STATE OF SOUTH CAROLINA
In the Court of Appeals

On Writ of Certiorari to Newberry County
Court of Common Pleas
J. Mark Hayes, Circuit Court Judge

Appellate Case No. 2021-000754

CARROL TREMAYNE WASHINGTON,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI:

Whether trial counsel provided ineffective assistance of counsel when he failed to object to the solicitor's closing argument, which improperly bolstered the complaining minor witness, where the case was a credibility battle and where the jury instruction failed to inform the jurors they were the sole arbiters of credibility and arguments of counsel were not evidence?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE:

The post-conviction relief court properly found Trial Counsel was not ineffective for failing to object to the solicitor's closing argument because the solicitor neither made personal assurances of the victim's credibility nor asked the jurors to put themselves in the victim's shoes.

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections. Petitioner was indicted at the May 2017 term of the Newberry County Grand Jury for first degree criminal sexual conduct with a minor (2015-GS-36-0546). Charles Verner, Esquire ("Trial Counsel"), represented Petitioner. Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel, of the Eighth Circuit Solicitor's Office, prosecuted the case. On February 29, 2016, Petitioner proceeded to trial before the Honorable Donald B. Hocker and a jury. The jury found Petitioner guilty as indicted on March 2, 2016. Judge Hocker sentenced Petitioner to twenty-five years' imprisonment.

Petitioner filed a timely notice of appeal. Lara M. Caudy, Esquire, of the South Carolina Commission on Indigent Defense, submitted a brief and motion to be relieved pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal on June 13, 2018. The remittitur was issued on July 2, 2018.

Petitioner filed his application for post-conviction relief on September 10, 2018 (2018-CP-36-00414). He alleged the following grounds for relief in his application:

A. Ineffective assistance of Trial Counsel during the guilt phase of the trial
    1. Trial Counsel was ineffective for failing to object to the amendment of the indictment from criminal sexual conduct with an adult to first degree criminal sexual conduct with a minor, which increased the maximum sentence
    2. Trial Counsel failed to adequately investigate improper conduct by law enforcement in order to properly challenge the officers' credibility
    3. Ineffective assistance of Trial Counsel for failure to object to leading questions by the prosecutor
    4. Ineffective assistance of Trial Counsel for failure to object to impermissible victim impact evidence in the solicitor's closing argument
    5. Ineffective assistance of Trial Counsel for failure to object to the solicitor's argument that Petitioner had lied under oath
    6. Ineffective assistance of Trial Counsel for failure to object to impermissible vouching for the credibility of the State's witnesses during the solicitor's closing argument
    7. Ineffective assistance of Trial Counsel for failing to object to the solicitor's improper remarks that the jury could act as the conscience of Newberry County

8. Ineffective assistance of Trial Counsel for failing to object to the solicitor's use of improper epithets intended to appeal to the jurors' prejudices and emotions
9. The totality of Trial counsel's failures throughout the entire trial created a reasonable probability that, but for the cumulative effect of Trial Counsel's unprofessional errors, the result of the proceeding would have been different

B. Ineffective assistance of Trial Counsel during the sentencing phase of the trial
   1. Trial Counsel failed to investigate, develop, and present all available relevant and admissible mitigating evidence
   2. Trial Counsel failed to object to inflammatory and irrelevant evidence presented by the prosecution
   3. Trial Counsel failed to object to the trial court's improper jury charge that the victim's testimony need not be corroborated

C. Ineffective assistance of Trial Counsel during the guilt phase of the trial
   1. Trial Counsel's cross-examination of a key witness for the State was impeded by Trial Counsel's conflict of interest

On January 18, 2021, Petitioner filed an amended application for post-conviction relief by and through counsel Ashley A. McMahan, Esquire, raising the following allegations:

1. Ineffective assistance of Trial Counsel
   a. Conflict of interest and failure to move for a mistrial once the victim's mother indicated Trial Counsel had represented her in the past
   b. Failure to object to multiple Golden Rule and vouching statements made during the solicitor's closing argument
   c. Allowing a juror to be seated that had worked with Petitioner and that Petitioner had asked repeatedly not to have on the jury

Respondent filed its return on December 17, 2018, and a virtual evidentiary hearing into the matter was convened on January 29, 2021, before the Honorable J. Mark Hayes, II. Petitioner was present at the hearing and represented by Ashley McMahan, Esquire. Assistant Attorney General Brianna L. Schill, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner went forward on the allegations raised or restated in his amended application. By written order dated June 21, 2021, and filed July 1, 2021, Judge Hayes denied and dismissed the application.

Petitioner thereafter filed a timely notice of appeal. By and through counsel Victor R.

Seeger, Esquire, Petitioner filed a petition for writ of certiorari on February 22, 2022. This Court granted Petitioner's petition for a writ of certiorari solely on the issue of Trial Counsel's failure to object to the solicitor's closing argument. Petitioner subsequently filed his Brief of Petitioner on June 11, 2024. This Brief of Respondent follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe,* 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient

performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.*

ARGUMENT

The post-conviction relief court properly found Trial Counsel was not ineffective for failing to object to the solicitor's closing argument because the solicitor neither made personal assurances of the victim's credibility nor asked the jurors to put themselves in the victim's shoes.

The PCR court's finding that Trial Counsel was not ineffective for failing to object to the solicitor's closing argument was correct because the solicitor never vouched for the credibility of Victim and never asked the jurors to put themselves in Victim's shoes.

A solicitor may not vouch for the credibility of a witness based on personal knowledge or other information outside the record. *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). "Vouching" occurs where the prosecutor indicates to the jury that her argument regarding the credibility of a witness is based on something *other* than the evidence admitted—i.e., that the prosecutor "knows something about the credibility of a witness that the jury does not know." *State v. Busse*, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023).

On the other hand, when the solicitor bases her credibility arguments on evidence *within* the record, or on reasonable or common-sense inferences therefrom, no improper vouching occurs. *State v. Caldwell*, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990), *overruled on other grounds by State v. Evans*, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006); *see also Busse*, 439 S.C. at 109, 886 S.E.2d at 211 ("A prosecutor arguing forcefully during closing argument that the jury should believe a particular witness is well within her proper role as a zealous advocate, so long as the argument is based on evidence admitted during trial."). A solicitor has the right to argue to the jury regarding the weight that should be given to a witness's testimony. *State v. Gibbs*, 438 S.C.

542, 553, 885 S.E.2d 378, 384 (2023). In fact, "a prosecutor is *expected* to comment on the credibility of the witnesses when making a closing argument. Far from improper, . . . doing so is one of the fundamental responsibilities of a lawyer." *Busse*, 439 S.C. at 111, 886 S.E.2d at 212 (emphasis added). Such comments are especially necessary when the case involves a "swearing contest" between a witness and the defendant. *State v. Raffaldt*, 318 S.C. 110, 115, 456 S.E.2d 390, 393 (1995).

At Petitioner's trial, the solicitor began his closing argument with the following language:

> Sometimes, if you listen carefully, the softest voices speak the loudest. Sometimes the words of the smallest carry the greatest weight. There are times that a voice like this cries out from the dark begging to be heard, asking to be believed. And this is what a child in this case looks like. . . . Will you believe the soft voice of the meek whose message rings the loudest, or are you going to believe the voice of the taker?

(App.p.343, line 25–p.344, line 13). He later noted the consistency between Victim's statements at the forensic interview and the testimony she gave in court, and he asked the jurors whether they truly believed "an eight, nine, 10-year-old is capable of concocting something like this." (App.p.346, lines 19–23; p.349, lines 3–8). He also pointed out most children of Victim's age wouldn't know enough about sex to be able to fabricate as detailed an account of sexual abuse as the one Victim gave. (App.p.349, line 17–p.350, line 4). He also stated that it took courage for Victim to testify in court, stating, "I can't imagine being in her shoes." (App.p.347, lines 2–9). He emphasized that neither Victim nor her family had any motive to frame Petitioner for sexual abuse. (App.p.347, lines 10–17; p.348, line 15–p.349, line 3; p.351, lines 1–8). He also noted Victim did not change her story despite the pressure of cross-examination, stating "a child will fold under a cross-examination because they're not capable of lying to that degree and to that extent." (App.p.354, lines 18–23).

The solicitor noted that the question of who was credible was up to the jury. (App.p.353, lines 23–24). He asked again whether the jury thought "the average nine, 10-year-old is capable of . . . coming in here and swearing on the Bible [and] telling that story like that in front of you all." (App.p.354, lines 11–13). He then stated, "I submit to you she was wholly credible. That she's only capable of telling the truth. She's not capable of carrying on a lie to that degree for that long. A child just isn't capable of doing that." (App.p.354, lines 14–18).

Trial Counsel did not object to any portion of the solicitor's closing argument. At the PCR hearing, Trial Counsel testified he reviewed the solicitor's argument and did not see anything that he thought clearly crossed a line. (App.p.473, line 21–p.474, line 17).

Petitioner argues the solicitor's comments regarding Victim's credibility constituted improper vouching because the solicitor explicitly assured the jury that Victim was "wholly credible" and claimed she was incapable of lying; therefore, Petitioner contends Trial Counsel was ineffective for failing to object to them. However, the solicitor never suggested the jury should believe Victim because the solicitor personally knew she was credible based on information outside the record, which is the definition of vouching. *See Matthews*, 350 S.C. at 276, 565 S.E.2d at 768. Rather, all of the solicitor's arguments concerning Victim's credibility were based on reasonable inferences from the record. The solicitor made several arguments for Victim's credibility: that Victim's testimony was consistent with her forensic interview, that Victim's account was too detailed to have been concocted by a child without any sexual experience, that Victim had no motive to falsely accuse Petitioner, and that Victim would have "cracked" under the pressure of cross-examination if she had not been telling the truth. All of these arguments are reasonable inferences from the testimony presented at trial. *See, e.g.*, *State v. New*, 338 S.C. 313, 321–22, 526 S.E.2d 237, 241 (Ct. App. 1999) (collecting cases and holding that arguments based

on "common knowledge" are considered reasonable inferences from the record and may properly be the basis for a solicitor's credibility argument). When the solicitor said, "I submit to you she was wholly credible," it was in the context of these evidence-based arguments; nothing about that statement would have suggested to the jury that the solicitor had some personal knowledge of Victim's credibility based on information outside the record. *See Busse*, 439 S.C. at 112, 886 S.E.2d at 212 ("Statements such as, 'I am going to outline for you the evidence I want you to focus on because this is the evidence that demonstrates the defendant's guilt' or 'Here is why I think you should find the evidence shows this witness to be credible' are appropriate during closing argument because the prosecutor is staying within her role as an advocate.") Therefore, the solicitor's comments did not constitute improper vouching, and Trial Counsel was not deficient for failing to object to them.

Petitioner also argues, in a footnote, that the solicitor made a "Golden Rule" argument. *See Brown v. State*, 383 S.C. 506, 515–16, 680 S.E.2d 909, 914 (2009) (holding a "Golden Rule" argument is one that asks the jurors to place themselves in the victim's shoes; such arguments are improper because they tend to completely destroy the jury's impartiality). While Petitioner admits the solicitor never expressly asked the jurors to place themselves in Victim's shoes, he argues the solicitor "implicitly invite[d] them to do so" when he stated, during closing argument, "I can't imagine being in her shoes." (App.p.347, lines 8–9). However, in context, that statement was made to emphasize how trying it must have been for Victim to testify in court, which was part of the solicitor's argument that Victim had no motive to make up a false accusation. (App.p.347, lines 2–13). Therefore, the statement was intended to complement the solicitor's evidence-based argument, not to replace evidence with bias and personal interest, as "Golden Rule" arguments do. *See Brown*, 383 S.C. at 516, 680 S.E.2d at 915 (citing *State v. Reese*, 359 S.C. 260, 271, 597 S.E.2d

169, 175 (Ct. App. 2004). The mere mention of "shoes" does not convert an otherwise proper argument into an improper "Golden Rule" statement.

The PCR court correctly ruled the solicitor's arguments constituted neither improper vouching nor "Golden Rule" arguments. Therefore, the PCR court properly found Petitioner failed to prove his allegation that Trial Counsel was ineffective for failing to object to them. Because substantial probative evidence supports that finding, this Court should not disturb the PCR court's ruling denying relief to Petitioner. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527. Accordingly, this Court should affirm the PCR court's decision.

CONCLUSION

For all the foregoing reasons, the State requests this Court affirm the post-conviction relief court's decision finding Trial Counsel was not ineffective for failing to object to the solicitor's closing argument.

Respectfully submitted,

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BY:_____
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July 11, 2024

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SC Court of Appeals

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CARROL TREMAYNE WASHINGTON,

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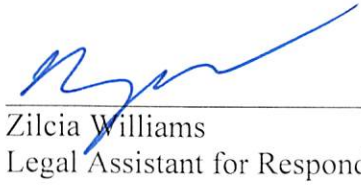
CERTIFICATE OF SERVICE

I, Zilcia Williams, certify that I have served one copy of the Brief of Respondent on Lara M. Caudy, Esquire, counsel of record for Petitioner, by electronic mail to the primary e-mail address listed for counsel in the Attorney Information System (AIS):

Lara M. Caudy, Esquire
lcaudy@sccid.sc.gov

This 11th day of July, 2024.



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July 11, 2024

The Honorable Jenny A. Kitchings
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Post Office Box 11629
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Re: **Carrol T. Washington v. State of South Carolina**
Appellate Case No.: 2021-000754

Dear Ms. Kitchings,

Enclosed please find the original Brief of Respondent in the above matter for filing. Petitioner is also being served with a copy of the same. If there is anything additional needed regarding this matter, please let me know.

Sincerely,

Zachary W. Jones
Assistant Attorney General
S.C. Bar #104174

ZWJ/zew
Enclosure

cc: Lara M. Caudy, Counsel for Petitioner *(via email only)*