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S.C. SUPREME COURT

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

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I.

Respondent's argument that Petitioner has not shown prejudice is not supported by the probative evidence in the record or by the jurisprudence of this State.

Prejudice

Respondent argued that Petitioner did not establish prejudice because the record does not contain what his trial testimony would have been had he taken the stand in his own defense. To support this contention, Respondent asserts, without citing any supporting authority, that the testimony regarding Petitioner's version of events was not elicited during questioning about his trial testimony and therefore is not evidence of what he would have testified to at trial. Respectfully, this argument is entirely unsupported by the record before this Court.

"In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011) (internal citations omitted) "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Id.

The probative evidence in the record directly refutes the PCR court's finding that Petitioner did not state what his testimony would have been at trial. Both Petitioner and Counsel Wiygul testified that Petitioner's "version of the case" was that Mixon knew Petitioner left his keys in his car, that Mixon had taken his car in the past, and that Mixon must have taken his car on this occasion to commit the burglary. App. 538, ll. 10-12; App. 574, l. 25-App. 575, l. 5. That the testimony was elicited during a particular line of questioning has no bearing on this Court's analysis. Petitioner's version of events, his side of the story, was testified to during the PCR hearing. It is not speculative to conclude that the versions of events Petitioner discussed

with counsel and testified to at the PCR hearing would be what he testified to had he taken the stand at trial. The PCR court's order finding Petitioner failed to prove prejudice is not supported by the record.

Additional Sustaining Ground

Respondent next argued, as an additional affirming ground, that Counsel Wiygul's advice to Petitioner regarding his prior convictions was not deficient performance because the trial court "could still have allowed the State to use the conviction if it determined that the probative value of the evidence substantially outweighs its prejudicial effect." Return Pg. 11. Further, Respondent argued that the State's "technical non-compliance with the written notice requirement" is excused in this case pursuant to the holding in State v. Colf, 332 S.C. 313, 321, 504 S.E.2d 360, 363-364 (Ct. App. 1998). Return Pg. 11. Neither of these arguments are persuasive.

Respondent's argument that Counsel's Wiygul's advice did not amount to deficient performance entirely ignores that the advice was based on a complete misunderstanding of the law that applied to the admission of prior convictions. Rule 609, SCRE, was adopted effective in 1995, almost twenty years before Petitioner's 2014 trial. By 2014, whether a prior conviction was a crime of moral turpitude had no bearing upon its admission and Counsel Wiygul's advice to Petitioner that his prior conviction would come in under the decades old standard was deficient performance. Respondent's argument further ignores that Counsel Wiygul's erroneous advice "was premised upon an unsubstantiated legal assumption" that the trial court would admit the convictions and Counsel "was under a duty to move the court for a ruling either confirming or invalidating" that assumption. Horton v. State, 306 S.C. 252, 254, 411 S.E.2d (1991).

Additionally, Respondent pointed to no specific facts or circumstances in the record that would support the speculative assertion that the trial judge could have deemed the prior convictions admissible. In fact, the evidence in the record militates against admission of the prior convictions. Petitioner's prior convictions for criminal sexual conduct and burglary were not crimes of dishonesty. See State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006) (holding a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness); State v. Broadnax, 414 S.C. 468, 476, 779 S.E.2d 789, 793 (2015) (holding that for impeachment purposes, crimes of "dishonesty or false statement" are crimes in the nature of crimen falsi "that bear upon a witness's propensity to testify truthfully); see also United States v. Smith, 551 F.2d 348, 362–63 (D.C.Cir.1976) ("[I]n its broadest sense, the term 'crimen falsi' has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth").

Additionally, all five convictions were remote in time. Rule 609(b), SCRE, creates a presumption against the admission of remote convictions, see State v. Robinson, 426 S.C. 579, 595, 828 S.E.2d 203, 211 (2019), and such convictions should "be admitted very rarely and only in exceptional circumstances." State v. Black, 400 S.C. 10, 18, 732 S.E.2d 880, 885 (2012). Regarding the prior burglary convictions, as the United States Court of Appeals for the Fourth Circuit stated in United States v. Beahm, 664 F.2d 414 (4th Cir.1981) and our Court of Appeals relied on in Colf, *supra*,

> Any conviction at least ten years old presumptively prejudices a defendant ... and the government [must] meet the heavy burden of rebutting the presumption....The presumption is certainly not rebutted by the fact that the conviction was for the same type offense for which the defendant [now stands] accused. .... Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. Since evidence of any similar offense should be admitted only rarely, a

> similar conviction already presumptively barred from admission by Rule 609(b) should be admitted more rarely.

Beahm at 418-419.

Finally, Colf, *supra*, does not excuse Counsel Wiygul's failure to obtain written notice of the State's intent to use Petitioner's prior convictions. In Colf, the Court of Appeals found that notice requirement was met because the record contained evidence of Colf's Request and Motion for Discovery and Production which included "any criminal arrests or convictions of the Defendant that could be used or may be preferred to impeach the Defendant or that could be used in cross-examining the Defendant." Colf at 321, 504 S.E.2d at 364. The Court of Appeals held that this request contemplated that Colf's criminal record might be used to question or impeach him if he chose to testify and thus there was no unfair surprise. Id. No such discovery evidence exists within the record of Petitioner's case. While the record in Petitioner's case indicates there was some discussion between the State and Counsel Wiygul about the use of Petitioner's prior CSC conviction, there is nothing in the record indicating Counsel Wiygul had any notice that the State would seek to admit Petitioner's prior burglary convictions for impeachment purposes until the State brought them up at trial. Further, there is no evidence that Counsel Wiygul received any form of *written* notice, such as a reply to discovery request, regarding the use of Petitioner's prior convictions.

Petitioner's case is further distinguished from Colf on this issue because Petitioner can show prejudice. Petitioner waived his right to testify because he was entirely unsure of what convictions would be used against him should he take the stand. The lack of notice, compounded by Counsel Wiygul's erroneous advice and failure to obtain a ruling on the admissibility of the convictions, prevented Petitioner from taking the stand in his own defense. The fact that the waiver of his right to testify was premised on actual non-compliance with the

law, erroneous legal advice, and an unsupported legal assumption render that waiver invalid and further highlights the ineffective assistance of counsel that Petitioner received.

II.

Respondent's argument that the solicitor's comments during opening statements and closing arguments were not improper is not supported by the probative evidence in the record or the jurisprudence of this State.

Respondent asserts that Counsel Wiygul was not ineffective for failing to object during the Solicitor's opening and closing statements because the comments were not improper. Respectfully, the probative evidence in the record shows the PCR court erred in finding the challenged statements were not improper as the various comments constituted impermissible vouching and were comments on Petitioner's right to remain silent.

Vouching

Respondent argues that the solicitor's comments about Mixon were not vouching because they were not personal assurances and did not discuss testimony that was not presented to the jury. This argument in directly refuted by the record. The solicitor told the jury "I believe you will find [Mixon] in spite of his criminal record to be a credible witness." The only reasonable inference from this statement is that the jury would find Mixon to be credible because the State has found Mixon to be credible and believable. This is a direct comment with personal assurances to the jury that the solicitor personally believes Mixon and therefore the jury should believe him as well. Further, the second time the solicitor vouched for Mixon he discussed Mixon's prior statement to police that was not entered into the record during trial. He relied on the unintroduced statement that was not presented to the jury to support Mixon's in court testimony which our appellate courts have repeatedly held is vouching. See Vaughn v. State, 365 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) ("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.")

Similarly, when the solicitor stated "I submit to you that Tyrone Goggins is a good, experienced, capable police officer and investigator" he did so to bolster Goggins credibility and minimize the errors made by law enforcement in the case. Respondent even conceded that the comments regarding Goggins were to "soften the blow" of the acknowledgment of the sloppy police work. The only way to soften the blow of sloppy police work is to vouch for the credibility and capability of the lead investigator on the case. All of these comments were improper vouching as they either were personal assurances of the credibility and capability of the State's witnesses or indicated information not presented to the jury that supported the witnesses in court testimony. See State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (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).

Comments on Petitioner's Silence

Respondent boldly argued that the comments challenged by Petitioner as comments on his right to remain silent were not improper because they were in response to Counsel Wiygul's cross-examination of Mixon and to her closing argument where she proposed an alternative scenario. Return pg. 15-16. These arguments are wholly specious. The cross-examination that occurred where Mixon's prior police interview was mentioned consisted of five questions, twelve lines of text in the transcript, where Mixon ultimately stated he did not remember the contents of the interview. App. 181, ll. 10-22. There was not a suggestion that Mixon was testifying inconsistently because once Mixon acknowledged that he could not recall the contents

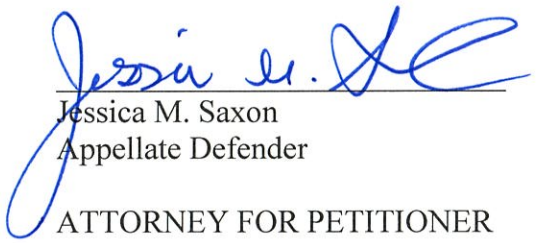
of the interview Counsel Wiygul moved on from the line of questions. At no point did she confront Mixon with his interview or attempt to show any inconsistencies in his testimony.

Respondent's argument that the solicitor was somehow replying to Counsel Wiygul's argument is refuted by the record as the State went first during closing arguments. The solicitor had no idea what Counsel Wiygul would argue to the jury and therefore could not be replying to her arguments when he improperly commented that Mixon's testimony was uncontracted and that there were no other scenarios offered for the jury to consider. As the record reflects, Counsel Wiygul's argument regarding an alternative scenario was in direct response to the solicitor's improper comments that Mixon's testimony was the only evidence as to who the two burglars were.

Finally, Respondent contends that calling Mixon's testimony uncontradicted was not error and attempts to distinguish the present matter from State v. Sweet, 342 S.C. 342, 536 S.E.2d 91, (Ct. App. 2000), arguing that the solicitor did not directly comment that only Petitioner could refute Mixon's testimony. This argument disregards the facts of the case. There were two individuals accused of the burglary. Mixon admitted to being one burglar and asserted that Petitioner was the other burglar. The only party that could contradict Mixon's testimony would have been the second burglar which the State asserted was Petitioner. Therefore, the arguments made by the solicitor were indirect comments on Petitioner's right to remain silent. See United States v. Triplett, 195 F.3d 990, 995 (8th Cir. 1999) (As this court indicated in Sidebottom v. Delo, a prosecutor may not comment on a defendant's failure to present evidence to contradict the government's case if "the defendant alone had the information to do so." 46 F.3d at 759 (quoting Richards v. Solem, 693 F.2d 760, 766 (8th Cir.1982), cert. denied, 461 U.S. 916, 103 S.Ct. 1898, 77 L.Ed.2d 286 (1983))).

CONCLUSION

Based on the arguments present above and the arguments presented in the petition for writ of certiorari, Petitioner respectfully requests that this Court reverse the PCR court's denial of relief and hold that Petitioner is entitled to a new trial based on ineffective assistance of counsel. In the alternative, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow full briefing of these issues.



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This 24th day of July, 2023.