid the jury in deciding who was the probable aggressor. The general details of the difficulty, however, are inadmissible.

333 S.C. at 168, 508 S.E.2d at 874. Consequently, pursuant to Taylor, the Petitioner submits that it is improper to admit any details of prior difficulties between the alleged perpetrator and the victim. Stated differently, the Petitioner contends that Taylor stands for the proposition that the State may introduce evidence that a defendant and a decedent quarreled, but not the specific details of the quarrel.

Accordingly, the Petitioner respectfully submits that this Court misapprehended Taylor when it held that Taylor prohibited "additional details of the incident." Staten, *supra*. It is not "additional" details that are prohibited, but any specific details. Britt testified as to the specific details when he testified that the Petitioner pointed a firearm at the decedent. Therefore, defense counsel should have objected to Britt's testimony pursuant to Rule 404(b), and his testimony should have been limited to the fact that the Petitioner and the decedent were in an altercation two days prior to the fatal shooting. The Petitioner respectfully asserts that this Court's misapprehension of Taylor led to an erroneous ruling that the testimony was admissible pursuant to Taylor, and requests that this Court rehear this appeal on this ground.

**B. Ground Two: Failure to Object to the Prosecutor's Closing Argument**

At trial, the Petitioner's central defense was third-party guilt; namely, that an individual named Maurice Sanders had acted alone and had shot the victim. During the State's closing argument, the prosecutor argued that Sanders and another co-defendant named Shakeem Wilson were properly charged as accessories after the fact based on evidence that the jury did not hear. App. p. 1253, line 18-p. 1254, line 14. In its opinion in this matter, this Court held that the closing argument was improper and that defense counsel was deficient in failing to object to this portion of the closing argument. Staten, *supra*. The Petitioner does not petition this Court to reconsider this finding. This Court, however, subsequently held that the Petitioner was not prejudiced by the State's improper closing argument because "we do not believe the comments were such that they infected the trial with unfairness." Id. The Court further concluded that "the State did not repeat the comments, and the comments occurred during a lengthy closing argument that spanned fifty-seven pages of the record." Id. The Petitioner respectfully petitions for rehearing on the basis that the comments were prejudicial, and that this Court's decision is at odds with Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002).

This Court concluded that the prosecutor's closing argument "improperly suggest[ed] the State had other evidence at its disposal that exonerated [Sanders and Wilson] of murder." Staten, *supra*. The Petitioner contends that this argument "infected the trial with unfairness as to make the resulting conviction a denial of due process" because it struck at the heart of the Petitioner's defense. Darden v. Wainwright, 477 U.S. 168, 181 (1986). If the prosecutor had vouched for Sanders and Wilson, or his other witnesses, on a collateral matter, then perhaps his comments would not have been prejudicial. The argument that the prosecutor made, however, defeated the Petitioner's entire defense in one fell, improper swoop. It is difficult to conceive of a more

damaging argument that the prosecutor could have made than the one the prosecutor utilized in this case. The Petitioner submits that this Court should not excuse the comments, and should not refuse to grant the Petitioner a new trial, simply because the prosecutor only made this argument once. In this case, making that argument once was enough.

Furthermore, the Petitioner respectfully contends that this Court's opinion is contrary to the Supreme Court's opinion in Matthews. In Matthews, the Supreme Court was presented with a twenty-two defendant drug case. 350 S.C. at 274, 565 S.E.2d at 767. The prosecutor, during her closing argument, made the following vouching statement for her witnesses:

> Now, you may not have liked Bimbo Hudson. I didn't like Bimbo Hudson. I don't have to like him. All I have to do is determine whether or not he is a credible witness. I don't trust any of these people **until I corroborate their testimony**. And **once I corroborate their testimony**, yes, I put them on the witness stand because they were the ones that were there, they were the ones that can tell it.

Id. at 275 (emphasis in original). The Supreme Court held that these comments, standing alone, were so improper that they warranted the grant of a new trial. Id. at 277, 565 S.E.2d at 769.

The Petitioner submits that the argument made by the prosecutor in Matthews was less offensive than the argument made by the prosecutor in this case. Furthermore, while the Petitioner does not have the record in Matthews to compare and contrast the number of pages utilized by the prosecutor in her closing argument, the Petitioner submits that it is reasonable to assume that her closing argument was rather lengthy, since she had twenty-two co-defendants to prosecute. Yet, in Matthews, the Supreme Court held that the prosecutor's vouching warranted a new trial. The Petitioner respectfully asserts that the same result should hold here.

## CONCLUSION

WHEREFORE, having set forth his grounds, the Petitioner respectfully petitions this Court to rehear its opinion issued in this matter. See Staten v. State, Op. No. 2015-UP-465 (S.C. Ct. App. filed September 30, 2015).

Respectfully submitted,

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**ATTORNEY FOR PETITIONER.**

This 15th day of October, 2015.

STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge



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Appellate Case No. 2011-187273
Lower Court Case No. 2007-CP-40-4259

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DUSHUN STATEN, #282328,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that one copy of the Petitioner's Petition for Rehearing in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 15th day of October, 2015.

**JEREMY A. THOMPSON**
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 15th day of October, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 7/10/2022

# The South Carolina Court of Appeals

Dushun Staten, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-187273

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## ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

James E. Lockemy J.

Stephen L. McDonald J.

Columbia, South Carolina

FILED

December 18, 2015

cc:
Jeremy Adam Thompson, Esquire
Alan McCrory Wilson, Esquire
James Clayton Mitchell, III, Esquire
The Honorable L. Casey Manning