

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County

Honorable J. Mark Hayes, Circuit Court Judge

MAURICE ANTHONY ODOM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001223

PETITION FOR WRIT OF CERTIORARI

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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S.C. SUPREME COURT

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ISSUE PRESENTED

I.

Did the PCR court err in determining that Petitioner failed to prove he was prejudiced by trial counsel's deficient performance where Petitioner declined to testify in his own defense because trial counsel incorrectly advised Petitioner that if he testified at trial the State would be able to impeach him with prior convictions that were outside of the ten year time limit imposed by Rule 609 when the State had not served trial counsel with written notice of their intent to use the remote in time convictions?

II.

Did the PCR court err in finding trial counsel provided effective representation where counsel failed to object to numerous improper statements made by the solicitor during opening and closing arguments which improperly vouched for the State's witnesses and commented on Petitioner's right to remain silent?

STATEMENT OF THE CASE

In the early morning hours of November 11, 2011, Officer Nick Moye was conducting routine patrol in the city of Clinton, South Carolina, when he approached the BP gas station located on Highway 72 in Laurens County. Upon approaching the store, Moye heard the security alarm going off and notified dispatch¹ of the audible alarm. App. 75, l. 19- 77, l. 12. Moye pulled around the side of the store where he observed one of the glass windows was broken and a male subject was exiting through the broken window. The unknown subject ran behind the store and into the woods where Moye lost sight of him. Moye then secured the scene and waited for backup units to arrive. App. 82, l. 5- 83, l. 24.

The security company simultaneously alerted the owner/manager, Hardik Patel, and the assistant manager, Ramesh Patel, that a shattered window alarm had been triggered. The Patel brothers responded to their family-owned store to assist police in the investigation of the break-in. App. 91, l. 17- 94, l. 14. The Patels provided law enforcement with copies of the in-store surveillance video which captured two individuals wearing long sleeves, long pants, gloves, and masks break into the store by throwing a rock through the window. The two individuals were captured on the video taking tobacco products and cash from the store. App. 100, l. 18- 104, l. 9; App. 284, ll. 17-21. The individuals took approximately \$2,000 in cash and attempted to take over \$3,200 in tobacco products but left the tobacco products at the scene as they fled. App. 113, l. 8- 115, l. 25.

During the investigation into the burglary, Detective Tyrone Goggins instructed an officer to drive along Interstate 26 (I-26) and Highway 72 to check for vehicles parked on the

¹As Moye was reporting the alarm, dispatch also received a 911 alert from the gas station's security monitoring company and notified officers with the City of Clinton to respond to the scene. App. 76, l. 24- 77, l. 2

roadside. A black Chrysler 300 was located parked on the shoulder of an exit ramp off of the eastbound lane of I-26. The hood of the vehicle was warm to the touch, which indicated to Goggins that it had been recently driven. He instructed the officer to keep the vehicle under surveillance while the gas station scene was processed. The license plate number was run through the National Crime Information Computer which returned a report showing the vehicle was registered in North Carolina to Petitioner. App. 263, l. 13- 269, l. 7. A search of Petitioner's name in South Carolina revealed he resided at an address in Barnwell, SC. App. 288, l. 14-18.

Agent Reid Creswell with SLED responded to the scene of the burglary with bloodhound tracking dogs to attempt to track the suspect that Moye had seen flee into the woods behind the gas station. App. 188, l. 7- 189, l. 24; App. 237, l. 20- 238, l. 7. Creswell and his dog were able to establish a track from the area behind the store to the edge of the west-bound lane of I-26. App. 240, l. 4- 247, l. 19. The track terminated in an area across from where the suspect vehicle² had been parked. App. 287, l. 18-. 288, l. 5.

Goggins ultimately traveled to Barnwell, SC, with Robert Dennis³ to speak to Petitioner about his car being found near the scene of the incident. App. 291, ll. 14-19. Officers with Barnwell police accompanied Goggins and Dennis to Petitioner's residence, but he was not located there. Barnwell officers saw Christopher Mixon in the area near Petitioner's home and arrested him on unrelated warrants. App. 292, ll. 3-25. Goggins interviewed Mixon who implicated himself and Petitioner in the burglary of the BP gas station. App. 295, l. 20- 296, l. 6.

² The officer assigned to watch the suspect vehicle had left his post and the vehicle had been driven away by the time the SLED dog finished tracking the scent. App. 287, ll. 2-14.

³ Investigator Dennis was a member of the Newberry County Sherriff's Department. App. 291, ll. 20-24.

According to Mixon, Petitioner drove the pair from Barnwell to Laurens County in Petitioner's Chrysler. App. 155, l. 9- 156, l. 5. They stopped at the gas station to drop off a rock before driving further down I-26 to park the vehicle. The pair walked back to the store at which point they threw the rock through the window, entered the store, and proceeded to gather up the tobacco products. App. 158, l. 16- 162, l. 21. The police showed up sooner than expected, and the two fled the store in different directions. They eventually met back up at Petitioner's vehicle and returned to Barnwell. App. 164, l. 16-. 171, l. 24.

Petitioner was indicted by the Laurens County grand jury during its February 2012 term for one count of burglary, one count of grand larceny, and one count of criminal conspiracy. App. 413-414; App. 417-418; App. 421-422. On June 9, 2014, the State, represented by O. Warren Mowry, Jr., and Christopher Dale Scott called the case to trial before the Honorable Donald B. Hocker and a jury. Petitioner was represented by Elizabeth P. Wiygul. App. 1. At the conclusion of the three-day trial, Petitioner was found guilty as indicted. App. 371, ll. 13-22. Petitioner was sentenced to fifteen years imprisonment on the burglary charge and five years imprisonment on both the grand larceny and conspiracy charges, all sentences to run concurrently. App. 402, ll. 10-16.

Petitioner timely appealed his convictions and sentences. The Court of Appeals affirmed the convictions and sentences in an unpublished opinion. State v. Maurice Anthony Odom, Op. No. 2015-UP-561 (Ct. App. Filed Dec. 23, 2015). The remittitur was issued on January 8, 2016. Petitioner timely filed the current PCR application on March 17, 2016. App. 424-447. The State filed a return dated March 30, 2017. App. 448-455. PCR Counsel Carson Henderson filed an amended PCR application dated January 8, 2021, alleging thirteen grounds of ineffective assistance of counsel. Among the claims was that Counsel Wiygul was ineffective for failing to

properly preserve the record regarding which of Petitioner's prior convictions could be used against him if he testified at trial and for failing to object to improper argument during the Solicitor's opening and closing statements. App. 456-466.

An evidentiary hearing was held via Webex on January 26-27, 2021, before the Honorable J. Mark Hayes. The State was represented by Brianna L. Schill. Petitioner was represented by Counsel Henderson. App. 467. Petitioner, Counsel Wiygul, and Solicitor Scott testified at the hearing. App. 468. An order of dismissal was filed on August 9, 2021. App. 630-661. Counsel Henderson filed a motion to reconsider on August 12, 2021. App. 662-673. A hearing on the motion to reconsider was held on June 22, 2022, before Judge Hayes. The State was represented by Zachary Jones. Petitioner was represented by Counsel Henderson. App. 674. The PCR court ultimately denied the motion to reconsider on August 19, 2022. App. 711-725.

ARGUMENT

I.

The PCR court erred in determining that Petitioner failed to prove he was prejudiced by trial counsel's deficient performance where Petitioner declined to testify in his own defense because trial counsel incorrectly advised Petitioner that if he testified at trial the State would be able to impeach him with prior convictions that were outside of the ten year time limit imposed by Rule 609 when the State had not served trial counsel with written notice of their intent to use the remote in time convictions.

Relevant Facts

Counsel Wiygul informed the trial court that if the defense put up a case, the only witness that would testify would be Petitioner. App. 235, ll. 12-15. After the State rested, the trial court informed Petitioner of his right to remain silent and his right to testify in his own defense. App. 319, l. 9- 320, l. 24. When the trial court asked Petitioner if he had any questions about his rights he responded,

No, sir. I'm just -- if you don't mind, I was just curious even though me and my lawyer have discussed this already, the reason why -- **the only reason why I didn't want to testify is I didn't want my record brought up to make it look like, you know, even though I find case law where it says that after a ten-year period -- a ten-year period that that conviction and -- after you finish the conviction and after your sentence that you cannot be cross-examined, but my lawyer explained that I have in the past when I was younger, a teenager, I have a past CSC [criminal sexual conduct] twenty years ago that they can bring it up.**

App. 321, l. 3-14 (emphasis added). Counsel Wiygul then informed the court that it was her understanding that Petitioner's 2002 CSC conviction was a crime of moral turpitude, and in discussions with the solicitor, he had informed her he intended to bring up that conviction if Petitioner took the stand. App. 321, ll. 15-20.

Solicitor Mowry informed the trial court that the State also had certified copies of four burglary indictments that Petitioner had pled to that he would seek to use against Petitioner. Although the convictions were beyond the ten-year period, he believed the trial judge could, in his discretion, allow the convictions in for impeachment purposes. App. 321, l. 22- 322, l. 3. Counsel Wiygul then stated she agreed with Solicitor Mowry and believed he would seek to bring in the remote convictions under a theory of common scheme or plan. App. 322, ll. 4-6. After this discussion, Petitioner informed the trial court that he would not testify. App. 322, ll. 7-25.

In Petitioner's *pro se* PCR application, he asserted that he had been misadvised by trial counsel that his prior remote-in-time convictions would be used against him at trial, and based solely on that misinformation he chose not to testify. App. 430-431. In the amended application filed by Counsel Henderson, Petitioner alleged ineffective assistance of trial counsel for failing to properly preserve the record regarding which of Petitioner's convictions could be used against him if he testified during the trial. App. 464.

During the evidentiary hearing on Petitioner's PCR application, Counsel Wiygul testified that she had advised Petitioner that his 2002 CSC conviction would be admissible to impeach him if he testified because it was a crime of moral turpitude. She maintained that she had researched the issue. However, she was not aware that the determination that a prior conviction is a crime of moral turpitude was not the relevant standard on the admissibility of prior convictions. She agreed that the evidentiary rule governing the admission of prior convictions specifically dealt with remote-in-time convictions and that the convictions the State would have sought to impeach Petitioner with would have been outside of the ten-year time frame imposed by the rule. App. 499, l. 24- 504, l. 19.

Counsel Wiygul had no independent recollection of being put on written notice of the State's intention to use Petitioner's remote-in-time convictions and had no such notice in her file. She had not realized that if the State sought to use remote-in-time convictions for the purposes of impeachment, that they had to produce written notice of their intent and a hearing had to be held on the matter. She conceded that she failed to ask the trial court to rule on the admissibility of the remote convictions that the State wanted to use to impeach Petitioner's testimony. Counsel Wiygul recalled that Petitioner had wanted to testify and had expressed that desire to the trial court, but that he did not testify because he believed his prior record would be used to impeach him. She ultimately admitted that it would have made Petitioner's decision about whether to testify easier if she had gotten the trial court to rule on the admissibility of the remote. App. 507, l. 1- 509, l. 5. On cross-examination, Counsel Wiygul stated Petitioner's only other concern about testifying was whether the State would be able to bring up his other pending charges. However, the trial court had determined in chambers that the State would not be able to discuss any of his pending charges if Petitioner took the stand. App. 539, l. 21- 540, l. 6. The trial court's ruling that the pending charges could not be discussed was relayed to Petitioner. App. 553, ll. 1-5.

Petitioner testified that he had wanted to take the stand during his trial, and the only reason he did not testify was because he was afraid of getting impeached by his prior record. He confirmed that if the trial court had ruled the State could not have used the remote convictions that he would have testified at trial. He stated that Counsel Wiygul never discussed the ten-year rule with him nor how his prior convictions fell outside of the ten-year rule. App. 565, l. 11- 566, l. 16.

The order of dismissal framed the issues surrounding Petitioner's prior record as "Allegations Regarding Applicant's Decision Not To Testify." App. 659. The PCR court wrote that Petitioner alleged he wanted to testify but did not do so because he was not aware of what convictions could be used against him. In denying Petitioner's claims related to Counsel Wiygul's failure to determine the admissibility of his prior convictions and his being denied the opportunity to testify, the PCR court focused only on prejudice. In finding that he had not met his burden the PCR court wrote,

Moreover, with respect to his amended allegation that Counsel was ineffective for failing to determine what convictions would have been used against Applicant had he testified, Applicant has failed to show that this alleged deficiency would have changed the outcome of the case with reasonable probability. Applicant failed to provide information regarding what his testimony would have been at trial, and how this testimony would have changed the outcome of his case with reasonable probability. Any allegation that Applicant was prejudiced by this alleged deficiency is highly speculative. Accordingly, this Court denies and dismisses the allegation with prejudice.

App. 659-661.

Counsel Henderson filed a motion to reconsider the dismissal of Petitioner's PCR application, reasserting the arguments that had been made at the hearing and re-emphasizing that the State had not provided the required written notice of intent to use convictions outside of the ten-year time limit pursuant to SCRE 609(b). Counsel Henderson further stressed that Petitioner wanted to testify, and the only bar to his testimony was his fear that the State would bring up his prior convictions. App. 669-671. At a hearing on the motion to reconsider, Counsel Henderson argued that the only reason Petitioner did not testify during his trial was because he believed his prior convictions would come in based on the bad advice of Counsel Wiygul. He argued that Counsel Wiygul was ineffective for not obtaining a ruling from the trial court on the admissibility of the prior convictions, which he asserted would not have been admissible because

the convictions were all outside of the ten-year time limit, and the State had not provided written notice pursuant to SCRE 609(b). App. 683, l. 23- 685, l. 20.

The State argued that Petitioner made the decision not to testify and that there was no evidence that he was prevented from testifying. Additionally, the State argued there was not an absolute bar on using old convictions against a testifying defendant and that because the State had threatened to use the old convictions it was not deficient performance to advise Petitioner that he should not testify. The State also argued that there could be no prejudice because Petitioner did not say what his testimony would have been had he taken the stand to testify. The State did concede that generally it would be the better practice to have the judge issue a ruling on the record about the admissibility of a defendant's prior convictions. App. 700, l. 2- 702, l. 7.

Counsel Henderson agreed that there was not an absolute bar on using old convictions but stressed that the State was required to provide written notice pursuant to SCRE 609(b) and that it did not meet that duty in this case. He further stated that it was not speculative to determine that Petitioner's testimony would boil down to "I didn't do it" based on his testimony and the position that he took denying involvement in the crimes. Counsel Henderson once again stressed that Petitioner did not testify because Counsel Wiygul gave him bad advice about his prior record and that by not getting a ruling on the admissibility of the convictions Petitioner was unable to truly evaluate whether to testify. App. 707, l. 2- 708, l. 21.

The PCR court ultimately issued an order denying Petitioner's motion to reconsider. In the order, the PCR court wrote that Petitioner claimed he reluctantly declined to testify at trial because Counsel Wiygul failed to seek a ruling regarding which of his prior convictions could have been used against him. The PCR court found that Petitioner had not met his burden of proving prejudice writing,

The Court acknowledges that the State is required to disclose to defense counsel, in writing, the prior record of a defendant and which part(s) of the prior record it intends to use to impeach a defendant, when (as in this case) more than ten years have elapsed since the defendant's release from confinement. *See* Rule 609, SCRE. Trial counsel should have required this disclosure from the State. However, any prejudice resulting from Trial Counsel's failure to do so in this case is purely speculative. At the evidentiary hearing, Applicant did not present any testimony he would have given at trial but for Trial Counsel's errors. Applicant also failed to show how his testimony at trial would have led to a different result.

App. 723-724.

Discussion

The PCR court ultimately found that Counsel Wiygul provided deficient representation because she failed to request the State comply with the requirements of Rule 609, SCRE. However, the court found that Petitioner had not shown prejudice because he had not presented what his testimony would have been had he testified at trial. This ruling was not supported by the record, as both Petitioner and Counsel Wiygul outlined what Petitioner's testimony would have been had he testified at trial.

The right of a criminally accused to testify or not to testify is fundamental. Rock v. Arkansas, 483 U.S. 44, 52 (1987) (“[F]undamental to a personal defense ... is an accused's right to present his own version of the events in his own words”) (internal citations omitted). “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” Id. at 53. “The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution.” Id. at 51. “It is one of the rights that are essential to due process of law in a fair adversary process.” Id. “The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call ‘witnesses in his favor,’ a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment.” Id. at 52. “The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee

against compelled testimony.” Id. “The choice of whether to testify in one’s own defense ... is an exercise of [that] constitutional privilege.” Id. at 53 (internal quotations removed). Stated plainly, “[a] person’s right ... to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence; ...” Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (internal quotations removed).

“Defense counsel bears the primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide. This advice is crucial because there can be no effective waiver of a fundamental constitutional right unless there is an intentional relinquishment or abandonment of a *known* right or privilege” United States v. Teague, 953 F.2d 1525, 1533 (11th Cir. 1992) citing Johnson v. Zerbst, 304 U.S. 458, 464 (emphasis in original) (internal quotations removed). “The defendant can then make the choice of whether to take the stand with the advice of competent counsel.” Teague at 1533.

Petitioner was not afforded the advice of competent counsel in making the decision to waive his constitutional right to testify. Not only was Counsel Wiygul deficient in failing to require the State to comport with the dictates of Rule 609(b), SCRE, but she was also deficient in erroneously advising Petitioner about which of his past-convictions could be used against him under Rule 609, SCRE. The record reflects that the State wanted to use five remote convictions to impeach Petitioner if he testified. All five convictions were past the ten-year time limit imposed by Rule 609. Thus, the State could only use the convictions if it had provided “sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.” Rule 609(b) (emphasis added). Without prior notice, the remote-in-time convictions were entirely inadmissible.

Additionally, whether a conviction is a crime of moral turpitude has no bearing on the ultimate admissibility of a conviction. While a crime of moral turpitude can be used to impeach the credibility of a witness, the determination of the admissibility of such a conviction is controlled by Rule 609(a), SCRE. Pursuant to the rule, the conviction must have either been punishable by imprisonment of one year or more or be a crime involving dishonesty or false statements. Then the court must determine whether the probative value of admitting the conviction for impeachment purposes is substantially outweighed by the danger of unfair prejudice to the defendant under Rule 403, SCRE. Counsel Wiygul's advice on the use of Petitioner's prior convictions and failure to compel the State to conform to the requirements of Rule 609, SCRE, fell below an objective standard of reasonable representation. The advice was directly contrary to the established rules of evidence and was deficient performance that greatly prejudiced Petitioner.

The PCR court found that Petitioner had failed to establish prejudice because he did not state what his testimony would have been at trial nor did he show how his testimony would have likely led to a different result. This holding was directly refuted by the record. Counsel Wiygul testified that Petitioner had always maintained that Mixon took his car without his knowledge and used it to commit the burglary of the gas station. App. 538, ll. 10-12. Petitioner confirmed that was the version of events he would have presented to the jury when the State asked him,

Q: Okay. And did I hear Ms. Wiygul correctly in that your version of the case was that Mr. Mixon stole your car to commit the crime. Is that fair?

A: I wouldn't say he stole it because he got, I keep my keys inside, and he had used my car before. He got my car before, he got it.

App. 574, l. 25- 575, l. 5. The record plainly shows that Petitioner's testimony at trial would have been that Mixon, who had taken his car in the past and knew Petitioner left the keys in the car, took the car by himself to commit the burglary.

Our Supreme Court addressed this issue in Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991). In Horton the defendant wanted to testify but chose not to take the stand based on the advice of counsel that he would be impeached with two prior convictions, a 1980 simple possession of marijuana and a 1972 assault and battery with intent to kill. Id. at 253-254, 411 S.E.2d at 224. In performing the requisite analysis pursuant to Strickland, our Supreme Court determined that under the then recognized standard, the simple possession of marijuana could not be used against the defendant because it was not a crime of moral turpitude. Turning to the 1972 ABWIK conviction, the Court found that although it was a crime of moral turpitude, "the lapse of fifteen years between petitioner's 1972 conviction and his 1987 trial for distribution of cocaine raise[d] the issue of remoteness in time," which was matter within in the sound discretion of the trial judge. The record did not contain a showing that trial counsel sought a ruling from the trial judge on the admissibility of the remote-in-time conviction. Our Court determined that counsel's advice was "premised upon an unsubstantiated legal assumption, and he was under a duty to move the court for a ruling either confirming or invalidating his assumption." Id. at 254-255, 411 S.E.2d at 224.

Turning to prejudice the Horton Court noted that the State's evidence against the defendant "consisted solely of Agent Peaster's testimony." Further, the defendant contended he wanted to testify about his belief that he was framed by the confidential informant but ultimately decided not to testify based on the advice of counsel. The Court concluded that the defendant had "met the second prong of the ineffective assistance test by a showing of prejudice by his

reliance upon counsel's erroneous advice; and that, but for counsel's error, there is a reasonable probability the result would have been different.” Id. at 255, 411 S.E.2d at 225.

There was no forensic evidence linking Petitioner to the crimes, and the mere presence of his vehicle on the side of a major interstate by itself was not evidence of his participation in the crimes. The only evidence that directly connected Petitioner to the burglary was Mixon, who admitted that he hoped he would receive leniency with regards to pending charges for testifying against Petitioner. As Counsel Henderson repeatedly stated, this case was essentially a swearing contest between Mixon and Petitioner, but Petitioner was unable to present his side of the story because of the failings of Counsel Wiygul. Had Petitioner been afforded the proper advice that his convictions could not be used to impeach him, he would have testified to his version of the events. Considering the chief source of the State’s evidence connecting Petitioner to the scene was the biased testimony of a convicted felon, it would be illogical to conclude that Petitioner’s testimony would not have impacted the outcome of the proceedings.

Petitioner has met both prongs of the Strickland analysis. Counsel Wiygul was deficient in her advice, and that deficiency prejudiced Petitioner because it deprived him of his right to testify. It further deprived the jury of the opportunity to hear from Petitioner his side of the story. Petitioner has shown ineffective assistance of counsel, and the ruling of the PCR court should be overturned.

II.

The PCR court erred in finding trial counsel provided effective representation where counsel failed to object to numerous improper statements made by the solicitor during opening and closing arguments which improperly vouched for the State's witnesses and commented on Petitioner's right to remain silent.

Relevant Facts

Petitioner alleged ineffective assistance of Counsel Wiygul for failing to object to various portions of the State's opening and closing arguments. There were two sets of comments Petitioner found objectionable. One set dealt with the veracity of the State's witnesses, and one set dealt with Petitioner's right to remain silent. Regarding witness veracity, in opening statements, the Solicitor addressed the veracity of Petitioner's co-defendant Mixon stating,

Now I'm gonna tell you, ladies and gentlemen, that -- I want to make you aware of this before we start. You're gonna hear from the Defendant's co-defendant, Christopher Mixon. Mr. Mixon will tell the story about how he and Maurice Anthony Odom did this break-in. Christopher Mixon has been convicted of several burglaries. You will hear about those. He is a convicted felon. **But I submit to you that he is before you with no promises, no rewards, no hope of anything like that. He is simply here to tell you the truth and I believe you will find him in spite of his criminal record to be a credible witness.**

App. 73, ll. 3-14 (emphasis added). In closing argument, the Solicitor addressed the veracity of the lead detective stating,

Now, ladies and gentlemen, I wanted to let you know in every case there are red herrings that are thrown about. One of the most experienced crime scene investigators I've ever known at SLED once told me that he'd never been involved with or investigated a perfect case. Law enforcement officers are human and they're fallible. They might miss something. They do their best. **And I submit to you that Tyrone Goggins is a good, experienced, capable police officer and investigator as his sixteen years would document, but what I tell you is we don't have a perfect case.**

App. 338, l. 19- 339, l. 4 (emphasis added).

Regarding Petitioner's right to remain silent, the Solicitor stated in closing argument,

Now you heard from Tyrone Goggins that Mr. Mixon made a statement to law enforcement back on November 18th of 2011. Mixon apparently said on -- well, he said on the witness stand he didn't remember making the statement. **The defense has access to it. Don't you think if there had been some gross inconsistency with what he said back then and what he testified to in court we would have heard about it? So I submit to you that Mixon's statement on November 18th, ladies and gentlemen, and his testimony are consistent and the one reason that they're consistent is because he told the truth. He told it then, he told it now. It's a lot easier to remember the truth than to remember what lies you told. Christopher Mixon told you the truth yesterday because he also told you the truth back on November 18th.**

So instead of being questioned about the events that happened inside the store, about how the burglary took place, about whether or not it was somebody else, not Maurice Anthony Odom, what we heard about with Mr. Mixon were tattoos, whether he was in a gang. ... **But there was never any contradictory evidence proposed, no alternative scenario, no alternative individuals to the crimes that were shown in this DVD and in the photographs that we submitted. No other scenario than the one proposed by Christopher Mixon from this witness stand.**

App. 333, l. 2- 334, l. 23 (emphasis added). The solicitor continued stating, “[t]he question is who done it? Christopher Mixon admits that he was one and **his uncontradicted testimony** is that Maurice Anthony Odom was the other.” App. 340, ll. 1-3 (emphasis added).

At the evidentiary hearing, Counsel Wiygul testified “that it is not practice to object during openings and closings. It is my belief that a lot of times that just brings additional kind of spotlights [to] whatever has been said.” App. 479, l. 25- 480, l. 3. Counsel Wiygul admitted that the solicitor was not supposed to vouch for the credibility of the State's witnesses, and she conceded that she did not make any objections to the various statements made by the solicitor. App. 481, ll. 11-24; 510, ll. 2-11. She agreed that the Solicitor commented on Petitioner's right to remain silent, that she failed to object to the argument, and that she did not have a reason for failing to object. She further stated if she had “picked up on” the Solicitor's statements about

Petitioner's right to remain silent, she would have objected. App. 510, l. 19- 513, l. 3; App. 540, ll. 7-22.

Counsel Wiygul admitted that the State vouched for Goggins' credibility but stated that strategic reasons she would not have objected to that specific comment by the solicitor. App. 513, l. 4- 514, l. 1. The strategic reason she offered for failing to object to the comment about Goggins was that she felt it would draw extra attention to the comment, and it would be better addressed in another manner. App. 542, ll. 2-10. Counsel Wiygul conceded that by not objecting or addressing the comments in another manner, she had not preserved the record on the issue. App. 544, l. 14- 545, l. 13.

In dismissing the allegations surrounding the impropriety of the State's opening and closing arguments, the PCR court determined the comments were not improper witness credibility vouching statements and therefore Counsel Wiygul was not deficient in failing to object. The PCR court held that the solicitor made no personal assurances regarding the credibility of the witnesses. Additionally, the PCR court found that even if the statements were improper, they did not rise to the level of manifest necessity warranting a mistrial. App. 646-648.

Counsel Henderson asserted in the motion to reconsider that the statements made by the solicitor during opening and closing arguments were improper vouching. Importantly, he further argued that some of the statements shifted the burden from the State to Petitioner by commenting on his failure to present a defense and on Petitioner's right to remain silent. He highlighted that Counsel Wiygul did not offer any strategic reasons for failing to object and that the comments were not just summaries of the facts that would or had been presented to the jury. App. 664-665 In the hearing on the motion to reconsider, Counsel Henderson argued the statements were

vouching and were harmful, particularly as they pertained to Mixon, because there was no other evidence connecting Petitioner to the burglary. He also argued again that some of the statements were comments on Petitioner's right to remain silent. App. 677, l. 24- 679, l. 9. The State argued that the solicitor did not personally vouch for the credibility of the witnesses, and none of the comments made during opening or closing argument were improper. The State additionally argued that the solicitor's statements on Petitioner's failure to put up a defense or challenge evidence were permissible under the missing witness rule. App. 690, l. 17- 694, l. 9.

In the order denying the motion to reconsider, the PCR court relied on its prior findings that the statements made by the solicitor were not vouching. The PCR court then ruled that the solicitor stating Mixon's testimony was uncontradicted was not an improper comment on Petitioner's right to remain silent. The PCR court did not address the other comments that Petitioner alleged were comments on his right to remain silent. App. 720.

Discussion

Counsel Wiygul wholly failed to object to the numerous improper comments made by the solicitor during opening and closing arguments. The PCR court found that Counsel Wiygul was not ineffective because the comments made by the solicitor were not improper vouching or comments on Petitioner's right to remain silent. Respectfully, the solicitor made personal assurances about the credibility of its witnesses and commented on Petitioner's right to remain silent three separate times. These comments were not objected to and so infected the trial with unfairness that Petitioner's conviction was a denial of due process. This Court should find that Petitioner received ineffective assistance of counsel.

"Generally, the assessment of witness credibility is within the exclusive province of the jury." Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) (internal citations

removed). Accordingly, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (internal citations removed). “A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances or indicating that information not presented to the jury supports the testimony.” Id. Solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

“Prosecutorial comment, whether direct or indirect, on the defendant's failure to testify is impermissible. Where the solicitor refers to certain evidence as uncontradicted and the defendant is the only person who could contradict that particular evidence, the statement is viewed as a comment on the defendant's failure to testify.” State v. Sweet, 342 S.C. 342, 347–48, 536 S.E.2d 91, 93–94 (Ct. App. 2000) (internal citations removed).

During both opening and closing arguments, the State vouched for the credibility of its witnesses. In his opening statement, the solicitor personally assured the jury that Mixon was simply there to tell the truth and then submitted his belief that the jury would find him to be a credible witness. Later in closing arguments, the solicitor again vouched for the credibility of Mixon by arguing his testimony was truthful because the defense did not challenge it with his prior statement. He also vouched for Officers Goggins by personally calling him “a good, experience capable police officer” and pointed to his years of service as proof of his credibility. These statements were vouching. By stating “I submit to you” the solicitor was offering his personal opinion about the credibility and quality of the State’s witnesses. The finding by the PCR court that these remarks were not vouching is without support in the record. The only

reason for the remarks was to place the prestige of the government behind the witnesses it relied heavily upon to secure a conviction against Petitioner.

Significantly more egregious were the solicitor's multiple comments on Petitioner's right to remain silent. Three separate times the solicitor commented on Petitioner's right to remain silent by arguing that the defense did not contradict testimony or present evidence of an alternative scenario. In doing so the solicitor managed to further vouch for Mixon's credibility by arguing that the defense failed to admit his prior consistent statement or to contradict his testimony. Our appellate courts have repeatedly held that such argument is an indirect comment on the right of the defendant to remain silent and as such is impermissible.

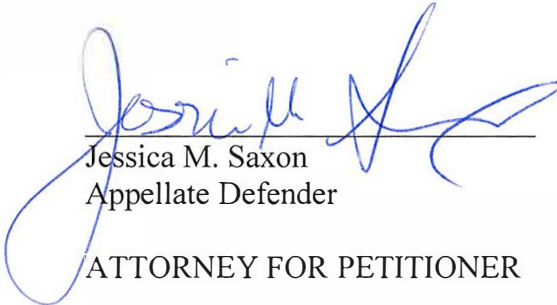
The solicitor's opening and closing arguments were rife with improper argument, but Counsel Wiygul never raised a single objection. She testified that she usually did not object during opening or closing argument because she felt it drew attention to the objectionable statements. Such a "tactic" cannot be deemed reasonable or strategic when it results in a complete failure to preserve the record for appellate review. Further, Counsel Wiygul admitted that she did not object to the solicitor's comments on Petitioner's right to remain silent and she had no reason for such a failure outside of not "picking up on it." The repeated failure to object to numerous instances of improper argument fell below an objective standard of reasonable representation and constituted deficient performance.

The PCR court determined Petitioner had not shown prejudice because he failed to show that the solicitor's improper comments infected the trial with unfairness as to make his conviction a denial of due process. This ruling is refuted by the record. The case against Petitioner was entirely dependent on the credibility of Mixon. His testimony was the only evidence connecting Petitioner to the burglary. The evidence of Petitioner's guilt was far from

overwhelming. Thus, there was not only a reasonable likelihood, but a significantly strong likelihood, that the improper witness vouching and repeated commenting on Petitioner's right to remain silent impacted the outcome of the trial.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow for full briefing of these issues.



Jessica M. Saxon
Appellate Defender
ATTORNEY FOR PETITIONER

This 27th day of March, 2023.