

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO LEXINGTON COUNTY  
Court of Common Pleas  
The Honorable Brooks P. Goldsmith, PCR Judge

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S.C. SUPREME COURT

Appellate Case No. 2019-001694

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CURTIS T. JOHNSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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

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ALAN WILSON  
Attorney General

LILLIAN L. MEADOWS  
Assistant Attorney General  
S.C. Bar No. 103665

Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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The PCR court erred in finding trial counsel was not ineffective for failing to object to statements made by the solicitor during closing that were inflammatory and improperly played to the jury’s emotions where the solicitor repeatedly referred to the decedent as an “Iraqi war veteran,” one wounded man’s body as having been “splattered,” and another injured man’s wound as a “bone sticking out [of] his leg.”

**RESPONDENT’S COUNTERSTATEMENT OF ISSUE ON CERTIORARI**

This Court should reject Petitioner’s contention the PCR court erroneously found counsel was not constitutionally ineffective for failing to object to certain portions of the solicitor’s closing argument where Petitioner relies in part on statements never raised and therefore not considered by the PCR court. Issue preservation concerns aside, however, the PCR court correctly concluded counsel was not ineffective for failing to object to these statements because they were neither improper nor prejudicial based on the evidence presented and when considered in the context of the entire proceeding.

## STATEMENT OF THE CASE

On November 20, 2006 Curtis T. Johnson (Petitioner) and his brother and co-defendant, Kerwin S. Parker (Parker), were arrested following an investigation into an incident where several people were injured and one person was fatally shot.

In April 2007, the Lexington County grand jury indicted Petitioner for one count of murder, two counts of assault and battery with intent to kill (ABWIK), and one count of possession of a firearm during the commission of a violent crime.<sup>1</sup> (App. 1116–23). On September 14, 2009, Petitioner and Parker proceeded to a joint jury trial before the Honorable Robin B. Stilwell. Elizabeth Fullwood, Esquire (Counsel), represented Petitioner. Eleventh Circuit Solicitor Donald V. Myers and Assistant Solicitor Colleen E. Dixon prosecuted the case.

### **A. Summary of Evidence Adduced at Trial**

At approximately 1:30 A.M. in the early morning hours of November 20, 2006, Jose Hernandez, a resident of the Church Hill Apartments in Lexington County, South Carolina, heard a loud noise coming from an area across from his apartment followed by several gunshots. (App. 324, 328–29). Hernandez went outside to see what was going on and, when he did so, observed a vehicle stuck between a tree and the apartment building across from him. (App. 329). He then saw two individuals, one with long hair and one with short hair, standing on a patio behind the apartment near where the vehicle was located. (App. 329–32). Hernandez continued to watch as the long-haired man walked back to the vehicle, and the short-haired man remained on the patio

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<sup>1</sup> Parker was indicted for one count of murder (2007-GS-32-1540); one count of assault and battery with intent to kill (ABWIK) (2007-GS-32-1542); and one count of possession of a firearm during the commission of a violent crime (2007-GS-32-1541) for his role in the incident. At the conclusion of trial, the jury acquitted Parker of murder but convicted him of ABWIK and possession of a weapon during the commission of a violent crime. (App. 877). Judge Stilwell sentenced Parker to concurrent terms of twenty years' imprisonment for ABWIK and five years for possession of a firearm during the commission of a violent crime.

while pointing a gun in a downward direction. (App. 329–32). Hernandez then heard someone ask not to be shot before he saw the short-haired man fire two gunshots. (App. 330, 333–34). Following the gunshots, a woman came out of the apartment and asked the men what they had done, and the men then walked down the street together. (App. 330–31). Thereafter, Hernandez watched as the short-haired man left the area, and the long-haired man returned to the apartment. (App. 330–31). The long-haired man then kicked a man lying on the ground several times, returned to the crashed vehicle, attempted to leave in it, and then walked away. (App. 331).

Shortly thereafter, law enforcement officers were notified of the shooting and responded to the scene. (App. 357–58; 374; 392–93; 412). After they arrived, Deputy Teddy Xanthakus and Deputy Danny Lewis of the Lexington County Sheriff’s Office observed a vehicle resting in the bushes next to the apartment building and saw a long-haired man, later identified as Petitioner, walking in the road “in a daze.” (App. 357–61; 374–75; 427). The officers arrested Petitioner and found a set of brass knuckles in his pocket. (App. 360–61; 376–77).

Deputy Xanthakus thereafter moved to secure the apartment, where he found a severely injured man on the apartment patio, observed a blood trail leading away from the apartment, and discovered the body of a deceased person sprawled out on the floor of the kitchen inside of the apartment. (App. 361; 363–66). Emergency medical personnel then arrived on the scene and began treating the injured victims, and officers secured the apartment. (App. 370). Officers subsequently recovered numerous pieces of evidence from the scene, including a shotgun, a metal pipe, eight shell casings, a box of shotgun shells, numerous bullet fragments, and multiple fired bullets. (App. 365; 463–65; 468–69; 473; 479; 489; 503–04; 508; 510; 512–13).

As the investigation into the shooting progressed, officers learned Petitioner’s older brother, Kerwin S. Parker, was involved in the incident, and they went to his residence to

apprehend him. (App. 85; 393–94; 653). Upon arriving, officers found a man standing in the yard of the residence, and he advised them that Parker was inside. (App. 399–400; 404). The officers then entered the residence, located Parker and his mother, and detained him. (App. 400; 405). Following his arrest, Parker’s mother provided the officers with his shoes and informed them Parker’s gun was in a vehicle located in the yard of the residence. (App. 400–01; 407–08). Officers then discovered a forty-caliber handgun in the glove box of the vehicle, which was later confirmed to belong to Parker. (App. 415; 419; 591–92).

After Petitioner and Parker were arrested, officers collected the sweatshirts they were wearing at the time and performed gunshot residue tests on their hands and clothing.<sup>2 3</sup> (App. 427–28; 432–33; 460; 471). Upon analysis, gunshot residue was discovered on both of Petitioner’s hands and on the right and left sleeves of both sweatshirts that were submitted for testing. (App. 563–64; 567–68). Blood was also located Petitioner’s socks and shoes and on Parker’s shoes. (App. 596–600). Jasper Humbert, a forensic D.N.A. analyst with SLED, determined the blood on Petitioner’s socks and shoes belonged to Isaac Wilson (“Isaac”) and A.J. Wilson (“A.J.”). (App. 603–04; 606–08). The blood had Parker’s shoes belonged to Isaac. (App. 603–04; 606–08).

Parker’s gun and the fired cartridges, bullets, and bullet fragments recovered during the investigation into the shooting were analyzed by SLED Agent David Black, an expert in firearms examinations. (App. 576–78). Based on his analysis, Black concluded all seven of the recovered

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<sup>2</sup> At the time of his arrest, Petitioner had long hair and had no visible injuries (App. 224; 748). Likewise, Parker had short hair, was not wearing any shoes and did not appear to have any injuries at the time of his arrest. (App. 396; 400; 402; 405; 536; 760–61). Furthermore, Petitioner was wearing a black sweatshirt and Parker was wearing a gray sweatshirt when they were arrested. (App. 319; 428).

<sup>3</sup> The gunshot residue test was not conducted on Petitioner until approximately 6:30 A.M., which was roughly five hours after the shooting. (App. 471; 565–66).

bullet cartridges were fired from Parker's gun, and three of the four recovered bullets were fired from the weapon.<sup>4</sup> (App. 578).

Meanwhile, the victims were taken to the hospital and treated for their injuries. (App. 609; 613–14). The man who left the blood trail at the scene, Walter Gadson (Walter), suffered a femur fracture during the incident. (App. 610–11). Likewise, the man found on the patio, A.J., suffered numerous injuries, including injuries to his vertebrae, face, mouth, extremities, shoulder, flank, wrist, and thumb. (App. 255; 612; 617–18). A.J.'s injuries were so severe that a person who saw him after the shooting stated "it looked like... some of his mouth was gone." (App. 119). Furthermore, the lower portion of A.J.'s body was paralyzed as a result of the shooting. (App. 256; 617–18).

Dr. Janice Ross, an expert in forensic pathology, performed an autopsy on Isaac, who was killed in the shooting. (App. 620–21). During the autopsy, Dr. Ross located two gunshot wounds to Isaac's chest and gunshot powder burns on Isaac's clothing. (App. 621–22). One bullet entered the right side of Isaac's chest, travelled through his lungs and heart, and left an exit wound that suggested Isaac was lying on concrete at the time he was shot. (App. 623–24). The other bullet entered the left side of Isaac's chest and travelled through his left lung and stomach. (App. 624–25). Based on her findings, Dr. Ross concluded Isaac bled to death as a result of the shooting. (App. 625). She further concluded Isaac was shot from a close distance, and the gun was only four to twelve inches away from his body when the shots were fired. (App. 622–23; 626).

Walter recounted he and Isaac got into a physical altercation with Petitioner earlier in the evening prior to the shooting, and Petitioner threatened them as he was leaving the area. (App.

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<sup>4</sup> Black was unable to determine which gun fired the final bullet because it was too damaged for proper analysis. (App. 578).

150–52). He testified he and Isaac then returned home before observing Parker’s vehicle near their apartment. (App. 153–54). In response, Walter stated he, Isaac, and A.J. exited the apartment after Isaac retrieved a shotgun. (App. 157–58). Once outside, Walter stated Petitioner got out of the vehicle and blew its horn, and then Parker came around from the side of the apartment. (App. 158–59). He testified he then spoke with Parker; Parker pulled his pants leg up and reached for something; A.J. yelled that Parker had a gun; A.J. and Isaac ran towards the patio; and Isaac tossed him the shotgun. (App. 159–70). After that, Walter indicated Petitioner drove the vehicle towards him while he unsuccessfully tried to fire the shotgun to stop the vehicle, and he was struck and injured. (App. 170–73). Thereafter, he stated he saw Petitioner exit the vehicle armed with a pistol and then heard multiple gunshots as he crawled away from the scene. (App. 173–176).

Similarly, A.J. testified he was at his apartment late on the night of November 19, 2006, when Isaac and Walter arrived and stated they had been in a fight with Petitioner. (App. 241–42; 263–64). Later that night, A.J. stated Petitioner arrived at the apartment complex so they all went outside with Isaac armed with a shotgun. (App. 244–45). Once outside, A.J. stated a man approached them and asked why they did something to his brother. (App. 246–48). After that, A.J. testified the man reached for something, and he responded by yelling that the man had a gun before running towards the apartment patio. (App. 249–50). Thereafter, A.J. stated he heard gunshots, went inside the apartment, and then went back outside when he did not see Isaac. (App. 250).

As he walked outside, A.J. indicated he saw a long-haired man on top of Isaac, and he tried to get the man off of Isaac. (App. 251–52). When he did so, he testified the man who confronted them earlier pulled out a gun and shot him in the mouth, side, hand, and back. (App. 252–56). A.J. further testified he selected the photograph of the shooter from a photographic line-up, and he

identified Parker in-court as the shooter and indicated he was certain of the identification.<sup>5</sup> (App. 254–60).

### **B. Petitioner’s Testimony**

Petitioner testified in his own defense and offered a substantially different account of the incident from the testimony of A.J. and Walter. (App. 653). Prior to the shooting, Petitioner stated he was attacked by Walter and Isaac while stopped at a red light, and Walter kicked him in the head while he was still seated in his own vehicle. (App. 670–71). Petitioner claimed he was then pulled from the vehicle during the altercation but was eventually able to escape. (App. 672–74). Thereafter, Petitioner testified he returned home and told Parker about the incident, and Parker responded by saying he was going to go speak with the attackers. (App. 677–78). As a result of the attack, Petitioner stated he suffered “a little nick” under his lip, dirt in his eye, and emotional pain. (App. 675–76).

Petitioner indicated they then drove to Isaac’s apartment, parked in the rear, and intended to resolve the dispute by talking to Isaac and Walter. (App. 681–685). Petitioner testified Parker exited the vehicle and walked out of view before Isaac, Walter, and A.J. approached his vehicle while carrying three different shotguns. (App. 687–90). He claimed he then heard Isaac say he was going to shoot him, he honked the horn, and they stopped walking towards him. (App. 690–91). When he honked the horn, Petitioner testified Parker ran back to the vehicle, stopped when he saw the shotguns, and asked the men to put the guns down. (App. 691–92; 902–03). Petitioner stated Parker then tried to convince Isaac to let them leave, but Walter charged at Parker with a shotgun.

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<sup>5</sup> Consistent with A.J.’s testimony, Amy Fleming, who lived with Isaac and A.J. at the time of the shooting, stated she saw Parker armed with a gun on the apartment patio after A.J. was shot, and she testified she heard Parker state he should kill all of them.

(App. 903–04). Petitioner stated he then drove towards Walter and struck a wall. (App. 905–08; 910).

After hitting the wall, Petitioner indicated he looked over at the patio and saw Isaac pointing a gun at Parker while A.J. held onto Parker. (App. 913). Petitioner claimed he then grabbed a gun from his vehicle’s glove box and fired a warning shot out of the window before running over and shooting A.J. five times and Isaac two times. (App. 913–14). Petitioner further claimed that he shot Parker during the incident. (App. 737, 915). After the shooting, Petitioner testified Parker left to go get help while he went into the apartment and then walked in the roadway. (App. 914–16).

### **C. Verdict & Subsequent Proceedings**

On September 18, 2009, the jury convicted Petitioner of one count of the lesser-included offense of voluntary manslaughter; two counts of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN); and one count of possession of a firearm during the commission of a violent crime. (App. 876). Judge Stilwell ordered a presentence investigation and deferred sentencing proceedings to a later date. (App. 878–79).

On October 21, 2009, the court convened a sentencing hearing. (Supp. App. 1–35). Judge Stilwell sentenced Petitioner to concurrent terms of thirty years’ imprisonment for voluntary manslaughter, ten years for each ABHAN conviction, and a consecutive five years’ imprisonment for possession of a firearm during the commission of a violent crime. (App. 1124–27) (Supp. App. 33). Petitioner appealed.

Appellate Defender Robert M. Pachak (Appellate Counsel) perfected Petitioner’s appeal by filing an *Anders*<sup>6</sup> brief and petition to be relieved as counsel with the Court of Appeals. (Second

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<sup>6</sup> *Anders v. California*, 386 U.S. 738 (1967).

Supp. App. 22). Upon further review of the record, however, Appellate Counsel discovered a portion of Petitioner's testimony was missing from the transcript due to an equipment malfunction. Appellate Counsel filed a motion to remand for reconstruction of the record, which the Court granted on March 10, 2011. (Second Supp. App. 14, 20). A reconstruction hearing convened before Judge Stilwell on October 3, 2011. (App. 882–970). Appellate Counsel filed the final *Anders* brief on June 4, 2012, and Petitioner filed a *pro se* brief thereafter. (Second Supp. App. 22, 35).

On January 16, 2013, the Court dismissed Petitioner's appeal and granted Appellate Counsel's petition to be relieved in an unpublished opinion. *State v. Johnson*, 2013-UP-022 (S.C. Ct. App. filed Jan. 16, 2013). Petitioner subsequently petitioned for rehearing, which was denied on February 21, 2013. (Second Supp. App. 68, 89). The case was remitted back to the circuit court on April 7, 2013. (Second Supp. App. 90).

Petitioner timely commenced the underlying PCR action August 22, 2013. (App. 971–80). The State submitted its return requesting an evidentiary hearing on December 18, 2013. (App. 983–92). An evidentiary hearing convened on April 21, 2015, before the Honorable Brooks P. Goldsmith. (App. 993–1077). Petitioner was present and represented by Anna R. Good, Esquire.

On June 7, 2019, the PCR court issued an order denying relief and dismissing the action with prejudice. (App. 1078–1107). Petitioner thereafter filed a motion to reconsider pursuant to Rule 59(e), SCRCP.<sup>7</sup> (App. 1111–14). Both parties submitted briefs at the request of Judge Goldsmith. On September 10, 2019, the PCR court issued an order denying Petitioner's motion. (App. 1115). This appeal follows.

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<sup>7</sup> Petitioner's *pro se* 59(e) motion was properly submitted pursuant to a consent order issued by the Honorable William P. Keesley relieving PCR counsel and allowing Petitioner to proceed *pro se*.

## STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court’s findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court’s conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989); *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)). “The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove 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 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

## ARGUMENT

**This Court should reject Petitioner’s contention the PCR court erroneously found counsel was not constitutionally ineffective for failing to object to certain portions of the solicitor’s closing argument where Petitioner relies in part on statements never raised and therefore not considered by the PCR court. Issue preservation concerns aside, however, the PCR court correctly concluded counsel was not ineffective for failing to object to these statements because they were neither improper nor prejudicial based on the evidence presented and when considered in the context of the entire proceeding.**

Petitioner contends the PCR court erred in concluding Counsel was not ineffective for failing to object to alleged inflammatory statements by the solicitor during his closing argument. Two of the statements Petitioner relies on in support of this argument were not raised nor ruled up by the PCR court, and therefore not properly before this Court. Even if these statements were preserved, however, Petitioner cannot show Counsel was ineffective because the solicitor’s closing argument did not leave room for a meritorious objection by trial counsel, and neither deficient performance nor prejudice results. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

### **A. Issue Preservation**

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. *Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is “to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” *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); *cf. Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App.2004) (“Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.”); Significantly, the application of issue preservation requirements ensures the trial court has an opportunity “to rule properly after it

considered all relevant facts, law, and **arguments.**” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added).

In order for an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004); *see also* JEAN HOEFER TOAL ET AL., *APPELLATE PRACTICE IN SOUTH CAROLINA* 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. *State v. Freiburger*, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Moreover, a party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Petitioner’s reliance on two of the solicitor’s statements, (citing App. 816 and 830)—which Counsel allegedly should have objected to—to buttress his argument on appeal are not properly before this Court. No testimony was elicited regarding these statements nor were they raised in the PCR application or addressed in the order of dismissal. The PCR court was not presented with the opportunity to consider or review these statements in ruling on this issue, these statements are not properly before this Court.

#### **B. Counsel’s Alleged Failure to Object to the State’s Closing Argument**

As an initial matter, the “use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation.” *United States v. Nguyen*, 379 F. App’x 177, 181 (3d Cir. 2010);

*c.f. Humphries v. Ozmint*, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) (“[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under *Strickland*.”). Because Petitioner’s underlying allegation is that trial counsel was ineffective for failing to object to prosecutorial misconduct, the standard of law governing prosecutorial misconduct is relevant to the inquiry.

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); *accord. Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The test for reversible prosecutorial misconduct generally has two components: that (1) the prosecutor’s comments must in fact have been improper and (2) the remarks must have so prejudiced the defendant’s substantial rights that the defendant was denied a fair trial.” *Fortune v. State*, 428 S.C. 545, 550, 837 S.E.2d 37, 40 (2019) (citing *United States v. Chorman*, 910 F.2d 102, 113 (4th Cir. 1990).

Closing arguments are a basic and important element of the adversarial fact-finding process in a criminal trial, and such arguments serve “to sharpen and clarify the issues for resolution by the trier of fact in a criminal case” while also providing both the solicitor and defense counsel with an opportunity to advocate for their respective positions, argue for certain inferences to be drawn from the evidence presented, and identify the weaknesses in the other side’s positions. *Herring v. New York*, 422 U.S. 853, 862 (1975). When presenting a closing argument, a solicitor generally possesses “wide latitude” as to the substance of his remarks to the jury and is fully permitted to prosecute with earnestness and vigor. *Bates v. Lee*, 308 F.3d 411, 422 (4th Cir. 2002); *see also United States v. Isaacs*, 493 F.2d 1124, 1164 (7th Cir. 1974) (“The closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture

. . . because to shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice.” (citations and quotation marks omitted), *overruled on other grounds by United States v. Koen*, 982 F.2d 1101 (7th Cir. 1992)). A solicitor’s closing argument, however, “must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences to it.” *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166 (citing *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999)).

At the PCR hearing, Counsel testified about a “fairly standard list of things Solicitors might do that’s inappropriate during closing arguments.” (App. 1046). She explained that she generally keeps a list on the table or just in her head, but that she tries to catch them all. (App. 1046). She aptly identified her shortlist as being “the gold rule type argument,” “burden shifting arguments,” and arguments she refers to as “asking for a verdict based on something outside of the evidence” such as emotion-evoking arguments. (App. 1054–54). Counsel testified hoped she would have objected if one of those occurred in Petitioner’s case. (App. 1047).

Counsel further agreed that the record reflected she did not object to the verbiage cited by Petitioner’s PCR counsel during the State’s closing argument. (App. 1054–56). Specifically, the solicitor referring to the deceased victim as an Iraqi war veteran and characterizing his body as “splattered;” the solicitor commenting that another victim was paralyzed for life and that he was “a young man asleep in a chair for the rest of his life;” and the solicitor stating, “I knew [Petitioner] couldn’t prove that.” (App. 806, 814, 819, 831, 833). PCR counsel stated the solicitor “mentions the body being splattered” on pages 814 and 819, and asked Counsel, “After the third time of him stating the body was splattered, did you not think that he was trying to stir the emotions of the jury

at that point?” (App. 1055). Notably, however, the solicitor refers to or mentions the body being “splattered” only once. (App. 806).

As discussed above, in determining whether Counsel’s failure to object to the solicitor’s closing argument constituted deficient performance, the reviewing court must first determine whether the prosecutor’s remarks constituted objectionable misconduct. *See Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir.2005) (explaining that the merits of the underlying claim “control the resolution of the *Strickland* claim because trial counsel cannot have been ineffective for failing to raise a meritless objection”); *see also Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013) (explaining that defense counsel’s failure to object during closing argument generally does not constitute deficient performance “absent egregious misstatements”).

Petitioner first contends the solicitor characterizing A.J.’s body as “splattered” was highly inflammatory and impermissibly played to the passions or prejudices of the jury.<sup>8</sup> Petitioner further contends the solicitor’s remarks about A.J.’s injuries—that his “spinal cord [was] severed” and that he will be in a wheelchair for the rest of his life—were similarly inflammatory and an attempt to improperly appeal to the emotions of the jury.

The PCR court properly concluded that none of these comments were even *remotely* improper, and were based upon facts established during trial or were aspects of the trial which were readily apparent to the jurors. A witness who observed A.J. immediately following the shooting stated “it looked like... some of his mouth was gone.” (App. 119). A.J.—who was clearly confined to a wheelchair at the time of the trial—testified he was paralyzed from the waist down and that he would never walk again as a result of the shooting. (App. 256–57). A.J.’s surgeon

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<sup>8</sup> As discussed above, PCR counsel stated the solicitor made the “splattered” remark three times. The record reflects the comment was made only once. (App. 806).

further testified he suffered numerous injuries, including injuries to his vertebrae, face, mouth, extremities, shoulder, flank, wrist, and thumb. (App. 617–18). Thus, the testimony regarding the nature and extent of A.J.’s injuries likely “produced sympathy for the victim long before the [solicitor] gave his closing remarks.” *Duvall v. Reynolds*, 139 F.3d 768, 795 (10th Cir. 1998)

Petitioner next complains about the solicitor’s reference to Walter’s femur fracture—of which he sustained when Petitioner struck him with a vehicle—as having “a bone sticking out of his leg.” (App. 814, 816, 819, 830). The PCR court correctly noted that this reference is corroborated by prior testimony from Dr. Randall Suarez, the orthopedic surgeon who treated and operated on Walter’s leg. (App. 610–11) (Walter “had an open femur fracture, femur being the thigh bone, open meaning what happened, the bone had come through the muscle and the skin and exited . . . his thigh bone.”). Walter also testified about his injury, and that he had to have emergency surgery where Dr. Suarez placed a metal rod in his leg. (App. 171–72).

Finally, Petitioner asserts the solicitor impermissibly attempted to arouse the emotions of the jury by referring to Isaac—the deceased victim—as an “Iraqi war veteran.”<sup>9</sup> Although not relevant for purposes of proving the elements of the crime charged, the PCR court noted the solicitor nonetheless “did not impermissibly play to the passions or prejudices of the jury by making any more than a fleeting reference to [the] victim’s status as a veteran.” (App. 1000). *Cf. United States v. Wexler*, 79 F.2d 526, 530 (2d Cir. 1935) (stating that the closing argument of a prosecutor need not be “confined to such detached exposition as would be appropriate in a lecture”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so.”).

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<sup>9</sup> Walter testified that he met Isaac shortly after he returned from deployment. (App. 144–45).

The PCR court correctly deduced that these arguments were ultimately offered in furtherance of the State's requesting the jury to find malice or aggravating circumstances in the acts charged based upon specific facts presented in the testimony received.<sup>10</sup> (App. 831–34). There was no impermissible request by the State to view the evidence from the viewpoint of the victim or to decide the case on passion rather than reason. Because nothing in the solicitor's closing argument constituted a misstatement of the law, egregious or otherwise, any objection would have been fruitless.

Even assuming counsel should have objected to the above-mentioned remarks in the solicitor's closing argument, the PCR court correctly found Petitioner failed to meet his "burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. Because any excerpt of the State's closing exists as one moment in an extended trial, reviewing courts must examine the effect of any misconduct "within the context of the entire record." *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) (citing *Donnelly*, 416 U.S. at 643).

Petitioner contends he was prejudiced by the solicitor's statements, specifically because the "credibility . . . of the witnesses was at stake" and further that the "graphic depiction of the

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<sup>10</sup> Petitioner committed the crimes alleged in November 2006, prior to our legislature's passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which abolished all prior statutory and common law assault and battery offenses and replaced them with a number of new offenses. The trial judge in Petitioner's case therefore charged the jury on the common law definition of ABWIK and ABHAN. The common law defined the offense of ABHAN as "the unlawful act of violent injury to another accompanied by circumstances of aggravation. *State v. Foxworth*, 269 S.C. 496, 238 S.E.2d 172 (1977). "Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, **infliction of serious bodily injury**, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority." *Foxworth*, 269 S.C. at 498, 238 S.E.2d at 173 (emphasis added).

injuries improperly influenced” the jury’s consideration of Petitioner’s self-defense claim. The extent of the victims’ injuries, however, are not probative on the issue of credibility and have no bearing on whether Petitioner acted in self-defense. The PCR court pointed out that “the entirety of the closing argument closely pertained to evidence properly received at trial and later corroborated through [Petitioner]’s own testimony.” (App. 804–34).

Accordingly, Petitioner has failed to demonstrate that Counsel’s failure to object to the solicitor’s remarks was “so serious as to *deprive the defendant of a fair trial.*” *Strickland*, 466 U.S. at 687 (emphasis added); *see generally State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (“A new trial will not be granted unless the prosecutor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.”).

**CONCLUSION**

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

ALAN WILSON  
Attorney General

LILLIAN L. MEADOWS  
Assistant Attorney General

BY:           s/LillianMeadows            
Lillian L. Meadows  
S.C. Bar No. 103665  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3737

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ATTORNEYS FOR RESPONDENT