STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Beaufort County

Honorable Roger M. Young, Circuit Court Judge

DONTARIOUS JARON WRIGHT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2024-000667

PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Senior 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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ISSUE PRESENTED

Did the PCR judge err in refusing to grant relief based on trial counsel's failure to object when the prosecutor improperly vouched for and bolstered the credibility of four different witness by asking them about pre-trial conversations they had with the prosecutor and investigators, indicating to the jury that the witnesses were telling the truth?

STATEMENT

In January of 2018, the Beaufort County Grand Jury indicted Petitioner, Dontarious Wright, for murder and possession of a weapon during the commission of a violent crime, indictments #2017-GS-07-1337, 1338. (App. pp. 495-498). On March 11, 2019, Petitioner proceeded to jury trial before the Honorable Perry M. Buckner. Trasi Campbell represented Petitioner at trial. Mary Jones and Kimberly Smith prosecuted the case. The jury returned verdicts of guilty as charged. Judge Buckner sentenced Petitioner to forty (40) years for murder and a concurrent five (5) years for the weapon charge. (App. pp. 499-500). A timely notice of intent to appeal was filed and the direct appeal perfected with the filing of a brief pursuant to Anders v. California, 386 U.S.738 (1967). On July 14, 2021, the South Carolina Court of Appeals dismissed the appeal. State v. Wright, 2021-UP-262 (S.C.Ct.App. filed July 14, 2021).

On March 9, 2022, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 501-507). On October 7, 2022, the State filed a return and motion for a more definite statement. (App. pp. 508-522). On November 2, 2022, Petitioner filed an amended PCR application. (App. pp. 523-526). On November 29, 2023, an evidentiary hearing was held before the Honorable Roger Young. Michael Lifsey represented Petitioner at the PCR hearing. Danielle Dixon represented the State. On March 25, 2024, Judge Young signed a written order denying relief and dismissing the application. (App. pp. 575-589). A timely notice of intent to appeal was filed on April 23, 2024. This petition for writ of certiorari follows.

ARGUMENT

The PCR judge erred in refusing to grant relief based on trial counsel's failure to object when the prosecutor improperly vouched for and bolstered the credibility of four different witnesses by asking them about pre-trial conversations they had with the prosecutor and investigators, indicating to the jury that the witnesses were telling the truth.

The jury found Petitioner, Dontarious Wright, known as D.J., (App. p. 71, lines 2-4), guilty in the fatal shooting of Adrian Lamont Manigo, known as Mont. In opening statement and closing argument defense counsel told the jury Petitioner acted in self-defense. (App. p. 173, line 8 – p. 174, lines 1-7; p. 439, lines 3-8). Three years prior to the 2017 shooting of Mont, Petitioner was shot in the leg by Jamal Washington, known as J.D. (App. pp. 73-74). On the afternoon Mont was shot Petitioner was at Frank Young Junior's house. Frank Young Junior is known as Mikey and is Mont's cousin. (App. pp. 192-194). Petitioner, Mikey, Michael Grant, known as Peter Piper or Pipe, and Derio Young were sitting under a tree when Mont drove up. (App. pp. 195-198).

According to Erik Black, who is Mikey's nephew, two weeks before Mont was shot Mont told Petitioner to "keep his hand out of the cookie jar." (App. p. 231, line 15 – p. 232, lines 1-25). Black agreed that Petitioner felt like Mont had threatened him. (App. p. 233, lines 20-23). During a pretrial hearing Investigator Draison testified that Petitioner and Mont exchanged words before the shooting and Petitioner asked Mont why he was telling J.D., the man who shot Petitioner in the leg three years earlier, where Petitioner lived. (App. p. 89, line 22 – p. 90, lines 1-6). Michael Grant, "Peter Piper" or "Pipe," testified that prior to the shooting Petitioner said, "Mont, you told J.D. where I live at." (App. p. 218, line 1). Although uncorroborated by witnesses at the scene, most of whom were family or close friends of Mont, Petitioner told Investigator Fraser that J.D. was in the passenger seat when Mont drove up. (App. p. 116, line

20 – p. 117, lines 1-5). Michael Grant, "Peter Piper" or "Pipe," who had grown up with Mont, drove away from the scene after the shooting. (App. pp. 220-224). Petitioner also told Investigator Fraser that, "J.D. had them boys working for him." (App. p. 119, lines 18-20). A gun was recovered from Mont's Tahoe and Mont had gun shot residue on his hands. (App. p. 284, line 10 – p. 285, lines 1-3; p. 334, line 20 – p. 335, line 1).

In the amended PCR application Petitioner alleged ineffective assistance of counsel because, "Applicant did not object when the Solicitor repeatedly referenced conversations various witnesses had with her, thereby putting herself in the position of a potential witness in the trial she was prosecuting." (App. p. 523). Applicant additionally alleged in the amended PCR application that, "The lack of objection to the Solicitor's actions in making herself a witness as described above in (c) served to increase the Solicitor's credibility to the jury when there was no challenge to such by Applicant's trial counsel." (App. p. 523).

During the PCR hearing Petitioner testified that trial counsel failed to object when the prosecutor discussed interviews she had with witnesses while they were testifying. (App. p. 536, lines 10-19). PCR counsel asked trial counsel, " - - do you remember the Solicitor repeatedly during questioning referring to the fact that she was present during certain interviews and with witnesses when she was cross-examining them." (App. p. 544, line 17 – 20). Trial counsel reviewed the trial transcript and agreed that she did not object. (App. p. 544, line 20 – p. 545, lines 1-5). PCR counsel asked trial counsel, "Did you give consideration to the fact that certainly could be construed, in addition to her being a witness, as her vouching for the credibility of a testifying witness?" (App. p. 545, lines 6-9). PCR counsel answered, "If she had just said herself alone, perhaps, but the investigator, who was the lead investigator on the case, had

testified - - was also included in the statement, so I did not object to it." (App. p. 545, lines 10-14).

In the order of dismissal the PCR judge addressed the prosecutor referencing pre-trial conversations she had with four different witnesses during their testimony at trial. (App. pp. 581-584). The PCR judge wrote:

> During witness Michael Grant's testimony, the solicitor asked:
>
> Q. Okay. Do you remember talking to Investigator Duncan?
> A. Yes, ma'am.
> Q. A couple days after the shooting?
> A. Yes, ma'am.
> Q. And you—he asked you about what happened that afternoon?
> A. Yes, ma'ma.
>
> Q. And you remember talking with me as well?
> A. Yes, ma'am.
> Q. We were actually in the parking lot of the Sheriff's office?
> A. Yes, ma'am.
> Q. And I asked you what happened that afternoon?
> A. Yes, ma'am.
> Q. Okay. And do you remember telling both myself and Investigator Duncan that the—that Derio was talking to Dontarious Wright?
> A. Yeah.
> Q. Did you tell us that?
> A. That he was talking to him? Not at the time, he was just standing there
>
> (Tr. 214-15).
>
> During witness Erick Black's testimony, the following exchange occurred:
>
> Q. Okay. Do you remember speaking with me about two weeks ago outside of [redacted].
> A. Yes.
> Q. And it was myself and Investigator Hightower?
> A. Yes.
> Q. And do you remember telling us that you saw the Defendant running away from Mikey's house?
> A. Yes.
> Q. In fact, you told Mr. Hightower and myself that you thought it

was odd he was running because he had been shot in the leg in the past?
A. Yeah. Because he—he was shot in the past, but he was normal at that point in time

(Tr. 227-29)

Q. Okay. And you remember talking to myself and watching a video of yourself when you are speaking with the police about this, correct?
A. Yes.
Q. And amounting to that video, you remember telling the police, who just got there, 'He said, if he keeps running his mouth, then next time I see him, I'm going to shoot him'?
A. Yeah. That was when we were in the car.

(Tr. 233).

During witness Andrew White's testimony, the following exchange occurred:

Q. Okay. Do you remember speaking with myself and Investigator Hightower a few weeks back at your home? This man right here?
A. Uh-huh. (Indicating affirmatively.)
Q. And also Ms. Smith.
A. Uh-huh. (Indicating affirmatively).
Q. We came to your home and spoke with you?
A. Uh-huh. (Indicating affirmatively).
Q. And we asked you about what happened that afternoon?
A. Uh-huh. (Indicating affirmatively).
Q. And you told us that while you were cutting the grass, two kids came running through your yard?
A. Well, I don't know if I said "running," but I know they were coming through my yard.

(Tr. 240).

Finally, during witness Fredericka Gray's testimony, the following occurred:

Q. Do you remember meeting with myself and Investigator Hightower downstairs a week or so ago?
A. Yeah.
Q. And you told us [Applicant] appeared 'panicked.'
A. Yeah.

(Tr. 251-52).

(App. pp. 581-583).

In denying relief the PCR judge wrote, "When questioned about the foregoing, trial counsel testified she may have objected if the solicitor had just referenced herself alone, but in each of the situations she referenced law enforcement being involved in the conversation. Counsel further testified she did not view the foregoing as vouching." (App. p. 583). The PCR judge then wrote, "This Court finds counsel articulated a valid reason for not objecting to the foregoing in that each reference involved a conversation with law enforcement, and the questioning did not constitute improper vouching." (App. p. 583). Finally, the PCR judge wrote, "This Court further finds Applicant failed to set forth a valid, legal objection counsel should have made to this questioning and thus did not prove deficiency. Likewise, this Court finds it is not reasonably likely an objection to the foregoing would have changed the outcome of the trial; thus, Applicant did not prove prejudice, and this claim is denied." (App. p. 584). The PCR judge erred. Petitioner showed deficient performance in trial counsel's failure to object when the prosecutor improperly vouched for and bolstered the credibility of four different witness by asking them about pre-trial conversations they had with the prosecutor and investigators, indicating to the jury that the witnesses were telling the truth. Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an

objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Both trial counsel and the PCR judge erred in finding that the prosecutor's questioning did not constitute improper bolstering or vouching. Contrary to the finding in the order of dismissal, trial counsel had no valid strategic reason to not object to the improper questioning. The fact that law enforcement was also present during the prior conversations referenced by the prosecutor during her examination of witnesses does not remove the taint of the improper bolstering or vouching by the prosecutor. In State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001), the South Carolina Supreme Court wrote:

> A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. Elmer v. Maryland, 353 Md. 1, 724 A.2d 625 (1999). Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony. See State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001); 75A AM.JUR. *Trial* § 700 (1991). Vouching occurs when a prosecutor implies he has facts that are not before the jury for their consideration. Missouri v. Wolfe, 13 S.W.3d 248 (Mo.2000).

In Shuler the Court found that the prosecutor's questioning a witness about a federal plea agreement that contained a provision to tell the truth did not constitute impermissible bolstering

or vouching. The Court in Shuler distinguished the questioning in the first person by the prosecutor in Kelly that the Court found improperly bolstered the credibility of the witness. In State v. Reyes, 432 S.C. 394, 404–05, 853 S.E.2d 334, 339–40 (2020) (n. 3 omitted), the Court, discussing Kelly, wrote:

> In State v. Kelly, we held the solicitor impermissibly bolstered the credibility of the State's witness—a jailhouse informant—during the sentencing phase of a capital murder trial by asking the following questions of the witness: "What did *I* tell you *that I absolutely required* regarding your testimony to this jury today?" and "Did *I* tell you to tell the truth to this jury?" Id. at 369 & n.12, 540 S.E.2d at 860-61 & n.12. (emphases added by the Kelly Court). We explained that because the solicitor phrased his questions in the first person, the jury could have perceived the solicitor believed the witness was testifying truthfully—a belief that carried with it the imprimatur of the government, which may have induced the jury to trust the State's judgment about the witness. Id. at 369 & n.12, 540 S.E.2d at 860-61 & n.12. Therefore, we held the trial court erred in overruling the defendant's objection to the solicitor's questions, but concluded the error was harmless because the witness's credibility was impeached on cross-examination and there was overwhelming evidence of an aggravating circumstance to warrant the jury's death sentence recommendation. Id. at 369-70, 540 S.E.2d at 861.

The present case is distinguished from Shuler. The questioning by the prosecutor in the present case was not about a plea agreement requiring the witnesses to tell the truth. Instead, with four different witnesses, the prosecutor improperly phrased her questions in the first person while asking the witnesses about pre-trial conversations. The jury could have perceived that the prosecutor believed that the witnesses were telling the truth - a belief that carried with it the imprimatur of the government, which may have induced the jury to trust the State's judgment about the witnesses. The questioning in the present case is like the questioning in Kelly and Reyes that the Court found improper. Unlike Kelly and Reyes, the improper questioning was not harmless.

Trial counsel was deficient for failing to object to the improper questioning of all four witnesses. Petitioner was prejudiced by the deficient performance. A challenge to the credibility

of the State's witnesses was critical to Petitioner's claim of self-defense. The improper bolstering of or vouching for witness Michael Grant, "Peter Piper" or "Pipe," was particularly prejudicial when, in closing argument, trial counsel questioned why Peter Piper left after the shooting and asked the jury, "What someone or something are you removing from the scene?" (App. p. 437, lines 7-10). This is important based on Petitioner's statement to police that J.D. was in the passenger seat when Mont drove up. (App. p. 116, line 20 – p. 117, lines 1-5).

The improper bolstering of or vouching for witness Erik Black was particularly prejudicial because Black claimed that, two weeks prior to the shooting, Petitioner threatened to shoot Mont after Mont threatened Petitioner to "keep his hand out of the cookie jar." (App. p. 231, line 15 – p. 232, lines 1-25). The purported threat by Petitioner, claimed by Black, undermines the self-defense claim. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Petitioner proved deficient performance and resulting prejudice requiring the grant of relief in the form of a new trial.

CONCLUSION

Based on the above argument, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 13th day of January, 2025.