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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Newberry County
Honorable J. Mark Hayes, Circuit Court Judge
Appellate Case No. 2021-000754

CARROL T. WASHINGTON,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RESPONDENT'S PETITION FOR REHEARING

On January 15, 2025, this Court issued an opinion reversing the denial of Petitioner's application for post-conviction relief ("PCR"). *Washington v. State*, Op. No. 6095 (S.C. Ct. App. filed Jan. 15, 2025). Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent the State of South Carolina respectfully petitions for rehearing because this Court appears to have overlooked and misconstrued several important points in holding that the PCR court comitted reversible error.

First, this Court appears to have taken the challenged portion of the solicitor's closing argument out of context, reading into the solicitor's language an interpretation that no reasonable juror would have drawn from it. Specifically, the Court isolates and criticizes the following portion of the solicitor's closing argument:

> *I submit to you [Victim] 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.

> And they tried to crack her under the pressure. They have cross-examination . . . they question her and question her until she cracks and they catch her in a lie. They couldn't do it. *And a child will fold under a cross-examination because they're not capable of lying to that degree and to that extent* and her story was consistent.

(App.p.354, lines 14–23) (emphases added by the Court). The Court repeatedly characterizes the solicitor's argument as mere "assurances that all children of Victim's age are incapable of lying" and "that it was impossible for her to be untruthful." Respectfully, this is not a reasonable reading of the argument; the solicitor repeatedly qualified his position with the phrases "*to that degree*," "*for that long*," and "*to that extent*." There is no way to read the solicitor's challenged comments without first giving meaning to those phrases, which plainly refer to the numerous points the solicitor had previously made about the possibility that Victim was lying:

> [I]t's been consistently testified to by [Victim] from the time she did the forensic interview to yesterday when she was in here. I just want to—do any of you people truly believe an eight, nine, 10-year-old is capable of concocting something like this[?] Going someplace like the Dickerson Center, sitting alone in a room with a perfect stranger and disclosing all these things in great detail like she did, and then months later, almost a year later come in this courtroom. . . . You're complete strangers to her. And she had to sit up here and besides y'all and she had to look out here at all these people and the person who did this to her and she had to again speak in great detail about this sort of thing. And that's a 10-year-old girl. . . . For what? What's the agenda? What's the motivation for making this up? Have you heard one? Has anyone heard one? She lived [*sic*] going to Whitmire. . . . Never had a problem with [Petitioner] before this. What's the motivation? Did that occur to you guys when you were hearing it?

(App.p.346, line 19–p.347, line 17).

> There's no agenda here. There's absolutely no motivation for this girl to concoct this story. This story has been consistent from the very get go from the initial allegation to the times—you all going [*sic*] to get to watch that forensic interview as much as you all want to, by the way, and you're going to find, and you can compare it to her testimony yesterday, that it's wholly consistent. Is a nine, 10-year-old capable of doing that[?] You know, if you're lying, you

> got to be good at it. If you're lying you got to remember what the lie is so you can carry it on. You know what I'm saying? But if you tell the truth you don't have to do all that because you remember what happened. If you're telling the truth your story is going to be consistent. The big part's going to be consistent, and that's what you're going to find when you watch that forensic interview and you remember how she testified yesterday. She's talking about things here that a nine-year-old doesn't probably really know about. She uses terms like a heinie. She didn't even have, I guess, a word for her genitalia. She's every [*sic*] naïve. She's very young. But she's describing those things we know sometimes child abusers do.

(App.p.349, lines 1–22).

> A nine, 10-year-old doesn't know that kind of thing because they don't understand things sexual in nature to that degree. And then she's describing the intrusion. . . . [Y]ou could tell the shame in her voice. You could tell the shame in her demeanor while she's up here. . . . How would an eight, nine, 10-year-old know to talk about something like that?

(App.p.350, lines 2–23).

> But why make this up if you're a 10-year-old girl and continue it? What does she have to gain from this? Did that ever occur to you guys? What is the end game here for a 10-year-old[?] I mean, it would have been very easy just to say I don't want to do this anymore. I forgot. I can't remember what happened. Just make it stop. I don't want to do this. There ain't no motivation here.

(App.p.351, lines 1–8).

These extensive arguments concerning Victim's credibility were properly based on the record and reasonable inferences therefrom. The solicitor argued that Victim's story remained consistent from the day of her forensic interview until the day she testified, nearly a year later, and he invited the jury to review the forensic interview during its deliberations and compare it with her testimony at trial. (App.p.346, line 19–p.347, line 2; p.349, lines 3–17). He asked the jurors whether any of them truly believed a girl as young as Victim could come up with such a consistent and detailed account if it were not true. (App.p.346, lines 22–23; p.349, line 8). He argued that

nine- and ten-year-olds are typically too ignorant of sexual matters to invent a detailed lie about sexual abuse, and he pointed out that Victim did not appear to even have sexual words in her vocabulary but described her assault using childish terms like "heinie." (App.p.349, lines 17–20). He discussed the details of Victim's account and asked the jury to consider whether a child of Victim's age would even know how to talk about those acts unless they had actually happened. (App.p.349, line 21–p.350, line 23). He pointed out that Victim had no motive to lie, that her demeanor on the stand suggested she was ashamed of being victimized, and that Victim had ample opportunity to avoid the stress and embarrassment of testifying merely by withdrawing her accusation, but she never did. (App.p.347, lines 4–8; p.350, lines 6–8; p.351, lines 1–8).

Then, immediately before the portion of the argument this Court deems improper, the solicitor expressly reminded the jurors that the determination of witness credibility was their responsibility. He again asked the jurors to consider Victim's demeanor on the stand and to evaluate her testimony in light of their own views about children's capabilities:

> And that's going to be up to y'all to decide who was credible and who was not. That's one of your jobs. And to determine this case you're going to decide whose story do I believe. . . . [Victim] got up there and you saw her demeanor. You saw her trying to testify and you saw her taking a deep, swallowing hard before she testified. Is that something you think the average nine, 10-year-old is capable of doing, coming in here and swearing on that Bible telling that story in front of you all[?]

(App.p.353, line 23–p.354, line 13).

These arguments were perfectly appropriate. None of these arguments were based on mere "assurances" by the solicitor; on the contrary, the solicitor repeatedly asked the jurors what *they* thought about Victim's testimony: "[D]o any of *you* people truly believe an eight, nine, 10-year-old is capable of concocting something like this[?] . . . What's the motivation for making this up? Have *you* heard one? . . . What's the motivation? Did that occur to *you* guys when *you* were

hearing it? . . . How would an eight, nine, 10-year-old know to talk about something like that? . . . What does she have to gain from this? Did that ever occur to *you* guys? . . . Is that something *you* think the average nine, 10-year-old is capable of doing[?]" (App.pp.346–54) (emphasis added). Far from substituting the government's view of Victim's credibility for that of the jury, the solicitor was clearly—and appropriately—*inviting* the jury to apply its *own* common sense, collective experience and knowledge of children's capabilities to the question of Victim's credibility.[1]

Arguments based on common knowledge, common sense, and appeals to jurors' own life experiences are not improper; they have always been considered reasonable inferences from the evidence in the record. *See, e.g.*, *State v. New*, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999) (holding solicitor's argument that the State's key witness, a jailhouse informant, would be considered a "rat" in prison, would not be treated well, and had "everything to lose" as a result of his testimony did not improperly bolster the witness or go outside the record because it was based on "common knowledge"); *State v. Caldwell*, 300 S.C. 494, 505–06, 388 S.E.2d 816, 822–23 (1990) (holding solicitor's argument that defendant's relatives, who testified for the State, were credible because it took "fortitude" for them to testify against a member of their own family was not improper bolstering, but was a "common sense" conclusion from the evidence in the record), *overruled on other grounds by State v. Evans*, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006). Courts from all over the nation agree with this sensible principle. *See, e.g.*, *People v. Mendoza*, 62 Cal. 4th 856, 908, 365 P.3d 297, 336 (2016) (prosecutor who argued "that no one who intentionally

[1] Near the conclusion of the solicitor's closing argument, he expressly urged the jury to apply its own collective experience to the determination of the case: "And you're going to put all 12 of your minds together[.] And you're going to put all 12 of your recollections together, *and you're going to put all that lifetime experience that each one of you have and you're going to combine it.*" (App.p.355, lines 13–17) (emphasis added). Again, this exhortation by the solicitor proves that the general thrust of his closing argument was to submit the factual issues in this case, including the issue of Victim's credibility, to the judgment of the jury.

kills in a domestic setting is in a normal or calm state of mind" was not alluding to evidence unknown to the jury or trading on the prestige of his office, but was properly appealing to common sense); *State v. Martinez*, 319 Conn. 712, 735–36, 127 A.3d 164, 177 (2015) (prosecutor's comment that defendant's giving drugs and money to his codefendant was the "logical" thing for a drug dealer to do was not unsupported testimony about the *modus operandi* of drug dealers, but was a permissible appeal to the jury's own "experience, intuition, and common sense"); *State v. Warholic*, 278 Conn. 354, 365–66, 897 A.2d 569, 581–82 (2006) (prosecutor's argument—that the only reason a thirteen-year-old boy would make an allegation of sexual assault was "because it's true"—was merely reiterating his earlier argument that victim had no motive to lie, which was properly based on the evidence, experience, and common sense); *Commonwealth v. Oliveira*, 431 Mass. 609, 613, 728 N.E.2d 320, 323–24 (2000) (prosecutor's comment that there are "a variety of reasons why, social and economic reasons why women stay with men who abuse them and abuse their children" did not constitute improper "expert" testimony by the prosecutor but merely reflected the commonly-known fact that men and women often remain in abusive relationships).[2]

The capabilities of children—including their propensity to lie, their skill at fabricating consistent and convincing lies, and the circumstances in which they will be motivated either to lie

[2] Many of these cases also refute Petitioner's claim that the solicitor's closing argument somehow implied that the State possessed secret, undisclosed expert reports on Victim's credibility. Since expert testimony is unnecessary to establish matters of common knowledge, a prosecutor may comment on such matters without the need for expert testimony, and such comments do not imply the existence of expert opinions not presented to the jury. *See Martinez*, 319 Conn. at 734–36, 127 A.3d at 176–77 (holding "no expert testimony was required" to support prosecutor's comments about what was "logical" for drug dealers to do); *Oliveira*, 431 Mass. at 613, 728 N.E.2d at 323–24 (prosecutor's argument that women have many social and economic reasons to remain in abusive relationships "was grounded in common sense, not expertise"); *see also Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013) ("[W]here a lay person can comprehend and determine an issue without the assistance of an expert, expert testimony is not required.").

or to tell the truth—are well within the power of the average layperson to assess. All jurors were children once; all jurors have interacted with children throughout their lives; many jurors have even raised children of their own. The likelihood that a nine- or ten-year-old child might struggle to formulate a sophisticated lie and to carry it on consistently, from her forensic interview until her testimony at trial almost a year later, and even under the pressure of cross-examination, is a matter that any juror can evaluate based on common sense and ordinary human experience. Similarly, jurors can rely on their common sense to determine whether a typical nine-year-old child possesses enough familiarity with sexual matters to fabricate a detailed account of sexual abuse; or whether a child would continue lying about such matters, with no apparent motive, even in the stressful and embarrassing atmosphere of a courtroom full of strangers. It was not error for the solicitor to call the jury's attention to all of these circumstances and to argue that a child of Victim's age would not be "capable of carrying on a lie *to that degree for that long*." *See State v. Glenn*, 97 Conn. App. 719, 734–36, 906 A.2d 705, 716–17 (2006) (holding prosecutor who "simply asked the jury to consider whether the victim and her siblings were sophisticated enough to perpetrate a conspiracy of lies and also whether they had any motive to so conspire" was properly relying on the evidence in the record and appealing to the jury's common sense).

This Court's opinion does not discuss the solicitor's extensive appeals to the consistency of Victim's testimony, to Victim's demeanor and vocabulary, to the absence of any motive to lie, and to the jury's own experience and common sense. Instead, the Court proceeds as if the solicitor pronounced a bare *ipse dixit* that "all children of Victim's age are incapable of lying." In so doing, the Court isolates a tiny fraction of the solicitor's closing argument, omits all surrounding context, and even ignores the qualifying phrases "to that degree," "for that long," and "to that extent" that repeatedly appear in the very sentences excerpted *and emphasized* by the Court.

No reasonable juror would have interpreted the solicitor's comments in that way. Prosecutors' comments should be read from the perspective of a reasonable juror. *See, e.g.*, *United States v. Roberts*, 618 F.2d 530, 537 (9th Cir. 1980) (collecting cases and finding that "[s]everal other circuits have held that the test for improper vouching is whether the jury could *reasonably* believe that the prosecutor was indicating a personal belief in the witness's credibility.") (emphasis added). "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). "We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand." *State v. Santiago*, 269 Conn. 726, 751, 850 A.2d 199, 216 (2004) (quoting *State v. Singh*, 259 Conn. 693, 726–27, 793 A.2d 226, 248 (2002) (Borden, J., concurring and dissenting)).

In this case, the only reasonable reading of the challenged comments is as a *summation* and *conclusion* of the solicitor's previous arguments. Having presented all the reasons why the evidence, viewed in the light of the jury's own experience and common sense, supported a finding that Victim was credible, the solicitor then concluded by submitting that Victim "was wholly credible" and "was not capable of carrying on a lie to that degree for that long." *See Warholic*, 278 Conn. at 366, 897 A.2d at 582 (finding no error in the prosecutor's comment "that the only explanation for why a thirteen year old boy would make this allegation is because it was true"; read in the context of the entire closing argument, "this statement was simply a *reiteration of the argument that the state made throughout its summation*: the evidence, common sense, and life experience all indicated that [the boy] lacked a motive to lie.") (emphasis added). By divorcing

this conclusion from its preceding context, the Court's opinion mischaracterizes the solicitor's entire closing argument. *See Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (appellate courts must "view the alleged impropriety of the solicitor's argument in the context of the entire record."). Any argument, no matter how well-founded and proper, can be made to *seem* unsupported and conclusory, if its supporting grounds are simply omitted and the conclusion presented as if it were meant to stand alone.

Second, this Court criticizes the solicitor for his use of the phrase, "I submit." The Court claims the State's use of first-person language "suggested to the jury that the State held the opinion that Victim was telling the truth." Although the use of first-person language in closing arguments has long been criticized for this reason, it is not *per se* improper. Our Supreme Court recently "recognize[d] that as a practical matter it is impossible for a lawyer to eliminate the first person from their courtroom advocacy." *State v. Busse*, 439 S.C. 104, 112, 886 S.E.2d 208, 212 (2023). In that case, the Supreme Court found no vouching where the solicitor stated "What I want you to ask yourselves and what was compelling to me, how does she know that. . . . I'm going to repeat what was compelling to me and should be to you, was how did she know that." The solicitor's comments in *Busse*, despite frequently using the first-person pronouns "I" and "me," were properly based on the evidence in the record—namely, the victim's knowledge of the defendant's erectile dysfunction, which implied that the victim was telling the truth about the defendant's unsuccessful attempt to have sexual intercourse with her. The Supreme Court reasoned that use of the first person in closing argument is permissible as long as "the prosecutor is staying within her role as an advocate, to convince the jury—based on the evidence before it—the State has proven the defendant guilty beyond a reasonable doubt." *Id.*[3] As discussed above, that is exactly what the

[3] The Court relies on two earlier cases—*State v. Reyes* and *State v. Kelley*—in its discussion

solicitor was doing in this case when he summarized his previous credibility arguments by stating, "I submit to you [Victim] was wholly credible."

In addition, many jurisdictions have specifically held that the phrase "I submit" does not constitute improper vouching. The South Carolina Supreme Court has previously relied on the case of *United States v. Walker*, 155 F.3d 180 (3rd Cir. 1998), for its discussion of the concept of vouching. *See State v. Kelly*, 343 S.C. 350, 368–69, 540 S.E.2d 851, 860 (2001) (quoting *Walker*, 155 F.3d at 184, for its definition of "vouching" and its discussion of the dual concerns raised by a prosecutor's vouching for a government witness)), *rev'd and remanded on other grounds by Kelly v. South Carolina*, 534 U.S. 246 (2002). In *Walker*, the Federal Court of Appeals for the Third Circuit acknowledged that "it is poor practice for federal prosecutors to frequently use rhetorical statements punctuated with excessive use of the personal pronoun 'I'." *Walker*, 155 F.3d at 189. Nevertheless, the *Walker* court held the prosecutor's repeated use of the phrase "I submit" did not constitute vouching:

> The phrase "I submit to you that," without more, does not constitute vouching. Submit means "[t]o commit to the discretion of another,"

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criticizing the solicitor's use of the first person in this case. However, *State v. Busse* distinguished those cases, both of which concerned a solicitor's use of the first person during direct examination of a State's witness on the topic of telling the truth, rather than in closing argument. *See State v. Reyes*, 432 S.C. 394, 400, 853 S.E.2d 334, 337 (2020) (solicitor asked witness if she understood that, "while you're here, *we* only talk about things that are the truth" and "when *we're* in here, *we're* going to talk about the truth") (emphasis added); *State v. Kelly*, 343 S.C. 350, 369 n.12, 540 S.E.2d 851, 860–61 n.12 (2001) (solicitor asked witness "[w]hat did *I* tell you that *I* absolutely required regarding your testimony to this jury today?" and "[d]id *I* tell you to tell the truth to this jury?") (emphasis added), *rev'd and remanded on other grounds by Kelly v. South Carolina*, 534 U.S. 246 (2002). Unlike the closing arguments in this case and in *Busse*, which were based on the record after all the evidence was in, the first-person questions in *Reyes* and *Kelly* attempted to convey that the witness was telling the truth, even before the witness had finished testifying. The Supreme Court held such questions improperly indicated that "the prosecutor was not there simply to elicit testimony—the proper role of an advocate during direct examination—but had previously verified the truth of the testimony and through that verification was making a representation to the jury that she and the witness '[a]re going to talk about the truth[.]'" *Busse*, 439 S.C. 104, 113, 886 S.E.2d 208, 213.

> or "[t]o yield to the will of another," or "to present for determination; as an advocate submits a proposition for the approval of the court." BLACK'S LAW DICTIONARY 1278 (5th ed.1979). Thus, the phrase "I submit to you that," is merely a method of prefacing an argument and does not by itself constitute vouching. The phrase fails to meet the vouching standard because it does not *assure* the jury that the witness is credible, but instead *asks* the jury to find that the witness was credible. This is proper argument.

Walker, 155 F.3d at 188 (emphasis in original). Numerous federal courts agree that, although prosecutors generally ought to refrain from using personal pronouns in closing argument, the phrase "I submit" is not improper. *See, e.g.*, *United States v. Bernal-Benitez*, 594 F.3d 1303, 1315–16 (11th Cir. 2010) (prosecutor's comment "I submit to you, as I said before, the informant is being perfectly honest about everything in this case" was not improper because "the prosecutor was simply urging the jury to draw certain conclusions from the evidence rather than interjecting his personal views on the evidence or the defendants' guilt."); *United States v. Bentley*, 561 F.3d 803, 811–12 (8th Cir. 2009) (phrases like "we know" and "I submit" are discouraged, but they are not improper when used to marshal the evidence presented at trial and summarize the government's case against the defendant); *United States v. Eltayib*, 88 F.3d 157, 173 (2d Cir. 1996) ("[T]he phrase 'I submit' expresses not a personal belief but a contention, an argument, which, after all, is what a summation to the jury is meant to be. The well-advised prosecutor will sidestep all uses of the pronoun 'I,' but we conclude that the phrase 'I submit' is not improper in these circumstances."); *United States v. Necoechea*, 986 F.2d 1273, 1279 (9th Cir. 1993) (prosecutor's comment "I submit to you, ladies and gentlemen, that she's not lying. I submit to you that she's telling the truth" was not vouching because such comments "do not imply that the government is assuring [the witness's] veracity, and do not reflect the prosecutor's personal beliefs.").

In a footnote, the Court also criticizes the solicitor's use of the word "was," implying that it somehow served "to improperly harken back to his unique knowledge of some event or

proceeding" unknown to the jury. *Busse*, 439 S.C. at 114, 886 S.E.2d at 213. This criticism appears to rest entirely on the Court's misreading of the solicitor's credibility argument as nothing more than "assurances that Victim was not capable of lying at all because children are not capable of lying." As already discussed, no reasonable juror would have interpreted the solicitor's comments as a bare assurance that children are incapable of lying, since those comments clearly referred to the prior extensive discussion of commonsense credibility inferences based on Victim's consistency, demeanor, ignorance of sexual matters, and lack of motive to lie. Therefore, "[v]iewed in the proper context," the solicitor's use of the verb "was" appropriately served "to lead the jury to focus on the evidence presented to them." *Id.*

Third, even *if* the Court's interpretation of the challenged language were reasonable, that by itself would not warrant the Court's conclusion that the language "infected the trial with unfairness such that there was a reasonable probability that that the outcome would have been different had trial counsel properly objected to these comments." The challenged portion of the solicitor's argument takes up only ten lines of the transcript; the solicitor's total argument covers thirteen *pages*. *See Randall v. State*, 356 S.C. 639, 643, 591 S.E.2d 608, 611 (2004) (holding solicitor's argument comparing defendants to "cockroaches" did not infect the entire trial with unfairness, where the argument "consist[ed] of only 10 lines in the transcript. This is not akin to other situations in which we have reversed for repeated improper references throughout trial."). Any impropriety in that portion of the argument was momentary and insignificant. Absolutely nothing else in the argument, or in the rest of the trial, could have been "infected" by that language.

For all these reasons, the State submits this Court erred in holding that the solicitor vouched for the Victim in this case. Nevertheless, even if the Court's holding on this point were correct, Trial Counsel would not necessarily have been deficient for failing to object. In the context of an

ineffective assistance of counsel claim, the test for deficiency is not whether counsel provided "perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). Counsel's performance, even if "far from exemplary," will only be found deficient if "no competent lawyer" would have acted the same way. *Dunn v. Reeves*, 594 U.S. 731, 739 (2021).

The courts of South Carolina have long recognized that "[i]t is often matter of difficulty to draw the line sharply between legitimate argument and unauthorized statement—between what is and what is not allowable . . . ." *State v. Robertson*, 26 S.C. 117, 1 S.E. 443, 444 (1887) (quoted in *State v. Squires*, 248 S.C. 239, 246, 149 S.E.2d 601, 604 (1966)). This difficulty has been acknowledged by other jurisdictions as well, including the United States Supreme Court. *See, e.g.*, *Donnelly*, 416 U.S. at 645 (noting "the process of constitutional line drawing . . . is necessarily imprecise" as regards comments by prosecutors in closing arguments); *United States v. Innamorati*, 996 F.2d 456, 483 (1st Cir. 1993) (stating "[t]he line between the legitimate argument that a witness's testimony is credible and improper 'vouching' is often a hazy one"); *State v. Roy D. L.*, 339 Conn. 820, 840, 262 A.3d 712, 731 (2021) ("As we previously have recognized, . . . the limits of legitimate argument and fair comment cannot be determined precisely by rule and line.").

At the PCR hearing, Trial Counsel testified that he did not believe that the solicitor's comments clearly "crossed the line" into improper vouching. Trial Counsel's failure to object can only be deemed deficient if "no competent lawyer" would have shared that belief. *Dunn*, 594 U.S. at 739. Because the line between permissible argument and improper vouching is infamously "imprecise" and "hazy," reasonable lawyers could differ as to whether the solicitor's comments were objectionable.[4]

[4] The PCR court, for one, agreed with Trial Counsel's appraisal of the challenged comments. In *Donnelly*, the United States Supreme Court reversed the finding of the First Circuit Court of Appeals that a prosecutor's remarks during closing argument "deliberately conveyed the false

Finally, the Court erred in holding that the trial court's instruction to the jury about the credibility of child witnesses did not cure the prejudice from Trial Counsel's failure to object. The very same instruction was held in *Reyes* to have rendered the solicitor's improper vouching "harmless beyond a reasonable doubt." *Reyes*, 432 S.C. at 407–09, 853 S.E.2d at 341–42.[5] The Court suggests that this case is different because the vouching here was "extensive", while the vouching in *Reyes* was "fleeting"; however, as discussed above, the challenged comments in this case amounted to a mere 10 lines in the transcript, and did not "infect" any other portion of the trial. The Court also states it has "difficulty imagining how jury instructions could be curative" where Trial Counsel failed to object, citing *State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("If the trial judge sustains a timely objection . . . and gives the jury a curative instruction . . . the error is deemed to have been cured by the instruction."). Of course, the trial judge in *Reyes* did not "sustain[] a timely objection" either, but the Supreme Court in that case still deemed the instruction rendered the solicitor's improper vouching harmless.

The Court's opinion fails to consider that the standard for finding "harmless error" is far stricter than the prejudice analysis for ineffective assistance of counsel claims. A reviewing court cannot pronounce an error "harmless" unless it can conclude, beyond a reasonable doubt, that the error did not contribute to the verdict. *State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319

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impression that respondent had unsuccessfully sought to plead to a lesser charge." 416 U.S. at 639. The Supreme Court noted that "[c]onflicting inferences have been drawn from the prosecutor's statement by the courts below," a fact which strongly suggested that it was "by no means clear . . . or even probable that [the jury] would seize such a comment . . . and attach this particular meaning to it." 416 U.S. at 643–44. Even if the Court ultimately maintains that the solicitor's comments in the present case were improper, it should at least consider whether the impropriety was *so clear that no competent lawyer would have failed to object*, since neither Trial Counsel nor the court below agreed with this Court's interpretation of those comments.

[5] In fact, the Supreme Court held in *Reyes* that the charge prejudiced *the State*, as an improper comment on the facts. *Reyes*, 432 S.C. at 408 n.4, 853 S.E.2d at 342 n.4.

(2002). "The question a reviewing court must ask is this: absent the prosecutor's [improper argument], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" *United States v. Hasting*, 461 U.S. 499, 511 (1983).

In other words, a court applying the "harmless error" standard *must* find prejudice, unless it is convinced beyond a reasonable doubt that the error *did not* contribute to the verdict. The Supreme Court in *Reyes* held the trial court's instruction on child witnesses met this exacting standard. In contrast, a court applying the ineffective assistance of counsel standard *must not* find prejudice, unless it is convinced of a reasonable probability that the error *did* lead to a different result. *Strickland v. Washington*, 466 U.S. 668, 696 (1984) (holding "a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."). This Court's opinion should explain why the PCR court erred as a matter of law in finding Petitioner failed to prove prejudice under *Strickland*, when the trial court gave the very same instruction that rendered the error "harmless beyond a reasonable doubt" in *Reyes*.

For these reasons, the State respectfully asks that this Court grant the petition for rehearing.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
In the Court of Appeals

Certiorari to Newberry County
Honorable J. Mark Hayes, Circuit Court Judge
Appellate Case No. 2021-000754

Carrol T. Washington,

Petitioner,

v.

State of South Carolina,

Respondent.

PROOF OF SERVICE

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

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

I further certify that all parties required by Rule to be served, have been served this 30th day of January, 2025.

Zilcia Williams
Legal Assistant for Respondent
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

January 30, 2025

The Honorable Jenny A. Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211
(via e-filing only - ctappfilings@sccourts.org)

Re: **Carrol T. Washington v. State of South Carolina**
Appellate Case No.: 2021-000754

Dear Ms. Kitchings,

Enclosed please find the original Petition for Rehearing in the above-captioned case, for filing in your office. If there is anything additional needed regarding this matter, please let me know.

Sincerely,

Zachary W. Jones
Assistant Attorney General
SC Bar No. 104174

ZWJ/zew
Enclosure

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