

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

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Appellate Case No. 2019-000839

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**RECEIVED**

**May 01 2020**

**S.C. SUPREME COURT**

Chris A. Liverman,

Petitioner,

v.

State of South Carolina,

Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation for trial by not calling an expert witness on memory and eye-witness identification to testify in rebuttal of the State's evidence presented at trial?
- II. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel improperly argued irrelevant and highly prejudicial character evidence during Petitioner's opening statement by telling the jurors his jury trial, thereby implying his guilt?
- III. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to move for suppression of objectively false evidence that Petitioner stole the gun used in the murders, resulting in Trial Counsel having to introduce otherwise inadmissible, irrelevant, and highly prejudicial character evidence of Petitioner's incarceration on a different charge when the gun was used during the murders was stolen?
- IV. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to object to improper and highly prejudicial testimony by the State's key witness, Tyrone Smith, that he was scared to testify but was testifying for the victims and their family?
- V. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to object to the admissibility of the State's gang expert witness's testimony and failed to request a hearing on the reliability of that testimony when such a hearing would have led to the exclusion of all or most of the prejudicial portions of the expert witness's testimony?
- VI. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to preserve for appellate review objections to highly prejudicial testimony of the State's gang expert witness, including but not limited to testimony about possible meanings of teardrop tattoos and hash mark tattoos?
- VII. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel improperly called an expert witness to testify about gangs, which included the possible meanings of tattoos, when that testimony only served to bolster the credibility of the State's gang expert witness and enhance the State's improper and highly prejudicial evidence related to gang membership and activity?
- VIII. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and mistrial based on the undue prejudice created by those comments?

- IX. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to object to the Solicitor's improper comments vouching and bolstering the credibility of the State's witness during closing argument and failed to move for a curative instruction and mistrial based on the undue prejudice created by those comments?
- X. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to object to the Solicitor's improper comments in violation of the golden rule during closing argument and failed to move for a curative instruction and mistrial based on the undue prejudice created by those comments?
- XI. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to properly object to and preserve for appellate review improper lay and expert opinion testimony regarding unduly prejudicial gang affiliation evidence and stigma in the minds of the jurors?
- XII. Did the PCR Court err in finding appellate counsel provided effective assistance of counsel when appellate counsel failed to argue on appeal before the S.C. Court of Appeals that the opinion of the State's gang expert about the possible meaning of tear drop tattoos and possible meaning of hash mark tattoos was inadmissible and preserved for appellate review?
- XIII. Did the PCR Court err in finding appellate counsel provided effective assistance of counsel when appellate counsel failed to appeal the portion of the S.C. Court of Appeals' opinion regarding the admissibility of the State's gang expert witness's testimony to this Court?
- XIV. Did the PCR Court violate the separation of powers doctrine by adopting the State's proposed order of dismissal when this independent judicial function cannot be delegated to an executive agency without providing specific rationale for denying each claim and for omitting relevant testimony, findings of fact, and conclusions of law?
- XV. Did the PCR Court violate the separation of powers doctrine by adopting the State's proposed order of dismissal when this independent judicial function cannot be delegated to an executive agency without providing specific rationale for denying each claim and for omitting relevant testimony, findings of fact, and conclusions of law?

### **STATEMENT OF THE CASE**

On August 27, 2004, the City of Columbia Police Department arrested Petitioner Chris Liverman for two counts of murder. App. 2449-50. The Richland County Grand Jury issued indictments for these charges on April 21, 2005. App. 2451-54. On August 28, 2006, the Honorable James W. Johnson considered pre-trial matters including a defense objection to

testimony about gang membership and hearings pursuant to *Jackson v. Denno* and *Neil v. Biggers*. App. 1-123. On October 30, 2006, Mr. Liverman proceeded to trial before Judge Johnson and a jury. App. 124-1551. Solicitors Barney Giese, Kathryn Luck Campbell, and Margaret Fent represented the State. Assistant Public Defenders Elizabeth Franklin-Best, Maxwell Schardt, and Carolyn Gripp represented Petitioner. The jury returned guilty verdicts on both counts of murder. On November 9, 2006, the Trial Court imposed two consecutive life sentences without the possibility of parole. App. 1550, lines 3-10; App. 2455-56.

Mr. Liverman appealed. Robert Dudek and Joseph Savitz, III, represented Petitioner and filed his final brief on September 8, 2008, and the State filed its final brief on November 3, 2008. App. 1605-78. The Court of Appeals affirmed Petitioner's convictions and sentences on December 4, 2009. *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). App. 1679-99. The Court of Appeals denied a petition for rehearing on January 20, 2010. App. 1700-05. On March 2, 2011, this Court granted Mr. Liverman's petition for a writ of *certiorari*. App. 1706-18; App. 1750. Following briefing by both parties (App. 1751-1808), this Court affirmed the Court of Appeals in result on June 6, 2012. *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012). App. 1809-21. This Court issued the Remittitur on June 26, 2012. App. 1822.

On July 17, 2012, Petitioner filed his application for post-conviction relief (PCR). App. 1823-29. The State filed a Return on October 18, 2012. App. 1830-37. Petitioner amended his PCR Application on March 6, 2013, August 7, 2018, and December 11, 2018. App. 1838-58; App. 1895-1913. On December 17, 2018, the Honorable R. Scott Sprouse presided over the evidentiary hearing. App. 1914-2075. Charles Grose and Dayne Phillips represented Petitioner, and Deputy Attorney General Ed Salter and Assistant Attorney General Lindsey McCallister represented the State. Prior to testimony, PCR Counsel verbally added allegations of ineffective

assistance of counsel based on Trial Counsel's failure to object during the State's closing argument. App. 1917, line 21 – 1923, line 20. Dr. Dawn McQuiston, Ph.D (App. 1924-78) and Trial Counsel Ms. Franklin-Best (App. 1979–2072) testified at the evidentiary hearing.<sup>1</sup>

Dr. McQuiston testified about how memory works and how memories are stored in the human brain. Specifically, she testified that there are three types of memory: sensory; short-term; and long-term. She also testified regarding “attention” and “perception”, and how each of these affects a person's memory. She explained how familiarity with a specific person can sometimes lead to a misidentification because it increases the person's confidence in the identification. Dr. McQuiston testified about the research on a person's confidence and accuracy when making an identification, noting that, based on empirical research, eye-witness confidence is not a strong predictor of the identification's accuracy. Notably, she testified that a one-on-one identification procedure (also known as a “showup”) where a person is shown a single picture of a person is suggestive, unlike the preferred method of using a lineup identification procedure.

Dr. McQuiston testified about empirical research examining how the one-on-one procedure compares to a lineup procedure. Research indicates there is a higher risk that people make false identifications when a one-on-one procedure is used compared to a lineup procedure. Dr. McQuiston also testified about the 1999 U.S. Department of Justice guidelines for the administration of identification procedure. She testified the National Academy of Sciences (NAS) released a comprehensive report endorsing the best practices for identification procedure, which concluded the use of a one-on-one identification procedure is inherently a suggestive

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<sup>1</sup> Dr. McQuiston, a Wofford College psychology professor, researches eye-witness memory. Her research is peer reviewed and published. The PCR Court qualified her as an expert witness in eye-witness identification and eye-witness memory, accepted numerous articles and reports containing research data on eye-witness identification and memory, and testified about the Innocence Project's research on eye-witness misidentification.

procedure and that in-court identifications can be influenced by a prior suggestive identification.

Dr. McQuiston had reviewed the testimony of Tyrone Smith and Investigator Joe Gray. She testified about relevant factors that could have affected the eye-witness identification of Petitioner, such as the inherently suggestive one-on-one identification procedure. She opined expert testimony on eye-witness identification and memory would have educated the jury in Petitioner's trial about those issues and would have put those jurors in a better position to determine the reliability of eye-witness identification and memory testimony.

Ms. Franklin-Best testified this was her first murder trial and she had limited experienced using expert witnesses. She noted Petitioner tested negative for Gunshot Residue (GSR) and that Petitioner's statement to law enforcement was materially different from provable facts based on the evidence. She testified about the implausible statements of witnesses and inconsistencies in the State's theory based on the evidence. The defense theory was that Diego Thompson was the shooter. He was present at the shooting and had a motive to lie during the trial. Ms. Franklin-Best further testified about the allegations in the PCR application:

- The State referenced a stolen gun during the its opening statement, and the defense told the jury about Petitioner's prior incarceration to prove he could not have stolen the gun.
- The eyewitness identification was flawed. She acknowledged not consulting an eye-witness identification expert and testified her failure to consult with an eye-witness identification expert was not a strategic decision.
- After reviewing the State's presentation of gang evidence, gang membership, gang tattoos/hashmarks, and expert testimony regarding gang membership and activity, she testified about the *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) hearing to determine the reliability of unscientific evidence.
- She admittedly failed to object during the State's closing argument to improper vouching/bolstering of the State's witnesses, improper references to Petitioner's tattoos, Solicitor's references about the danger to the community, and Golden Rule arguments.

Instead of presenting closing arguments, the parties filed post-hearing briefs. App. 2360-

2412. The PCR Court dismissed Mr. Liverman’s PCR application on April 23, 2019. App. 2413-40. On April 30, 2019, Petitioner served a Rule 59(e), SCRCP motion, which the PCR Court denied on May 10, 2019. App. 2441–46. This petition for writ of certiorari follows.<sup>2</sup>

### STANDARD OF REVIEW

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. To establish ineffective assistance of counsel, a Petitioner must satisfy the two-prong test in *Strickland v. Washington*, 466 U.S. 668 (1984). “First, an [Petitioner] must show that counsel’s performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). “The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 118, 386 S.E.2d at 625. A Petitioner must prove “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.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

“The burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic “[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d

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<sup>2</sup> The following are notable pages in the Appendix to assist in understanding the full, complex record in this case: (1) background provided in appellate opinions—App. 1680-87; 1811-14; (2) trial counsel’s opening statement—App. 232, line 20 – 253, line 16; (3) State’s gang testimony—App. 1024-93; (4) defense’s gang testimony—App. 1286-1346; (5) Tyrone Smith’s identification testimony—App. 874-952; and (6) State’s closing arguments—App. 1422-44; App. 1491-1394).

757, 768 (2014). “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). This Court held, “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

## ARGUMENTS

**I. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation for trial by not calling an expert witness on memory and eye-witness identification to testify in rebuttal of the State’s evidence presented at trial.**

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003). “In assessing the reasonableness of an attorney’s investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *Wiggins*, 539 U.S. at 527. “A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

Furthermore, “while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Lounds v. State*, 380 S.C.

454, 460, 670 S.C. 646, 649 (2008) (quotation omitted). The duty to conduct a reasonable investigation extends to consulting and possibly presenting expert witnesses. *See McKnight*, 378 S.C. at 46, 661 S.E.2d at 360-61; *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (“Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder.”). In *Lounds v. State*, 380 S.C. at 462, 670 S.E.2d at 650, this Court found that it “was not objectively reasonable given the defense theory of the case” for trial counsel not to call witnesses who would have “added significantly to the credibility of petitioner’s case”. *See Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had trial counsel introduced relevant and favorable evidence at trial).

In this case, Trial Counsel failed to consult with an expert witness for an independent review of the eye-witness identification evidence implicating Petitioner as the murderer when it was reasonable and necessary given the critical importance of Tyrone Smith’s testimony (i.e., his identification of Petitioner). App. 874-952; 1924-7878; *See Strickland*, 466 U.S. at 691; *Wiggins*, 539 U.S. at 527; *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743. Trial Counsel testified her failure to consult with this type of expert witness was not a strategic decision and would have affected the outcome of the case. App. 1997, line 15 – 1998, line 18; App. 2067, lines 8-22).

Additionally, Trial Counsel’s failure to call an expert witness in eye-witness identification and memory at trial “was not objectively reasonable given the defense theory of the case” because this expert testimony would have “added significantly to the credibility of petitioner’s case”. *See Lounds*, 380 S.C. at 462, 670 S.E.2d at 650. This argument is supported by Dr. McQuiston’s testimony and the exhibits admitted into evidence at the evidentiary hearing

(i.e., the jury would have been in a better position to judge the identification evidence if educated on the research data of mis-identification). App. 1974, line 8 – 1976, line 5; App. 2076 – 2359); *See McKnight*, 378 S.C. at 46, 661 S.E.2d at 360 (finding that counsel was ineffective in a homicide by child abuse case for: (1) calling an expert witness that undermined the defense; (2) failing to call an expert witness that supported the defense theory; and (3) in failing to challenge the State’s evidence.). Trial Counsel’s deficient performance prejudiced Petitioner because her failure to investigate prevented Petitioner from presenting a full and complete defense against the State’s key piece of evidence at trial (i.e., Tyrone Smith’s unreliable identification of Petitioner).

**II. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel improperly argued irrelevant and highly prejudicial character evidence during Petitioner’s opening statement by telling the jurors petitioner had been incarcerated for twenty-six months prior to his jury trial, thereby implying his guilt.**

“[E]vidence introduced for the sole purpose of implying a defendant has a prior criminal record is improper.” *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991) (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986)); *see also Deck v. Missouri*, 544 U.S. 622 (2005); *Estelle v. Williams*, 425 U.S. 501 (1976). *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) held “counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness”. *See Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (“labeling counsel’s actions as ‘trial strategy’ does not automatically immunize an attorney’s performance from sixth amendment challenges.”).

In this case, Trial Counsel moved for a continuance during a pre-trial hearing based on pre-trial publicity, referencing an article in *The State Newspaper* from the previous day. App. 9, line 23 – 10, line 17. The article “included a mug shot of [Petitioner],” which counsel noted

“would be clearly inadmissible at trial.” The article also discussed Petitioner’s trial, alleging he was a member of a gang and implicating him in other unsolved murders. The article appeared on the website, [www.thestate.com](http://www.thestate.com), and linked to an article setting forth Petitioner’s criminal history. Trial Counsel argued the publication of this article denied Petitioner “due process” and interfered with his “right to a fair trial” because of its location and timing. App. 12, line 15 – 15, line 9.

During opening statements, Trial Counsel Maxwell Shardt improperly informed the jurors, Petitioner “was arrested in 18 minutes, and he has been under arrest ever since.” Mr. Shardt emphasized, “For the last 26 months he has been under arrest, and for the last 26 months the State has had the opportunity to build a case against him, so that’s 26 months he has been in jail.” App. 240, line 18 – 241, line 2.

At the evidentiary hearing, Ms. Franklin-Best acknowledged the extraordinary pre-trial publicity, including her fear that Petitioner’s mugshot in *The State Newspaper* might taint the jury panel. App. 1983, line 23 – 1988, line 2. She further testified “the overall strategy in the case” was to exclude bad character evidence, whether it involved “incarceration,” “gang membership,” or the “stolen gun.” App. 2067, line 5 – 2068, line 23. She admitted telling the jurors Petitioner had been incarcerated for 26 months was contrary to their strategy. Notably, this statement implied Petitioner’s guilt and was improper character evidence in violation of Rule 404(a), SCRE. *See Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 345 (1991) (citing *State v. Tate*, 288 S.C. 104, 341 S.E.2d 380 (1986)). *See also Deck*, 544 U.S. 622; *Estelle*, 425 U.S. 501.

**III. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel failed to move for suppression of objectively false evidence that Petitioner stole the gun used in the murders, resulting in trial counsel having to introduce otherwise inadmissible, irrelevant, and highly prejudicial character evidence of Petitioner’s incarceration on a different charge when the gun was used during the murders was stolen.**

*Roseboro* held “counsel must articulate a valid reason for employing a certain strategy to

avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness”. 317 S.C. at 294, 454 S.E.2d at 313; *See Solem*, 801 F.2d at 1051 (finding that “labeling counsel's actions as “trial strategy” does not automatically immunize an attorney’s performance from sixth amendment challenges.”); *Sikes v. State*, 323 S.C. 28, 32, 448 S.E.2d 560, 563 (1994) (“Because counsel’s failure to motion to suppress evidence was based on the fact that he thought the officers’ action were justified, we find counsel’s decision fell below an objective standard of reasonableness”); *see also Martin v. Maxey*, 98 F.3d 844 (5th Cir. 1996) (Failure to file a motion to suppress could be grounds for ineffectiveness claim).

In this case, Officer Robin Dutton located the firearm in a creek bed that was used in these two murders while working on another case on October 2, 2004. An N.C.I.C. check revealed the firearm had been reported stolen *prior* to these murders in June of 2004. (App. 831 – 853). Yet, the Solicitor elicited the improper testimony from the lead investigator, Joe Gray, implicating Petitioner as being in possession of the stolen gun. App. 773, line 22 – 775, line 2. The Solicitor’s argument that Petitioner stole the gun was objectively false, which Trial Counsel proved by calling Officer Tylisa L. Edmonds of the Columbia Police Department and Captain William M. Bowman of the Alvin S. Glenn Detention Center to testify.

Officer Edmonds testified about responding to the automobile breaking on June 24, 2004 where the murder weapon was reported stolen. App. 1218, line 4 – 1223, line 21. Captain Bowman testified that Petitioner was incarcerated from June 2-28, 2004. App. 1258, line 17 – 1259, line 14. Thus, Trial Counsel was forced to call witnesses to prove Petitioner was incarcerated on an unrelated charge on the day the firearm was stolen. This testimony improperly informed the jurors that Petitioner, who did not testify at trial, had a prior criminal record. *See Deck, Estelle, Geter and Tate, supra.*

At the evidentiary hearing, Trial Counsel reviewed this testimony and testified it was “inconsistent” with the trial strategy of excluding Petitioner’s prior criminal history, and acknowledged the defense did not move the Trial Court to require the Solicitor to correct this false testimony. The Solicitor had a due process obligation and ethical duty not to present false testimony during Petitioner’s trial. *See Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) (State was obligated to correct co-defendant’s false testimony at trial); *see also Giglio v. United States*, 405 U.S. 150 (1972). Notably, *Riddle* was decided five months before Petitioner’s trial, and Trial Counsel was deficient for not objecting to the presentation of false testimony and for not moving the Trial Court to require the solicitor to correct it (i.e., to avoid the necessity of calling the witnesses who introduced evidence of Petitioner’s unrelated prior criminal history).

**IV. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel failed to object to improper and highly prejudicial testimony by the State’s key witness, Tyrone Smith, that he was scared to testify but was testifying for the victims and their family.**

In *Mincey v. State*, 314 S.C. 355, 444 S.E.2d 510 (1994), this Court found counsel ineffective for failing to object to the solicitor’s closing argument that petitioner had intimidated witnesses where there was no evidence of intimidation presented at trial. This Court has found counsel ineffective in a case involving multiple charges arising from a shooting incident due to counsel’s failure to object to the admission of a handgun found in the defendant’s apartment that had no relevance to the offenses for which the defendant was charged. *See Holman v. State*, 381 S.C. 491, 674 S.E.2d 171 (2009); Rules 401 and 403, SCRE. This Court has also found trial counsel’s failure to object to a forensic interviewer’s inadmissible testimony that a criminal sexual conduct victim’s statement was “believable,” and that the victim had no reason “not to be truthful” was not a valid trial strategy where counsel failed to set forth a specific strategic reason for failing to object. *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *see also Dawkins v.*

*State*, 346 S.C. 151, 551 S.E.2d 260 (2001) (failure to object to prejudicial hearsay because he did not want to “confuse or upset the jury” was not valid strategy).

In this case, Trial Counsel provided ineffective assistance of counsel by failing to object to improper and highly prejudicial testimony by the State’s witness, Tyrone Smith, that he was scared to testify but was testifying for the victims and their family. App. 898, line 14 – 899, line 2; *See Mincey*, 314 S.C. 355, 444 S.E.2d 510; *see also* Rules 401 and 403, SCRE.

**V. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel failed to object to the admissibility of the State’s gang expert witness’s testimony and failed to request a hearing on the reliability of that testimony when such a hearing would have led to the exclusion of all or most of the prejudicial portions of the expert witness’s testimony.**

In *Mitchell v. State*, 298 S.C. 186, 379 S.E.2d 123 (1989), this Court found defense counsel ineffective for failing to object to the inadmissible evidence of defendant’s devil worship and mafia membership which tended to prove only that the defendant was a bad person with a propensity to commit crime. *See Smith*, 386 S.C. 562, 689 S.E.2d 629; *Dawkins*, 346 S.C. 151, 551 S.E.2d 260; *see also* Rules 401 and 403, SCRE.

Here, WIS TV aired “a series on gangs in the Midlands” prior to jury selection. App. 1982, lines 18-25. Trial Counsel feared extraordinary pre-trial publicity—generally about gangs and specifically about Petitioner’s case—might taint the jurors. App. 1984-88. Accordingly, she adopted an “overall strategy in the case” to exclude bad character evidence involving “incarceration,” “gang membership,” or the “stolen gun.” App. 2067-68.

During a pre-trial hearing, relying on *State v. Price*, 368 S.C. 494, 629 S.E.2d 363 (2006), the Solicitor announced the State planned to introduce gang expert testimony. App. 3-12. The State acknowledged the testimony in *Price* was limited to a history of gang activity in Columbia, including clothing and hand signals. The State further acknowledged it was “improper” for the

witness in *Price* “to testify based on hearsay that the defendant was a member of a gang.” The State, however, announced its hope “to introduce evidence of the tattoos on [Petitioner’s] body that are indicative of” gang membership. The State’s gang expert would “explain the pitchfork, the IGD which is tattooed on [Petitioner’s] hand that he is a member of the Insane Gangster Disciple which is a set of Folk Nation.” App.

The State claimed this evidence is part of *res gestae* and supported motive for the murders. Trial Counsel noted gang membership is not “an element of the crime” and reminded the Court about the pre-trial publicity concerning gangs. The Trial Court ruled the testimony would be admissible under *Price* and not excluded under Rule 403, SCRE. The State pressed further, telling the Trial Court, “[W]e will be eliciting information regarding the tattoos...at some point we would just want to cover those prior to opening statements.” App. 3-12.

The Trial Court called for arguments about “the State wishing to require [Petitioner] to demonstrate or expose tattoos.” Although acknowledging the display of the tattoos would be “non-testimonial,” Trial Counsel argued the State “must lay a foundation before they can get these tattoos into evidence.” Trial Counsel argued the State should not be allowed to “attribute a specific meaning to the tattoo” and expressed concern the prosecution “want[ed] to enter this into evidence so that the jury will infer that it [represents] the death of these two children, but it is not what these two tattoos mean.” Counsel argued “this sort of evidence is character assignation” and an attempt to “terrify the jury with this talk of hidden meanings and secret meanings of gang members,” which is “grossly and unduly prejudicial to [Petitioner].” Counsel argued “allowing any evidence about tattoos” would be “back door character propensity evidence” that would deny Petitioner a fair trial under the state and federal constitutions. App. 112-14.

The State maintained these tattoos have specific meaning but acknowledged this

information came from hearsay (interviewing gang members about the specific meanings of tattoos). Trial Counsel requested “an *in camera* hearing on this specific question before we actually do this in front of the jury so that [the trial court] can make a determination of whether or not it is admissible.” The Trial Court agreed to hold a hearing pursuant to *Council, supra*. See also *White, supra*; *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979); and Rules 702 and 703, SCRE. (App. 237 – 240). Notably, the Trial Court never convened a *Council* hearing.

When the trial resumed, the State called Edward O’Cain as an expert in gangs, subject to Trial Counsel’s previous objections. He acknowledged his information came, in part, from interviews of inmates in the Department of Corrections and street investigations. Mr. O’Cain testified about the purported meanings of Petitioner’s tattoos and “brands.” Referencing the meanings of gang tattoos, the Solicitor asked about what a person has to do to get the “rank” of “set king strike two.” Mr. O’Cain responded, “What I’m being told from the streets and interviews, to get the strike series of that rank, you have to have bodies attributed to you.” Trial Counsel objected and asked for a hearing outside the presence of the jurors. Trial Counsel moved for a mistrial calling the testimony “a completely outrageous claim [with] absolutely no support at all.” Trial Counsel argued the information was hearsay that implicated the Confrontation Clause and cited *Price*. The Trial Court overruled the objection. App. 1023-76.

At the evidentiary hearing, Trial Counsel testified she should have renewed the request for a *Council* hearing because the testimony was not relevant under Rules 401 and 402, SCRE, objected to the improper character evidence under Rule 404, SCRE, and pointed out the Trial Court’s previous Rule 403, SCRE analysis was no longer sufficient “because the pitch fork with slashes was something new.” App. 2022, lines 2-22. Trial Counsel was deficient for not insisting on a *Council* hearing to determine the admissibility of the State’s gang expert testimony. The

Trial Court had the gatekeeping obligation to determine whether the subject matter rose to the level of expert testimony, whether the expert had the requisite qualifications, and whether the testimony was reliable. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010). Notably, a *Council* hearing would have led to a proper application of *Price*, and the exclusion of the most prejudicial portions of Mr. O’Cain’s expert witness testimony. *See Jones, Council, White*, and Rules 702 and 703, SCRE.

**VI. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel failed to preserve for appellate review objections to highly prejudicial testimony of the State’s gang expert witness, including but not limited to testimony about possible meanings of teardrop and hash mark tattoos.**

“On appeal, [Petitioner] contend[ed] the Trial Court erred in allowing Investigator O’Cain to testify the hash marks on [his] back indicated he had bodies attributed to him, as this evidence placed his character at issue in violation of Rules 403 and 404(b), SCRE. *Liverman*, 386 S.C. at 242, 687 S.E.2d at 79-80. Specifically, Petitioner argued “this testimony, in violation of Rule 404(b), ‘referred to possible homicides prior to the two for which [appellant] was standing trial,’ as the State had maintained the two teardrop tattoos symbolized the homicide of Courtney and Terrence.” *Id.* Petitioner “further summarily argue[d] evidence appellant was involved in two prior murders is inadmissible under Rule 403, SCRE, as it is “unduly prejudicial and inflammatory.” *Id.* The Court of Appeals ultimately held, “The precise argument appellant raises on appeal, that the hash mark testimony referred to prior homicides and thus violated Rules 403 and 404(b), was not raised to the Trial Court and therefore is not preserved for review.” *Id.* 386 S.C. at 242, 687 S.E.2d at 80.

At the evidentiary hearing, Trial Counsel testified she should have objected to this testimony as improper character evidence under Rule 404, SCRE, and pointed out the Trial Court’s previous Rule 403, SCRE analysis was no longer sufficient “because the pitch fork with

slashes was something new.” App. 2022, lines 16-19. Had Trial Counsel made these objections and requested a proffer of the testimony during an *in camera* hearing, then such a hearing would have led to the exclusion of all or the most prejudicial portions of the gang expert witnesses’ testimony. Alternatively, these objections would have preserved the issue for appeal and allowed the Court of Appeals to address the merits of these issues. Trial Counsel was ineffective for not preserving this issue for appeal. *See, e.g., Mitchell* (failure to object to improper character evidence was prejudicial ineffective assistance of counsel warranting a new trial).

**VII. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel improperly called an expert witness to testify about gangs, which included the possible meanings of tattoos, when that testimony only served to bolster the credibility of the State’s gang expert witness and enhance the State’s improper and highly prejudicial evidence related to gang membership and activity.**

In this case, Trial Counsel called Robert C. Walker as an expert in gangs with the hope of establishing that the State’s gang expert testimony was not reliable. App. 1286, line 9 – 1346, line 8; *see also* App. 1999–2031 (trial counsel discussing State’s gang expert witnesses’ testimony including defense including defense concerns about reliability. Unfortunately, the defense expert emphasized the most prejudicial portions of testimony by Mr. O’Cain and Officer Mahoney (highlighting unreliable and inadmissible testimony under *Price, Council* and *Jones*).

To the extent that Mr. Walker had relevant testimony, Trial Counsel should have presented it during an *in camera* hearing to assist the Trial Court in exercising the Court’s gatekeeping role regarding the admissibility of the State’s unreliable testimony. *See Watson, supra*. Therefore, Trial Counsel was ineffective for not presenting this testimony during an *in camera Council* hearing because this hearing would have led to the exclusion of all or the most prejudicial portions of the gang expert witnesses’ testimony. Trial Counsel was also ineffective for presenting this unreliable testimony to the jurors. Notably, this improper testimony also

emphasized inadmissible bad character evidence against Petitioner. *See Mitchell, supra*.

**VIII. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel failed to object to the Solicitor’s improper comments during closing argument and failed to move for a curative instruction and mistrial based on the undue prejudice created by those comments.**

During closing argument, “[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.” *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). Yet, the “argument must not be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences to it.” *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct. App. 2003) (citation omitted); *See State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (finding a solicitor’s closing argument must be carefully tailored so as not to appeal to the personal biases of the jury).

“Solicitors are bound to rules of fairness in their closing arguments.” *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). “While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.” *Id.* “The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.” *Id.* “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.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (finding “[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.”); *See State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) (“A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.”); *Vaughn v. State*, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868

(1974)). Notably, when the solicitor has improperly commented on the accused's right to maintain silence, the prejudice prong is the same as the harmless error analysis on direct appeal. *See McFadden v. State*, 342 S.C. 637, 539 S.E.2d 391 (2000).

Here, Trial Counsel provided ineffective assistance of counsel by failing to object when the prosecutor argued in closing: (1) "There is not a single witness, or any evidence in this case, that points to anyone other than [Petitioner] as being the shooter, the murderer"; (2) "He sits there today bragging to you, to us, and to our community, that he did this"; (3) references to tattoos on Petitioner's face; (4) juror's community, not gangs; (5) "My office, my job was to seek justice"; and (6) "We use the word truth". App. 1427, ll. 15-16; App. 1442, ll. 3-6; App. 1491-97; App. 1515, l. 2 – 1516, l. 7. These unduly prejudicial arguments were burden shifting and an impermissible comment on Petitioner's right not to testify. *See Humphries*, 351 S.C. at 373, 570 S.E.2d at 166; *McFadden*, 342 S.C. 637, 539 S.E.2d 391; *State v. Kennedy*, "272 S.C. 231, 250 S.E.2d 338 (1978) (finding curative instruction could not cure the prejudice to the defendant).

**IX. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel failed to object to the Solicitor's improper comments vouching and bolstering the credibility of the State's witnesses during closing argument and failed to move for a curative instruction and mistrial based on the undue prejudice created by those comments.**

Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. *State v. Kelly*, 343 S.C. 350, 368-69 540 S.E.2d 851, 860 (2001) , *rev'd on other grounds*, *Kelly v. South Carolina*, 534 U.S. 246 (2002). Improperly "vouching for the credibility of government witnesses raises two concerns." *Id.* First, "such comments can convey the impression that evidence is not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the

evidence presented to the jury.” *Id.* Second, “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” *Id.*; *See State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977 (2001) (“[A] solicitor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness’ truthfulness . . . . Improper vouching occurs when the prosecution places the government’s prestige behind a witness by making explicit personal assurances of a witness’ veracity, or where a prosecutor implicitly vouches for a witness’ veracity by indicating information not presented to the jury supports the testimony[.]”) (citations omitted). Therefore, “[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness’s credibility.” *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (quoting *Kelly*, 343 S.C. at 369, 540 S.E.2d at 861).

In *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002), this Court found defense counsel’s decision not to object to prosecutor’s improper vouching for the credibility of the State’s witnesses because counsel did not want the judge to scold him in front of the jury or give the prosecution more time to make their closing was not valid, even though the record reflected the judge did admonish counsel for wrongfully objecting during the closing and did grant additional time to compensate for the interruption.

In this case, Trial Counsel provided ineffective assistance of counsel by not objecting to the Solicitor’s improper comments vouching/bolstering the credibility of the State’s witnesses during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. App. 1428; App. 1442, ll. 14-17; App. 1492, ll. 8-110; App. 1500, ll. 2-12; App. 1504, ll. 2-3. *See Shuler* and *Gilchrist*, *supra*.

**X. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel failed to object to the Solicitor’s improper comments in violation of the golden rule during closing argument and failed to move for a curative instruction and mistrial based on the undue prejudice created by those comments.**

In *Von Dohlen v. State*, 360 S.C. 598, 611, 602 S.E.2d 738, 745 (2004), this Court noted, “[o]ther courts, including our own Court of Appeals, uniformly have condemned and prohibited golden rule arguments in criminal and civil settings”. See *State v. Reese*, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct. App. 2004) (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence), *aff’d in part and rev’d in part*, 370 S.C. 31, 633 S.E.2d 898 (2006) (affirming the Court of Appeals’ finding that the defendant was entitled to a new trial based on the solicitor’s “Golden Rule” closing argument).

In this case, Trial Counsel provided ineffective assistance of counsel by not objecting to the Solicitor’s improper comments (e.g., references to the juror’s community versus gang turf) in violation of the Golden Rule during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. App. 1515, l. 15 – 1516, l. 30; See *Von Dohlen*, 360 S.C. at 611, 602 S.E.2d at 745; *Reese*, 359 S.C. at 271, 597 S.E.2d at 175.

**XI. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Trial Counsel failed to properly object to and preserve for appellate review improper lay and expert opinion testimony regarding unduly prejudicial gang affiliation evidence and stigma in the minds of the jurors.**

In *United States v. Santiago*, 643 F.3d 1007, 1011 (7th Cir. 2011), the Seventh Circuit Court of Appeals held that juries are “likely to associate gangs with criminal activity and deviant behavior, such that the admission of gang evidence raises the specter of guilt by association or a

verdict influenced by emotion.” (internal quotation marks omitted)); *Cf. United States v. Archuleta*, 737 F.3d 1287, 1295 (10th Cir. 2013), cert. denied, 134 S. Ct. 2859 (2014) (“Any unfairness from gang-affiliation testimony stems from the implicit connection [drawn] between the crimes committed by gangs and the defendant gang member. In most cases, concern about such innuendo would be proper, because ordinarily the jury should not assume that the defendant gang member committed the [gang’s] crimes.”); See Rules 403 and 702, SCRE.

In *State v. Owens*, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008), this Court held constitutional claims are not preserved for review without a contemporaneous objection at trial. See *State v. Smith*, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) (“A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.”); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (arguments not raised below and ruled on by the court are not preserved for appellate review).

In this case, Trial Counsel provided ineffective assistance of counsel by failing to properly object to and preserve for appellate review lay opinion and expert testimony regarding unduly prejudicial gang affiliation evidence and stigma in the minds of the jurors. See *Santiago*, 643 F.3d at 1011; *Archuleta*, 737 F.3d 1287, 1295 (10th Cir. 2013), cert. denied, 134 S. Ct. 2859.

**XII. The PCR Court erred in finding Appellate Counsel provided effective assistance of counsel because Appellate Counsel failed to argue on appeal before the S.C. Court of Appeals that the opinion of the State’s gang expert about the possible meaning of tear drop tattoos and possible meaning of hash mark tattoos was inadmissible and preserved for appellate review.**

In this case, the pre-trial hearing addressed the admissibility of the State’s gang expert testimony on multiple grounds. The Trial Court expressly considered the hearsay argument under *State v. Price*, 368 S.C. 494, 629 S.E.2d 363 and employed a Rule 403, SCRE analysis.

Trial Counsel argued that any testimony about certain tattoos implying that Petitioner had killed people would be “character assignment” and “grossly and unduly prejudicial.” App. 112 – 114. These objections were renewed when the State called its gang expert witnesses.

Due process requires a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

Appellate Counsel was deficient for two reasons. First, Appellate Counsel did not argue that the most prejudicial portions of the expert testimony was inadmissible hearsay under *Price*. Second, Appellate Counsel did not argue that Trial Counsel had preserved the Rules 403 and 404 objections when they argued attributing meanings to the tattoos was prejudicial character assignment. The PCR Court erred in finding Appellate Counsel provided effective assistance of counsel when Counsel failed to argue on appeal before the Court of Appeals that the opinion of the State’s gang expert about the possible meaning of tear drop and hash mark tattoos were inadmissible and preserved for appellate review.

**XIII. The PCR Court erred in finding Appellate Counsel provided effective assistance of counsel because Appellate Counsel failed to appeal the portion of the S.C. Court of Appeals’ opinion regarding the admissibility of the State’s gang expert witness’s testimony to this court.**

In *Evitts v. Lucey*, 469 U.S. 387 (1985), the Supreme Court held a criminal defendant is constitutionally entitled to the effective assistance of appellate counsel, and to be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. *See Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel failed to raise an issue on appeal that constituted reversible error); *Southerland*, 337 S.C. at 617, 524 S.E.2d at 836.

In this case, had Appellate Counsel properly briefed this issue and appealed it, this Court would have reversed his convictions and sentences. *See Lucey*, 469 U.S. 387; *Patrick*, *supra*. Appellate Counsel's deficient performance also prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692).

**XIV. The PCR Court violated the separation of powers doctrine by adopting the State's proposed order of dismissal because this independent judicial function cannot be delegated to an executive agency without providing specific rationale for denying each claim and for omitting relevant testimony, findings of fact, and conclusions of law.**

Article I, Section 8 of the South Carolina Constitution provides, "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." Section 17-27-80 of the South Carolina Code of Laws provides, in relevant part: "The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."

In this case, the procedure followed by the PCR Court denied Petitioner an opportunity to have his PCR claims adjudicated by an independent judicial officer in violation of the separation of powers doctrine. *See S.C. Const. art. I, § 8*. Specifically, the PCR Court did not provide the State with any specific basis for denying Petitioner's claims. The PCR Court essentially adopted a modified version of the State's adversarial Respondent's Memorandum in Opposition to PCR because this independent judicial function cannot be delegated to an executive agency without providing its rationale for denying each claim and for omitting relevant testimony, findings of fact, and conclusions of law. *See Marlar v. State*, 375 S.C. 407, 408, 653

S.E.2d 266 (2007) (holding, “Pursuant to S.C. Code Ann. § 17-27-80 . . . , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.”).

Fundamental fairness also requires that the PCR Court’s Order contains all relevant findings of fact and conclusions of law for an objective, independent review of the evidence presented at the evidentiary hearing and to preserve all issues for appellate review. Therefore, PCR Court erred in essentially adopting the State’s adversarial memorandum in opposition of PCR in violation of the separation of powers doctrine. *See* S.C. Const. art. I, § 8; S.C. Code Ann. § 17-27-80.

### CONCLUSION

Based on the foregoing reasons, Petitioner Chris Liverman respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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