STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SUMTER COUNTY
Brian M. Gibbons, PCR Judge
William H. Seals. Jr., Trial Judge

Appellate Case No. 2017-001292

MICKEY MARKELL JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES

I. **Did the post-conviction relief court properly determine that Petitioner was entitled to belated appellate review of direct appeal issues pursuant to White v. State, 263 S.C 110, 208 S.E.2d 35 (1974)?**

II. **Did the post-conviction relief court properly deny relief when Petitioner failed to establish counsel was constitutionally ineffective for failing to object to the State's closing argument because the closing argument was proper and did not warrant an objection?**

STATEMENT OF THE CASE

On March 9, 2012, the South Carolina State Grand Jury indicted Petitioner Mickey Markell Johnson (herein Petitioner) for Criminal Conspiracy, Accessory Before the Fact to Murder, Accessory After the Fact to Murder, Pointing and Presenting a Firearm at a Person, and Unlawful Carrying of a Pistol (2012-GS-47-03). On June 13, 2012, a superseding indictment was returned against Petitioner, adding one count of Accessory before the Fact to First-Degree Burglary. He was represented by Shaun C. Kent, Esquire. The case was prosecuted by Assistant Attorneys General Cary Goings and Curtis Pauling of the South Carolina Attorney General's Office.

On July 16, 2013, Petitioner proceeded to a jury trial before the Honorable William H. Seals, Jr. On July 18, 2013, the jury convicted Petitioner of Accessory Before the Fact to Murder, Pointing and Presenting a Firearm at a Person, Unlawful Carrying of a Pistol, and Criminal Conspiracy. The jury acquitted Petitioner of Accessory After the Fact to Murder. The trial court sentenced Petitioner to life without the possibility of parole for Accessory Before the Fact to Murder, five years imprisonment for Pointing and Presenting a Firearm at a Person, one year imprisonment for Unlawful Carrying of a Pistol, and five years imprisonment for Criminal Conspiracy, with all sentences to be served concurrently.

Petitioner attempted to perfect a direct appeal, but the South Carolina Court of Appeals dismissed the appeal by order filed on November 22, 2013, finding Petitioner had failed to timely serve his notice of appeal on the respondent pursuant to Rule 203(b)(2), SCACR. The Remittitur was issue on December 11, 2013.

Thereafter, on July 22, 2014, Petitioner filed an application for post-conviction relief. On August 15, 2014, Petitioner, through counsel Wendy J. Keefer and Adam Owensby, served a "Petition in Support of Post-Conviction Relief Pursuant to S.C. Code Ann. § 17-27-20," alleging the following grounds for relief:

1. Ineffective assistance of counsel for failing to file a timely appeal;

2. Prosecutorial misconduct for failing to provide exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963); and

3. Ineffective assistance of counsel for failing to investigate and present alibi witnesses.

The State (Respondent) served its return on October 22, 2014, requesting an evidentiary hearing and consenting to Petitioner's claim that he was denied his right to appellate review and therefore entitled to belated appellate review of direct appeals issues pursuant to White v. State, 263 S.C 110, 208 S.E.2d 35 (1974). An evidentiary hearing was convened on November 9, 2016, before the Honorable Brian M. Gibbons, circuit court judge. Petitioner was present and represented by Lance S, Boozer. Respondent was represented by Assistant Attorney General LaRone K. Washington of the South Carolina Attorney General's Office. At the hearing, Petitioner testified and presented testimony from trial counsel Kent, Willie J. Johnson, and Trevaugh Jackson. By written order filed on June 1, 2017, the court granted Petitioner belated appellate review of direct appeals issues pursuant to White and denied Petitioner's remaining allegations.

Petitioner filed a notice of appeal. On January 5, 2018, Petitioner filed a Petition for a Writ of Certiorari and a Brief of Appellant Pursuant to White. This Return to Petition for a Writ of Certiorari and accompanying Brief of Respondent Pursuant to White follow.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The post-conviction relief court properly granted Petitioner belated appellate review of direct appeal issues pursuant to White v. State.

Petitioner asserts counsel was ineffective for failing timely file a direct appeal on his behalf and asserts he wanted to appeal his convictions and life sentence. In its return, Respondent conceded that Petitioner was entitled to belated appellate review pursuant to White.

"Following a trial, counsel must make certain the defendant is made fully aware of the right to appeal." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (internal citations omitted). "In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967)." Turner v. State, 380 S.C. 223, 224, 670 S.E.2d 373, 374 (2008) (internal citation omitted). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Simuel, 390 S.C. at 271, 701 S.E.2d at 740 (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004) (internal citation omitted).

In the present case, there is no evidence that Petitioner made a knowing and intelligent decision not to pursue a direct appeal. Rather, the record establishes Petitioner not only wanted to pursue a direct appeal, but was only denied this opportunity by his counsel's failure to timely serve notice on the State, resulting in dismissal of his direct appeal pursuant to Rule 203(b)(2), SCACR. Therefore, since Petitioner did not knowingly and intelligently waive his right to appeal, the post-conviction relief court properly determined Petitioner is entitled to a belated appellate review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Respondent addresses the issues raised in this belated appellate review in the accompanying Brief of Respondent Pursuant to White v. State, also served on today's date,

II. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to object to the State's closing argument.

Petitioner asserts trial counsel was constitutionally ineffective for failing to object to impermissible vouching in the State's closing argument and that the post-conviction relief court erred in denying him post-conviction relief. However, as the post-conviction relief court correctly held, the State's closing argument did not amount to improper vouching, and therefore, Petitioner is not entitled to relief. This Court should deny certiorari.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the

attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. State v. Cooper, 334 S.C. 540, 514 S.E.2d 284 (1999). A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). 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. It is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record. Id. During closing arguments, 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) (citing State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001)).

Petitioner has failed to prove counsel's performance was constitutionally ineffective, as the State's closing argument was not impermissible vouching. Petitioner argues the following portion of the State's closing argument was improper:

> You know, there was a lot of testimony about plea deals and proffer agreements, when statements were made, and that kind of thing. And, ladies and gentlemen, proffer agreements are done because the State has to know what an individual--what information he has before they can make any decisions about whether a plea agreement is going to be entered. That's the purpose of a proffer agreement. It is an agreement between the State and the defendant saying come in here, tell me what you know, and I will not use it against you. I cannot use it against you, but I have to know what you're going to say before I can make any type of determination as to what plea deal to give you.
>
> Does that change the fact that it's not the truth? No. It's the truth.

(App. 578-579). Petitioner asserts that because credibility important in Petitioner's case and trial counsel failed to provide a trial strategy for not objecting, the post-conviction relief court erred in denying relief.

The post-conviction relief properly denied relief because the State's comments during closing argument do not amount to impermissible vouching. As the court noted, this portion of the State's closing argument summarizes the proffer process, which was testified about at length by nearly every witness presented at trial, both on direct and cross examination. Counsel's entire closing argument focused on the deals all of the cooperating witnesses received in exchange for their testimony and the purported lengths the State went through to make sure these statements matched up. The State's closing argument was merely commenting on his version of the testimony presented and was proper.

Petitioner relies on Matthews, arguing the State's closing argument was improper vouching of its own witnesses. Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002). In

Matthews, this Court held trial counsel was ineffective for failing to object to improper vouching, when the State argued:

> Now, you may not have to like [witness]. I didn't like [witness]. 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 that can tell it. (original emphasis).

Matthews, 350 S.C. at 275. This statement was found to be improper, because "[it] led the jury to believe the government corroborated the witness' testimony before trial and found it credible." Id. at 266. In contrast, the State's comments in Petitioner's closing argument do not guarantee the veracity of the witnesses' testimony, but rather, permissibly summarize the proffer process for the jury.

Although the State's comments during closing were proper, Petitioner also failed to meet his burden of proving he was prejudiced. Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). 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 (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

In this case, Petitioner has failed to present evidence of what the specific impact of any allegedly impermissible comments had on the impact of Petitioner's trial. The State's comments were all confined to facts established during trial and, in the context of the entire record, were not so egregious as to have infected the trial with unfairness as to make the conviction a denial of due process.

Further, the trial judge effectively cured any possible vouching of credibility by the State during its jury instructions. Particularly, the trial court instructed the jury as follows:

> Furthermore, it is your job as jurors to determine the credibility and believability of the witnesses who have testified in this case. In determining the believability of witnesses who have testified in this trial, you may believe one witness over many or many over one. You may believe a part of the testimony of a witness and reject the remaining part. You may believe the testimony of a witness in its entirety or reject it in full. **You many consider whether the witness has an interest in the result of the trial, whether the witness is prejudiced toward either party**, the opportunity for the witness to have seen the matters and things about which the witness may testify, and the way the witness acts on the witness stand.

(App. 603-04) (emphasis added).

Petitioner has not challenged the validity of the trial court's instruction. It is clear from the instructions, the jury was made aware of the proper weight to give witness testimony and what constitutes evidence in the case. Any potential error by the State was cured by the trial judge's jury instruction. Specifically, Petitioner asserts he was unfairly prejudiced because the evidence the State presented against him was based solely upon varying accounts from self-interested witnesses who had motives to lie. The jury had the opportunity to weigh, and was further instructed by the trial court to weigh, motives of witnesses when reaching their verdict. The jury weighed the evidence against Petitioner and found him guilty of Accessory Before the Fact to Murder, Pointing and Presenting a Firearm at a Person, Unlawful Carrying of a Pistol, and Criminal Conspiracy and acquitted Petitioner of Accessory After the Fact to Murder. Therefore, Petitioner failed to meet his burden of proof and the post-conviction relief court properly denied relief.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari as to issue two. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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July 16, 2018

STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

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

Appellate Defender Robert M. Pachak
S.C. Commission on Indigent Defense – Appellate Division
Post Office Box 11589
Columbia, South Carolina 29211

This 16th day of July, 2018

CAROLINE COLLINS
Administrative Coordinator

ALAN WILSON
ATTORNEY GENERAL

July 16, 2018

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Mickey Markell Johnson, #298814 v. State of South Carolina**
Appellate Case No. 2017-001292
Lower Court Case No. 2014-CP-43-1491

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
SC Bar No. 100108

MHJ/cc
Enclosures

cc: Robert M. Pachak, Esquire (2 copies)