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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

Honorable J. Mark Hayes, Circuit Court Judge

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Feb 22 2022

S.C. SUPREME COURT

CARROL T. WASHINGTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000754

APPENDIX

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1 when I wrote Charles Verner the detailed letter just like
2 I wrote you, I told him the same thing. So prior before
3 trial or anything he knew, he knew the name, I am not
4 saying he knew who he was as a person but he knew the name
5 because I adamantly put it in the letter that I wrote him.

6 Q So in a communication you wrote down you discussed
7 Mr. Thompson?

8 A Yeah and --

9 Q And some prior dealings between the victim and Mr.
10 Thompson?

11 A Yes. And like I said I told him that, you know, I
12 didn't know it was the alleged victim until court, I
13 thought it was the Owens but it come to find out it was
14 the alleged victim when it came to the trial.

15 Q And that is because of what Ms. Sims said in trial?

16 A Yeah.

17 Q Okay.

18 MS. MCMAHAN: Nothing further, Your Honor.

19 THE COURT: Yes, Ms. Schill, do you have any
20 questions?

21 MS. SCHILL: Just one, Your Honor, briefly.

22 CROSS-EXAMINATION

23 By Ms. Schill:

24 Q Mr. Washington, did I understand your testimony
25 correctly, you said you nearly, you mentioned Christopher

1 Thompson's name but you had mentioned nothing about Mr.
2 Thompson being involved in the prior divorce proceedings
3 with Mr. Verner. Like you made no connection in the
4 letter, is that fair to say?

5 A I can't actually remember but I know I put his name
6 in the letter. It would be detailed.

7 Q You had said, you said something to the effect that I
8 am not saying he, meaning Mr. Verner, knew who he, meaning
9 Mr. Thompson was. So is that right?

10 A Yeah, I spoke his name though.

11 Q Okay. I wanted to make sure my understanding is
12 correct. So you had indicated in the letter, you had
13 mentioned Mr. Thompson's name and had indicated that he
14 might have, he meaning Mr. Thompson, might have been
15 involved in some kind of sexual misconduct with one of the
16 children?

17 A That is what the mother told me and Tonya.

18 Q That was the, what your letter was concerning?

19 A That is what she said, I heard that out of her mouth.

20 Q Okay. And you merely relayed that back to Mr.
21 Verner?

22 A Yes and Officer Epps when we first talked.

23 Q Okay. Those are all the questions I have.

24 THE COURT: Anything in redirect on Mr. Washington?

25 MS. MCMAHAN: None, Your Honor, the Applicant rest.

1 THE COURT: Does the State intend to call any other
2 witnesses in the matter?

3 MS. SCHILL: No, Your Honor.

4 THE COURT: Okay, well, Mr. Washington, again, it is
5 a pleasure meeting you and sorry we can't be together face
6 to face. I would ask that you please stay in touch with
7 your lawyer, I will take the matter under advisement and
8 take a look at it. Thank you very much.

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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STATE OF SOUTH CAROLINA)
 COUNTY OF NEWBERRY)
)
)
 Carrol Tremayne Washington, #367333)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

Case No.: 2018-CP-36-0414

ORDER OF DISMISSAL

FILED
 NEWBERRY COUNTY
 2021 JUL -1 PM 2:57
 CLERK OF COURT

This matter comes before this Court by way of a post-conviction relief application, filed by Carrol T. Washington (Applicant) on September 10, 2018. Respondent made its Return on December 14, 2018, requesting an evidentiary hearing be convened. The evidentiary hearing was held on January 29, 2021, via the WebEx Virtual Courtroom platform. Applicant 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.

Applicant testified on his own behalf at the evidentiary hearing. Mr. Charles Verner, Esquire, also testified. After a thorough review of all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof in establishing he is entitled to post-conviction relief and hereby denies and dismisses this application with prejudice. Specific findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During the May 2017 term, the Newberry County Grand Jury indicted Applicant for first degree criminal sexual conduct with a minor (2015-GS-36-0546). Charles Verner, Esquire (“Counsel”) represented

Applicant. Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel of the Eighth Circuit Solicitor's Office prosecuted the case. On February 29, 2016, Applicant proceed to a jury trial before the Honorable Donald B Hocker. On March 2, 2016, the jury convicted Applicant as indicted. Judge Hocker sentenced Applicant to the mandatory minimum sentence of twenty-five years of imprisonment.

Applicant filed a timely notice of appeal. Lara M. Caudy, Esquire, of the South Carolina Commission on Indigent Defense - Office of Appellate 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 Applicant's appeal on June 13, 2018. The remittitur was returned to the circuit court on July 2, 2018.

Summary of Relevant Facts

On March 25, 2015, Nicole Simms (Simms) took her ten-year old daughter (Victim) to the Sheriff's department to report Victim had been raped. (Trial Tr. 26.) Simms met with Officer Brad Epps regarding Victim's allegations and identified "Man" as the offender. (Trial Tr. 26.) Officer Epps set up a forensic interview for Victim. (Trial Tr. 26-27.) Officer Epps was able to identify "Man" after Simms provided additional information about Applicant. (Trial Tr.26-27, 36.) Officer Epps put a photo-lineup together that included Applicant's DMV picture (Trial Tr. 36.) He showed the photo-lineup to Victim on June 3, 2015, and Victim identified Applicant as the offender. (Trial Tr. 37.)

On June 4, 2015, Applicant was interviewed by Officer Epps and stated "he didn't know why [Victim] would say this about him and all the kids gravitate towards him". (Trial Tr. 29, 141.) Furthermore, Applicant went on to say that "she was a fast little girl" in reference to questions about Victim. (Trial Tr. 29.) On June 10, 2015, Applicant was interviewed again and confirmed



his nickname was "Man." (Trial Tr. 31, 143.) Applicant was arrested that day and, he told officers "he was ready to plea and get it over with." (Trial Tr. 34.)

Ethyl Simms (Grandmother), the victim's grandmother, testified she knew Applicant as her cousin's boyfriend and he and her cousin live in her same complex. (Trial Tr. 45.) Grandmother also said that at some point, Victim did not want to go visit her and would rather cry than come visit. (Trial Tr. 46.) Furthermore, she said that it was common for Victim to go over to her cousin's apartment because Victim plays with her cousin's son. (Trial Tr. 46.) Grandmother testified she had seen Victim and Applicant together a lot. (Trial Tr. 46, 50.)

Simms testified Victim started having behavioral problems at school in 2014 and she did not want to go see her grandmother anymore. (Trial Tr. 115-117.) She testified Victim was usually happy and loved everyone. (Trial Tr. 115-117.) Trina Elfering, Director of Forensic Services at the Dickerson Children's Advocacy Center, testified at trial. (Trial Tr. 179-196.) Elfering conducted the forensic interview of the victim that was videotaped. This video was played at trial.

Victim testified she often saw "Man" whenever she visited her Aunt Tonya. (Trial Tr. 58-59.) She also testified she and Applicant played hide and seek together. (Trial Tr. 58-59.) When asked about how many times scary things happened between her and "Man", she stated around four times. (Trial Tr. 61.) She was then asked to identify "Man" in the courtroom and she pointed to Applicant. (Trial Tr. 62.) She further testified officers showed her pictures of different men at the sheriff's department and, "I had to see which one was the one that was abusing me." (Trial Tr. 63.) The solicitor then asked her if she recognized anyone in the photos and she stated yes, it was "Man". (Trial Tr. 64.) She also recalled putting a checkmark by his picture on the lineup card. (Trial Tr. 65, 224.) When asked about what happened in the bathroom with "Man", the victim stated that he touched her inappropriately. (Trial Tr. 204.) She further testified Applicant touched



her “heinie” under her pants and that she felt pressure and “it felt hard.” (Trial Tr. 205-206.) When asked how many times it occurred, she said twice. (Trial Tr. 207.) The victim then testified that on another occasion, Applicant forced her to pull her pants down. (Trial Tr. 213.) She explained that he asked her again to pull her pants down but she was not as afraid to say no that time. (Trial Tr. 218.) She also recalled telling her mother and sister that “Man” had been inappropriately touching her. (Trial Tr. 222-224.)

Current Action Before this Court

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

Ineffective Assistance of Counsel

1. “Trial counsel was ineffective for failing to object to amendment of indictment which changed offenses from CSC adult to CSC with minor 1st and thereby raised maximum punishment. The amendment deprived the court of jurisdiction. Hopkins v State, 451 S.E.2d 389 (SC 1994).”
2. “Counsel’s failure to adequately investigate law enforcements improper conduct on several issues, and develop critical facts, deprived Applicant’s trial strategy relevant, admissible, information regarding an accurate assessment of impermissible tactics to present impeachable evidence which would create a reasonable doubt necessary to determine officer’s credibility and bias”
3. “for failure to object to leading questions by the prosecutor. Applicant argues that trial counsel’s failure to object to such repeated questionable conduct by the solicitor shows a clear failure by trial counsel to effectively assist applicant in his defense”
4. “for failure to object to impermissible victim impact testimony. With at least 15 individual instances of improper comments by the solicitor in closing argument alone. No objections to this issue from defense counsel”
5. “for failure to object when the solicitor impermissibly informed the jury of highly inflammatory remarks which infer applicant and dense witness lied under oath”
6. “for failure to object to impermissible vouching of state’s witness’ credibility.”
7. “Trial counsel’s failure to act as an adversarial defense attorney allowing the prosecution to use improper and highly inflammatory statements that were prejudicial and irrelevant throughout the entire trial is the exact scenario to base the cumulative effect of counsel’s deficiencies are sufficient to demonstrate a reasonable probability that but for the

- accumulation of counsel's unprofessional errors the results of the proceeding would have been different"
8. "Counsel failed to investigate, develop and present all available, relevant and admissible mitigating evidence. See *Wiggins v State*, 539 U.S. 510 (2003)."
 9. "Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence presented by the prosecution"
 10. "Counsel failed to object to the courts erroneous charge. See *State v. Stokes*, 416 SC 493, 787 S.E.2d 480 (2016)."
 11. "See *Coyler v. Sullivan*, 466 U.S. 335 (1980) Counsel's ethical obligation to promptly advise the court of a potential conflict of interest. Applicant's right to effective assistance violated from counsel's failure to advise and his Sixth Amendment rights violated"

Concerning relief, Applicant requested that his conviction be "vacated" and "remand[ed] to general sessions for a fair trial."

On January 18, 2021, Applicant filed an amended application, asserting the following claims:

1. Conflict of interest and failure to move for a mistrial.
2. Failure to object to multiple golden rule and witness credibility type arguments during the solicitor's closing statement.
3. Trial counsel allowed a juror to be seated that had worked with the Applicant and Applicant has asked repeatedly not to have on the jury.

At the PCR hearing, Applicant went forward on the allegations listed in his amended application, and Applicant's initial PCR allegations number 5-7, 9, and 11 listed above, to the extent they coincide with the amended application. All other allegations raised in his initial application are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of Testimony Presented

Applicant's Testimony

Applicant testified he filed the initial PCR application and PCR Counsel filed the amended application on his behalf. Applicant testified he was represented by Counsel at trial. Applicant testified he visited with Counsel once after six months and then saw him approximately two times during his general sessions court dates. Applicant testified he and Counsel started discussing trial after he did not receive bond. Applicant testified he tried to relieve Counsel as counsel. Applicant testified he tried to obtain a private attorney. Applicant testified he went before the court but his motion to relieve was not granted.

Applicant testified he was concerned with Counsel representing him because Counsel asked Applicant about where he worked, and at some point was talking about the wrong case with Applicant. Applicant testified on a few occasions he would contact Counsel and Counsel would not reply. Applicant testified he and Counsel discussed courtroom procedure such as where to sit in the courtroom and that he should speak clearly. Applicant testified he and Counsel did not discuss the testifying witnesses prior to trial and that the witnesses were called "at the spur of the moment." Applicant testified he and Counsel discussed the reasonable doubt standard. Applicant testified they did not discuss the criminal sexual conduct charges before trial.

Applicant testified he did not know Victim was going to testify at trial until she proffered testimony to the court. Applicant testified he and Counsel did not review the forensic interview. Applicant testified he did not know Counsel was Simms's divorce attorney prior to trial.

Applicant testified he learned about a plea offer for the second time prior to trial. Applicant testified his first plea offer was zero-to-fifteen years non-violent, but he rejected it because he did

not commit the offense and did not want to plead to something he did not do. His second plea offer was zero-to eight years of imprisonment, but he rejected it for the same reason.

Applicant testified he told Counsel he knew one of the jurors, but Counsel decided to pick the juror even after they had this conversation. Applicant testified he knew the witness from work because Applicant worked at the cafeteria at a Caterpillar plant. Applicant testified this juror, although he was not sure what the juror's name was, came through his line at the Caterpillar plant on occasion.

Applicant testified the solicitor was playing on his phone during trial. Applicant testified he did not like the solicitor's closing arguments because they put fear into the community and refer to Applicant's previous job as an ice cream truck driver.

Applicant testified he and Counsel did not discuss the elements the State had to prove his guilt. Applicant testified he and Counsel did discuss the possible sentence he was facing. Applicant testified he and Counsel did not discuss defenses of trial strategy. Applicant testified he and Counsel did not discuss his constitutional rights.

Applicant testified he knew Victim through Simms because he was in a relationship with Simms. Applicant testified this relationship started in August of 2011 or 2012. Applicant testified he met Victim while he was employed as an ice cream truck driver because Grandma would buy ice cream for the victim. Applicant testified this occurred before his relationship with Simms started.

Applicant again testified he knew one of the jurors from his job at Caterpillar, although he could not recall which juror. Applicant testified Verner told him it could help him, but Applicant did not want him on his juror because he was superstitious. Applicant testified this juror was a Caucasian male. Applicant testified he and this juror had spoken on an occasion in the parking lot

at the Caterpillar plant. Applicant also testified they both attended a company party, which was attended by many employees of the Caterpillar plant.

Counsel's Testimony

Counsel testified he represented Applicant. Counsel testified he met with Applicant at least once per month between the commencement of his representation and trial. Counsel testified he met with Applicant first in July of 2015, and his trial was in May of 2016. Counsel testified he and Applicant discussed defenses and possible sentences. Counsel testified he likely asked Applicant about his employment in order to determine his eligibility for a public defender.

Counsel testified Simms was the mother of Victim, and that she came in to his office in 2006 for representation. Counsel testified he represented her for a simple uncontested divorce. Counsel said custody of Simm's children was not an issue in the divorce case. Counsel testified that in 2006, her last name was Thompson, not Simms. Counsel testified he did not remember who Simms/Thompson was until trial.

Counsel testified as a matter of course, he always consults with his clients regarding their opinions of jurors. Counsel testified that he instructs his clients to advise him if they have a strong opinion regarding a potential juror. Counsel testified that none of the jurors in Applicant's case gave any indication they could not be impartial. Counsel testified he and Applicant had a discussion regarding one of the jurors. Counsel testified if Applicant indicated he did not want this juror on the jury, he would not have selected this juror for the jury.

Regarding the closing argument statements, Counsel testified he did not feel any of the comments listed in Applicant's amended application rose to the level of being improper such that they "crossed the line" per se. Counsel testified that the particular solicitor in this case was known for "pushing the limits," and Counsel did feel he was "pushing the limits" during the opening and

closing in this case. Counsel testified he had some notes indicating he was monitoring the solicitor's statements at the time they were made. Counsel testified, however, he did not believe they were improper such that he would have objected to them.

On cross-examination, Counsel testified he has been practicing law for almost 26 years as of the date of his hearing. Counsel testified he has been a public defender for 20 years. Counsel testified he and Applicant discussed the elements of the offenses, defenses, trial strategy, and the discovery with Applicant.

Counsel testified there was not a lot of hard evidence in this case, as this was essentially a "he said, she said" case. Counsel testified the victim testified more "forcefully" than the defense had anticipated. Counsel testified he and Applicant discussed the witnesses before trial.

Counsel reiterated that custody of Simms's children, including Victim, were not at issue during his representation of Simms for her divorce. Counsel testified Applicant was not involved in Simms's divorce, as he did not know Simms at the time. Counsel testified that prior to Applicant's trial, he had not spoken with Simms since early 2007.

With respect to trial strategy, Counsel testified they presented an alternative theory as it relates to the Victim's father. Counsel testified the only defense in this case was that the incident did not occur and that either the victim either misremembered what occurred or that the victim was coached into making the allegation.

Counsel testified he does not necessarily object to every possible objectionable statement, but has no problem objecting if he feels that the statement crossed the line. Counsel testified he evaluates the statement at the time it is given and will object when he believes it is appropriate. Counsel testified he did not feel the solicitor was improperly vouching for the credibility of the witness. Counsel testified that in this case, he did not believe he should object, but rather address

the comments by way of his own closing argument on behalf of Applicant. Counsel also did not believe the other comments inflamed the passions of the jury such that it put the jury in the position of the victims.

On redirect, Counsel testified he and Applicant had a conversation about the fact that the victim's mother continued to let the victim visit Applicant's house even after the allegations against Applicant had been made. Counsel testified that this fact was a part of their defense because it showed the allegations against Applicant were not credible. Counsel testified he was not aware of any conflict-related rules of professional conduct that go away after a certain period of time.

Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, records submitted by the parties, and applicable law. Before this Court are Applicant's Newberry County Clerk of Court records, Applicant's South Carolina Department of Correction records, the trial transcript, Applicant's direct appeal records, and the PCR action records. Pursuant to South Carolina Code Annotated, Sections 17-27-70 and -80, this Court dismisses the application based upon the following findings:

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] 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. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also* Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).



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; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Conflict of Interest

Applicant first alleges a conflict of interest existed because Counsel previously represented Simms in a divorce proceeding. This Court finds this allegation is without merit and denies and dismisses this allegation with prejudice.

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980); *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984)); *Padgett v. State*, 324 S.C. 22, 484 S.E.2d 101 (1997).

Furthermore, the Rules of Professional Conduct, whose purpose is to regulate and guide the legal profession in ethical conduct, do not have any bearing on assessing a claim of ineffective assistance of counsel as "[n]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty." *Langford v. State*, 310 S.C. 357, 426 S.E.2d 793 (1993) (citing Rule 407, SCACR).

An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692

(2007); *Fuller v. State*, 347 S.C. 630, 557 S.E.2d 664 (2001). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); also see *Burger v. Kemp*, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." *State v. Gregory*, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005).

Counsel testified Simms was the mother of the victim, and that she came in to his office in 2006 for representation. Counsel testified he represented her in a simple uncontested divorce. Counsel testified the custody of Simms's children was not an issue in the divorce case as the custody issued had previously been resolved. Counsel testified her last name in 2006 was Thompson, not Simms.

Counsel testified he did not remember who Simms/Thompson was until trial. Counsel testified Applicant was not involved in Simms's divorce because Applicant did not even know Simms at the time of her divorce. Counsel testified that prior to Applicant's trial, he had not spoken with Simms since early 2007. Applicant testified his relationship with Simms started in August of 2011 or 2012.

This Court finds Applicant's allegation is without merit. This Court finds Counsel's testimony on this issue credible, while also finding Applicant's testimony on this issue credible only to the extent he testified his relationship with Simms began in 2011 or 2012. This Court finds no actual conflict existed, as Applicant and Simms did not have adverse inverse interests. See *Thomas v. State*, 346 S.C. 140 (2001), citing *Duncan v. State*, 281 S.C. 435, 315 S.E.2d 809 (1984) (interests of other client and defendant are sufficiently adverse if it is shown the attorney owes a

duty to the defendant to take some action that could be detrimental to his other client.). Counsel represented Simms in a simple uncontested divorce approximately nine years before Applicant's trial, and at least four years prior to Applicant even knowing Simms. Prior to Applicant's trial, Counsel had not spoken with Simms since 2007 as his representation of her concluded by 2007. Counsel owed no duty to Simms that could have negatively affected Applicant, and vice versa. Moreover, this Court finds Counsel's previous representation of Simms did not negatively affect attorney's representation of Applicant. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998). Accordingly, this Court finds Applicant has failed to meet the burden imposed upon him, and denies and dismisses this allegation with prejudice.

Failure to Object to Solicitor's Closing Statement

In his application, Applicant alleges Counsel was ineffective for failing to object to certain statements containing alleged Golden Rule violations and alleged witness-credibility vouching arguments. This Court disagrees and denies and dismisses this allegation with prejudice.

It appears Applicant takes issue with the following alleged improper statements:

- (1) "[a]nd you're going to speak to the consciousness of the county. That's what you are. You're going to speak to the ideals of Newberry County." Transcript page 355, lines 18-20. "...[y]ou speak for this county and the values and morals of Newberry County. And you're going to speak for what Newberry County will decide is acceptable and not acceptable. ... give voice to the weak. Do what's right. Do what justice calls for." Transcript page 356, lines 2-7.
- (2) "...voice like this cries out from the dark begging to be heard, asking to be believed. ... And this is the kind of case that demands justice." Transcript p. 344, lines 3-6.
- (3) "...if we have a criminal justice system that can't speak up and protect the most vulnerable of us, the most helpless of us, then what good is it?" Transcript p. 344, lines 7-9.
- (4) "... 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?" Transcript p. 344, lines 11-13.
- (5) "... do any of you people truly believe an eight, nine, ten year old is capable of concocting

something like this? ... sitting alone in a room with a perfect stranger and disclosing all of these things in great detail like she did..." Transcript p. 346, l. 22- p. 347, l. 1.

- (6) Is a nine, ten year old capable of doing that? You know, if you're lying you got to be good at it." Transcript p. 349, lines 8-9.
- (7) "I submit to you [victim] was wholly credible. That she's only capable of telling the truth." Transcript p. 354, line 14-15.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. *Brown v. State*, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (citing *State v. Reese*, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct.App.2004) *aff'd in part and rev'd in part*, 370 S.C. 31, 633 S.E.2d 898 (2006) (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of the victim is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence)). "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." *Id.*, 383 S.C. at 515-16, 680 S.E.2d at 914 (citing *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)).

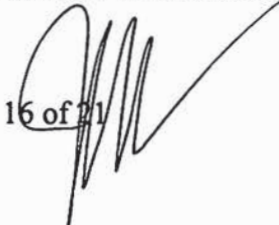
"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994); *see also State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony."). A prosecutor should "prosecutor with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." *New*, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument

may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." *Id.* "[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

"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) (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). Solicitors may not make explicit personal assurances or indicate there is information not presented which supports the testimony, i.e. vouch, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. *Id.*, 416 S.C. at 250, 785 S.E.2d at 477 (citing *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004))

To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Reese*, 383 S.C. at 516, 680 S.E.2d at 915. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Id.*, 428 S.C. at 550, 837 S.E.2d at 40 (quoting *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the Applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *Id.*

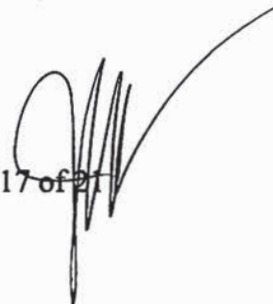
This Court finds none of these statements rise to the level of a Golden Rule violation.



These statements do not invoke the passions and prejudices of the jury such that they are improper Golden Rule violations. None of these statements ask the jury to put themselves in the victim's shoes or misinterpret the evidence.

Moreover, this Court finds none of the above statements improperly vouched for the victim's credibility. Throughout his closing argument, the solicitor used the evidence and record to attempt to counter the defense's theory that the victim either misremembered the incident or was coached into making the allegation. Although the solicitor states at one point, "I submit to you [victim] was wholly credible," the solicitor made no personal assurances as to the witness's credibility, nor did he directly or indirectly refer to any information outside of the record. The solicitor discussed testimony throughout his closing argument and then properly and fairly argued that the *evidence* would, according to the State's theory, show the victim's testimony supported a conviction. The solicitor did not improperly vouch for the victim's credibility. Because this Court finds these statements were not improper, this Court also finds Counsel cannot be deemed deficient for failing to object to these statements.

In any event, this Court finds that Applicant has failed to prove that he was prejudiced by Counsel's actions as Applicant has failed to show that the comment infected the trial with unfairness as to make his conviction a denial of due process. *See e.g. State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (holding that the solicitor's closing argument did not prejudice the defendant, where the Court held that "the State may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law"). Accordingly, Applicant has failed to meet the burden imposed upon him, and therefore, this allegation is denied and dismissed with prejudice.

A handwritten signature in black ink, consisting of a large, stylized initial 'M' followed by several vertical strokes and a long, sweeping flourish that extends upwards and to the right.

Juror Allegation

In his application, Applicant alleges Counsel was ineffective for failing to strike a juror, or alternatively use a peremptory challenge on a juror who allegedly knew Applicant. This Court disagrees and denies and dismisses this allegation with prejudice.

Jury selection is a process that inherently falls within the expertise of counsel, and trial counsel is not ineffective for failing to exercise peremptory strike as instructed by applicant. *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). Also see *Magazine v. State*, 361 S.C. 610, 606 S.E.2d 761 (2004), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018), citing *Wilcher v. State*, 863 So.2d 719, 754-55 (Miss. 2003) (holding that counsel was not ineffective for failing to use all of the available peremptory challenges). Moreover, the Supreme Court of South Carolina has held that a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury. *State v. Patterson*, 324 S.C. 5, 482 S.E.2d 760 (1997).

In terms of *voir dire* questioning and a juror's concealment of information, an applicant would have to show: (1) the juror intentionally concealed information; and (2) the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenge. *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013).

Counsel testified as a matter of course, he always consults with his clients regarding their opinions of jurors during *voir dire*. Counsel testified that he instructs his clients to advise him if they have a strong opinion regarding a potential juror. Counsel testified that none of the potential jurors in Applicant's case gave any indication they could not be impartial. Counsel testified he and Applicant had a discussion in which Applicant indicated he knew one of the jurors. Counsel testified that if Applicant indicated he did not want this juror on the jury, he would not have

selected this juror for the jury.

Applicant testified he knew one of the jurors from his job at Caterpillar, although he could not recall which juror. Applicant testified Counsel told him it could help him, but Applicant did not want him on his juror because he was superstitious. Applicant testified this juror was a Caucasian male. Applicant testified he and this juror had spoken on an occasion in the parking lot at the Caterpillar plant.

This Court finds Counsel's testimony on this issue very credible, while also finding Applicant's testimony on this issue not credible. As an initial matter, the record indicates that all of the selected jurors indicated they could be fair and impartial. Two prospective jurors were excused for cause by the judge, one due to the fact that he previously worked for the sheriff's office and another was excused due to a previous personal incident with sexual molestation. (Tr. 10-11). Accordingly, this Court accepts the jurors' *voir dire* responses as true as Applicant provided no evidence to support his claim that a juror actually did know Applicant and intentionally concealed this information during *voir dire*. In fact, Applicant could not identify which juror he allegedly worked with. In any event, even if Applicant had actually worked with this juror at the Caterpillar branch, it is entirely likely this juror did not recognize Applicant from their brief encounters while allegedly working at the same Caterpillar branch, and therefore, thus juror had no knowledge of this association. This Court cannot depart from the jurors' indications at *voir dire* indicating they could be fair and impartial, as Applicant has provided no evidence to support such a departure. Moreover, the credible testimony shows that Counsel consulted with Applicant regarding this issue, and Applicant did not request that this juror be stricken. Counsel testified that per his usual business practice, if Applicant had requested the juror be removed, he would have had the juror removed. As discussed above, jury selection is a process that inherently



falls within the expertise of counsel. Accordingly, this Court finds Counsel was not deficient.

Applicant has also failed to meet his burden as to prejudice, which requires him to show the result of the proceeding would have been different had Counsel moved to strike or use a peremptory challenge on this juror. *See Cherry*, 300 S.C. at 117-18. As discussed above, there is no indication or evidence to suggest that any of the jurors had a conflict that would prevent them from being fair and impartial. Accordingly, this Court finds Applicant has failed to meet the burden imposed upon him and denies and dismisses this allegation with prejudice.

Conclusion

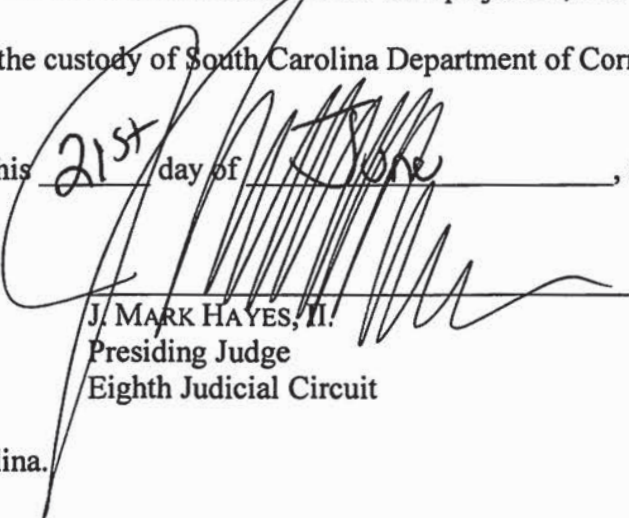
Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

The Court notifies Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on his own behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the PCR application must be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of South Carolina Department of Corrections.

AND IT IS SO ORDERED this 21st day of June, 2021.


J. MARK HAYES, II.
Presiding Judge
Eighth Judicial Circuit

Newberry, South Carolina.

✓
WITNESSES

Stephen Bradley Epps
Newberry County Sheriff

WARRANT NUMBER

2015D3600100033

TRUE COPY

Phyllis Sanders
Foreman of the Grand Jury

Date: 10-9-15

VERDICT

Guilty
Shyld Arnold
Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

October Term, 2015

Indictment # 15GS36-0546

THE STATE

vs.

Carrol Tremayne Washington

INDICTMENT FOR

Sex / Criminal Sexual Conduct with Minor - victim

under 11 yrs of age - First degree

§16-03-0655

CDR: 0385

3/2/16

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

COUNTY OF NEWBERRY

**Sex / Criminal Sexual Conduct with Minor - victim
under 11 yrs of age - First degree
§16-03-0655**

At a Court of General Sessions, convened on the 9th day of October, 2015, the Grand Jurors of Newberry County present upon their oath:

That Carrol Tremayne Washington did, on or about May 3, 2012 to March 25, 2015, in Newberry County, being older than the victim, willfully and unlawfully commit criminal sexual conduct with a minor in the first degree, to wit: that the said defendant did engage in sexual battery upon a person under the age of eleven (11) years, to wit: one MINOR (DOB:), in violation of Section 16-3-655(A) (1) of the South Carolina Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



Taylor Daniel
Assistant Solicitor

528

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Newberry VS. STATE

INDICTMENT/CASE#: 15GS36-0546

Carrol Tremayne Washington

A/W#: 2015D3600100033

AKA:

Date of Offense: 5/3/2012

Race: AFRICAN AME Sex: M Age: 32

S.C. Code §: 16-03-0655

DOB: SS#: [redacted]

CDR Code #: 0385

Address: Bell Street Circle

City, State, Zip: Clinton, SC 29325

DL#: SID#:

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS Sex / Criminal Sexual Conduct with Minor - victim under 11 yrs of age - First degree

in violation of § 16-03-0655 of the S.C. Code of Laws, bearing CDR Code # 0385

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Taylor David SC Bar# 100588 Defendant; Charles SC Bar# 10033 Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 25 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. Credit 266 days. The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP Total: \$ plus 20% fee: \$ Payment Terms: Set by SCDPPPS

Recipient:

days/hours Public Service Employment Obtain GED Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling Random Drug/Alcohol testing Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender Fund Other: Sex offender registry

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114(BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$ 3.90, TOTAL \$ 133.90

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Gackin S. Brown; Court Reporter: Tara Scott

Presiding Judge [Signature]; Judge Code: 2167; Sentence Date: 3/2/16

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Feb 22 2022

S.C. SUPREME COURT

Certiorari to Newberry County

Honorable J. Mark Hayes, Circuit Court Judge

CARROL T. WASHINGTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000754

PETITION FOR WRIT OF CERTIORARI

VICTOR R SEEGER
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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ISSUES PRESENTED

1. Whether trial counsel provided ineffective assistance of counsel for failing to diligently investigate into the complaining witness' mother for the existence of a conflict of interest and for failing to move for a mistrial at trial after he discovered that a conflict of interest existed because trial counsel represented the complaining minor witness' mother in her divorce?

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

STATEMENT

During the October 2015 term, the Newberry County Grand Jury indicted Petitioner for first degree criminal sexual conduct with a minor. App. 526 – 528.

On February 29, 2016, Petitioner proceeded to trial before the Honorable Donald B. Hocker, and a jury. App. 1. Charles Verner represented Petitioner. Id. Dale Scott and Taylor Daniel represented the state. Id. Petitioner was found guilty as indicted. App. 370, l. 19 – 371, l. 2. Judge Hocker sentenced Petitioner to twenty-five years' imprisonment. App. 378, ll. 7 – 22.

On March 17, 2017, a direct appeal was filed pursuant to Anders v. California, 87 S.Ct. 2094 (1967), for Petitioner. App. 381 – 398. On December 14, 2018, the state filed its Return. App. 423 – 430. In an unpublished opinion, the Court of Appeals dismissed Petitioner's direct appeal on June 13, 2018. App. 399 – 400; State v. Washington, No. 2016-000792 (S.C. Ct. App. June 13, 2018).

On September 5, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 401 – 422. On January 8, 2021, Petitioner filed an amended PCR application. App. 431 – 434. Among other allegations, Petitioner alleged trial counsel provided ineffective assistance of counsel for failing to move for a mistrial when he discovered a conflict of interest existed because he represented the minor complaining witness' mother in her divorce, and that trial counsel was ineffective for failing to object to the solicitor's egregious bolstering of the complaining minor witness. Id.

On January 27, 2021, Petitioner's PCR hearing was held before the Honorable Mark Hayes. App. 435. Ashley A. Mahan represented Petitioner. Id. Brianna L. Schill represented the state. Id.

In an order of dismissal filed on June 21, 2021, the PCR court denied Petitioner relief. App. 505 – 525. The PCR court found that his allegations were without merit and he was not able to show how he was prejudiced from trial counsel’s alleged errors. App. 516 – 518; App. 518 – 521.

This petition follows.

ARGUMENT

1. Trial counsel provided ineffective assistance of counsel for failing to diligently investigate into the complaining witness' mother for the existence of a conflict of interest and for failing to move for a mistrial at trial after he discovered that a conflict of interest existed because trial counsel represented the complaining minor witness' mother in her divorce.

Relevant Facts

Petitioner was in a live-in relationship with Tonya Dawkins, a relative of the complaining minor witness ("Minor"). App. 101, l. 2 – 102, l. 14; App. 103, ll. 13 – 19; App. 252, ll. 4 – 6; App. 269, ll. 5 – 18. Nicole Simms, Minor's mother, would bring Minor to her grandmother's home, Ethyl Simms, in Whitmire, South Carolina which was "within five minutes" of Dawkins and Petitioner's home. App. 100, ll. 11 – 24.

On March 25, 2015, Minor alleged that Petitioner penetrated her anus with his finger at Dawkins' home while she was on a visit to her grandmother's house. App. 131, l. 23 – 134, l. 18; App. 203, l. 1 – 206, l. 10; App. 221, ll. 17 – 21. Minor said the suspect went by the name of "Man." App. 131, l. 23 – 134, l. 18; App. 203, l. 1 – 206, l. 10. Minor's mother, Nicole Simms, brought Minor to police, informed Investigator Brad Epps of the allegation, and that Petitioner, known as "Man," was the suspect. App. 131, l. 23 – 134, l. 18. Minor picked Petitioner out of a photo-identification lineup and underwent a forensic interview where she reiterated her claims against Petitioner. App. 136, l. 20 – 138, l. 5; App. 179, l. 15 – 181, l. 3; App. 185, l. 22 – 187, l. 24.

There was no physical evidence or eye-witness accounts to the alleged assault. The entirety of the evidence was Minor's allegation and identification of Petitioner. Accordingly, the case was

a “he said, she said” credibility battle. App. 89, ll. 11 – 13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3.

On June 4, 2015, Petitioner was interviewed by Epps. App. 139, l. 25 – 142, l. 18. Petitioner denied improperly touching Minor and explained that he did not know why Minor would make that allegation. Id. He also insinuated that Minor had a reputation for being promiscuous. Id. Petitioner confirmed that his nickname is “Man.” App. 143, ll. 4 – 14. On June 10, 2015, Epps arrested Petitioner. App. 143, l. 25 – 144, l. 6.

During Simms’ testimony at Petitioner’s trial, trial counsel “realized” he represented Simms in an earlier matter for her divorce with Minor’s biological father. App. 125, l. 23 – 128, l. 16. In his questioning of Simms, trial counsel attempted to elucidate Petitioner’s defense theory that a different man committed the sexual misconduct and that Minor mistakenly identified Petitioner. App. 126, l. 23 – 128, l. 16. The main suspect trial counsel tried to point to as the true perpetrator was Minor’s biological father. Id.

Trial counsel asked Simms about her children’s reluctance to visit their biological father and about a prior allegation of abuse involving the biological father. Id. Simms was noticeably taken aback. App. 126, l. 23 – 127, l. 8. Moreover, after the shock of that line of questioning subsided, she angrily retorted “you should know” about the child abuse allegation with her ex-husband, Minor’s biological father, because trial counsel learned about it when he represented her in her divorce. App. 127, ll. 9 – 24. Simms went on to testify that trial counsel had all this information in his file from her divorce. App. 127, ll. 22 – 24. Simms’ response put trial counsel on notice that he learned of Christopher Thompson’s abuse during his representation of Simms such that bringing it up now constituted a breach of the confidentiality of their prior attorney-client relationship.

It was in that moment that Petitioner needed an uncompromised advocate to forcefully question Simms because his main defense was that he was mistakenly identified as the perpetrator and the true perpetrator was Minor's biological father. App. 126, l. 23 – 128, l. 16; App. 501, l. 24 – 502, l. 22. Trial counsel could not pursue that line of questioning ardently because of his duty to not violate confidentiality with his prior client Simms. Id. Trial counsel cut short his cross-examination of Simms, the trial proceeded, and Petitioner was found guilty. App. 370, l. 19 – 371, l. 2.

At his PCR hearing, Petitioner testified trial counsel never mentioned that he had been Simms' divorce attorney. App. 448, l. 17 – 449, l. 3. The revelation that trial counsel used to be Simms' attorney during trial was a "shock" to Petitioner. Id. Petitioner recalled an incident prior to trial where trial counsel admitted to Petitioner that he remembered Simms but did not inform Petitioner he knew Simms from a prior representation. Id. While that conversation was taking place, Dale Scott, trial counsel's assistant, interrupted and tried to get Petitioner to accept a plea offer from the state. App. 449, ll. 4 – 17.

Trial counsel testified at the PCR hearing as well. App. 459, l. 21. Trial counsel minimized his attorney-client relationship with Nicole Simms. App. 466, l. 22 – 469, l. 19. He stated that her divorce was "uncontested" and the biological father was not an issue in the divorce proceedings. Id. However, that claim was contradicted by Simms' trial testimony where Simms stated trial counsel had "everything on file" and "should know" about the allegation of abuse her children made on Christopher Thompson from the divorce proceedings. App. 127, ll. 5 – 24.

Petitioner also put trial counsel on notice of Christopher Thompson prior to trial. Petitioner wrote trial counsel a detailed letter explaining the incident and allegation. App. 500, l. 19 – 501, l. 5. In that letter, Petitioner made sure to include that Thompson was Minor's biological father. Id.

Petitioner also specifically raised the defense theory that Christopher Thompson “might have been involved in some kind of sexual misconduct” with Minor. App. 502, ll. 11 – 22.

Trial counsel confessed that “at some point” prior to trial, he learned that Minor’s father was Christopher Thompson. App. 494, l. 10 – 496, l. 9. Minor’s last name was Thompson. App. 497, ll. 2 – 13. When trial counsel represented Simms, her last name was Thompson. Id. Given those connections, a competent attorney would have at the very least investigated to see if Nicole Simms was the Nicole Thompson he represented in her divorce from Christopher Thompson.

Despite the abundance of evidence that should have made trial counsel aware Simms was his prior client, he incredulously asserted he conducted an adequate conflict check that was thwarted because Simms no longer went by the last name Thompson. App. 495, l. 11 – 496, l. 2. Tellingly, when trial counsel explained his conflict checking process, the entirety of the conflict check consisted of asking the question “do I recognize the name [of the client]?” Id.

Trial counsel categorized Simms as an adversarial, material witness. App. 493, ll. 9 – 14. He agreed with PCR counsel that his duties to her as her former attorney continued after the representation was over. App. 493, l. 15 – 494, l. 4. As Simms was an adversarial, material witness trial counsel knew Simms would testify for the state “from day one.” App. 494, ll. 5 – 9; App. 496, ll. 10 – 20. Trial counsel further admitted that if he had “any concerns about it this case it would be” the conflict of interest with Simms. App. 494, l. 18 – 495, l. 11.

During Simms’ divorce, trial counsel learned about Simms’ relationship with Christopher Thompson and the state’s PCR counsel recognized that even during questioning at the PCR hearing there were topics she could not ask about because of the attorney-client privilege between trial counsel and Simms. App. 467, l. 22 – 468, l. 15. Simms testified at Petitioner’s trial that trial counsel’s file contained the information about the abuse allegation against Christopher Thompson.

App. 126, l. 23 – 128, l. 2. Thus, trial counsel learned of the abuse allegations while he was in an attorney-client relationship with Simms such that he was bound by his duty of confidentiality not to disclose that information. That duty of confidentiality still existed during Petitioner’s trial. Accordingly, Petitioner was prejudiced by trial counsel’s conflict of interest because trial counsel’s duty of confidentiality to Simms hamstrung his cross-examination of her regarding the crux of his defense.

Discussion

In this case Petitioner was deprived of his constitutional right to be represented by a conflict-free attorney. Trial counsel provided ineffective assistance by failing to move for a mistrial when it was revealed that he represented Minor’s mother in an earlier matter, where she was the state’s “adversarial, material witness” against Petitioner. That undisclosed conflict of interest violated Petitioner’s Sixth Amendment right to effective assistance of counsel because “an attorney who has previously represented one of the state’s witnesses has a continuing obligation to that former client not to reveal confidential information received during the course of the prior representation” and that inability to question his prior client regarding that information “dampen[ed] the ardor of [trial counsel’s] defense” of Petitioner. Nix v. Whiteside, 106 S.Ct. 988, 1005 n.7 (1986) (Stevens, J., concurring); State v. Gregory, 364 S.C. 150, 153 – 54, 612 S.E.2d 449, 450 – 51 (2005).

A defendant's claim that counsel's ineffective assistance required reversal of a conviction has two components. Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). “First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced

the defense.” Id. Prejudice means that defense counsel's errors deprived the defendant of a fair trial whose result was reliable. Id.

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance. Thomas v. State, 346 S.C. 140, 143–44, 551 S.E.2d 254, 256 (2001) See Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998) (citing Cuyler v. Sullivan, 100 S.Ct. 1708, (1980); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Jackson v. State, *supra* (citing Duncan v. State, *supra*).

In South Carolina an attorney owes a duty of confidentiality to clients, both past and present. Rule 1.6(a) of the South Carolina Rules of Professional Conduct states “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” Rule 1.6(a), RPC, Rule 407 SCACR.

That duty extends to prior clients under Rule 1.9(c) of the South Carolina Rules of Professional Conduct, which states in part, “A lawyer who has formerly represented a client in a matter... shall not thereafter: use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or reveal information relating to the representation except as these Rules would permit or require with respect to a client.” Rule 1.9(c), RPC, Rule 407 SCACR. In this case trial counsel owed Simms a duty of confidentiality to not reveal information he learned while he represented her, including the allegation of abuse from Simms’ children on

their father, Christopher Thompson. That duty hindered trial counsel's ability to defend Petitioner in this case because he could not adequately cross-examine Simms at trial.

A conflict of interest can arise when an attorney represents a current client, but also previously represented a past client who then becomes a witness for the state against the current client, even when the matters are not substantially related. See Mickens v. Taylor, 122, S.Ct. 1237 (2002). In Mickens, a Virginia jury convicted Mickens of the murder of Timothy Hall. Mickens, at 1239. One of Mickens' three appointed attorneys, Saunders, represented Hall on assault and concealed weapons charges at the time of the murder: Id., at 1240. The juvenile court judge who dismissed the charges against Hall, because he was now deceased, also appointed Saunders to represent Mickens. Id. Accordingly, the juvenile court should have known that there was a potential conflict of interest in Saunders' representation of Mickens; however, the juvenile court failed to inquire into that potential conflict of interest. Id. Mickens' trial continued, and he was found guilty of murder. Id., at 1239.

Mickens argued in a federal habeas corpus appeal that the juvenile court judge's failure to inquire into the potential conflict either mandated automatic reversal of his conviction or relieved him of the burden of showing that the conflict of interest adversely affected his counsel's performance. Id., at 1240. In a five-to-four decision, the United States Supreme Court held that while the representation of a prior client with adverse interests to a current client did present a conflict of interest, the lower court's failure to inquire into the potential conflict of interest did not eliminate Mickens obligation to show that the conflict adversely affected his counsel's performance. Mickens, at 1244 – 46. Moreover, since the Court of Appeals determined that the conflict of interest did not adversely affect trial counsel Saunders' performance, an actual conflict did not exist in Mickens' case. Id., at 1245.

In South Carolina, the issue of whether an actual conflict of interest existed for an attorney who previously represented a client with adverse interests to their current client arose in Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001) and our Supreme Court's decision illustrated that a knowing waiver of conflict-free representation was necessary to eliminate the conflict of interest. In Fuller, the defendant was indicted and tried jointly with two codefendants, McClain and Meadows. Fuller, at 632, 557 S.E.2d at 665. All three defendants were represented by James O. Thomasson and all claimed an alibi defense. Id. Critically, Thomasson advised all the defendants of "the potential for conflicts of interests" and each defendant agreed to continue with Thomasson's representation. Id.

McClain subsequently changed his story and Thomasson moved to be relieved from representing him. Id., at 632 – 33, 557 S.E.2d at 665. Both Meadows and Fuller were advised by the trial judge of the potential conflicts of interest that could arise if Thomasson continued to represent them. Id., at 633, 557 S.E.2d at 665. Both agreed to continue to be represented by Thomasson because they had the same alibi defense and witnesses. Id.

Meadows and Fuller both testified at trial, but McClain did not. Id. The testimony from the witnesses for were conflicted, one witness placed Fuller and Meadows at the scene and three other witnesses placed Fuller but not Meadows at the scene. Id. The jury convicted McClain and Fuller, but Meadows was acquitted. Id.

Fuller proceeded to a post-conviction relief hearing on the grounds that Thomasson provided ineffective assistance of counsel because but for Thomasson's prior representation of McClain, counsel could have called McClain to testify and then impeach him with his earlier statement to police that neither he, Fuller, or Meadows was present at the crime scene. Id., at 634, 557 S.E.2d at 666. Thomasson testified at the PCR hearing that he did not call McClain to testify

because he “knew what [McClain] was going to say as far as putting [Fuller] at the scene.” Id., at 633, 557 S.E.2d at 665.

In Mickens, “The PCR court found the appearance of a conflict based on the fact that Fuller was convicted while Meadows was acquitted, and that counsel [was] unable to cross-examine McClain about statements he made” due to Thomasson’s prior representation of McClain warranted reversal of Fuller’s conviction. Id., at 634, 557 S.E.2d at 665 – 66. Accordingly, Fuller was successful at PCR and the state appealed. Id.

This Court reversed the PCR court’s decision, holding that Fuller failed to demonstrate there was an actual conflict of interest. Id., at 634, 557 S.E.2d at 666. As for the joint representation, the Court determined no conflict existed because Fuller and Meadows’ defenses were consistent and because “both had been advised of the potential for conflicts and agreed to continued joint representation” thereby waiving their right to conflict-free representation. Id.

For Thomasson’s prior representation of McClain, Fuller alleged that but for Thomasson’s prior representation of McClain, counsel could have called McClain to testify and then impeach him with his earlier statement. Id. However, at Fuller’s PCR hearing, Thomasson testified that he had no intention of calling McClain as a witness because they knew he was going to testify that Fuller was present at the crime scene. Id.

This Court “[found] there was neither an actual conflict, nor the appearance of a conflict of interest in [Fuller’s] case” because Fuller waived any potential conflict regarding Thomasson’s previous representation of McClain at the hearing where Thomasson was relieved as McClain’s attorney. Fuller, at 635 n.5, 557 S.E.2d at 666 n.5. Moreover, “the appendix demonstrate[d] that both Meadows and Fuller were questioned by the trial judge and indicated they understood the possibility of a conflict, and that they nonetheless wished to proceed.” Id. The Court further held

there was neither “any deficiency, nor any conflict, in counsel's failure to call a witness who, by all indications, would have inculpated Fuller in the crime.” Fuller, at 634–35, 557 S.E.2d at 666. Accordingly, Thomasson’s choice to not call McClain to testify was a strategic decision rather than a limitation due to being McClain’s former attorney.

In this case, the conflict of interest was neither disclosed nor waived prior to trial. Undersigned counsel is unaware of any South Carolina cases that analyze whether a conflict of interest existed when an attorney previously represented a client who goes on to become a witness for the state in the trial against his current client where the attorney failed to disclose the prior representation and where the current client never waived his right to a conflict-free attorney.

The Minnesota Supreme Court did encounter such a circumstance in State v. Patterson, 812 N.W.2d 106 (2012). In that case, Patterson was on trial for the murder of Rashante Artison because of an intra-gang conflict. Patterson, at 108 – 110. Patterson hired attorney Newmark to defend him at trial. Id., at 108. The state moved to dismiss Newmark because Newmark represented three of the state’s potential witnesses. Id. Over Patterson’s waiver of his right to conflict-free counsel, the trial court granted the state’s motion on the basis of the potential conflicts with two of the state’s prospective witnesses. Id. Patterson continued with a different attorney and was found guilty of second-degree murder. Id.

On appeal, Patterson argued the trial court violated his right to counsel of choice by disqualifying Newmark over his objection. Id., at 109; See State v. Patterson, 796 N.W.2d 516 (Minn. Ct. App. 2011). The Minnesota Court of Appeals held “the district court thoroughly analyzed Newmark's purported conflicts of interest,” and “any prejudice to Patterson was outweighed by the state's interest in the finality of any judgment of conviction, the court's interest in preserving the ethical standards of the legal profession, and the public's interest in having a

criminal justice system that is perceived as fair.” Patterson, at 109. The Supreme Court of Minnesota reviewed the disqualification of Patterson’s counsel of choice for an abuse of discretion and examined the trial court record to determine if an actual conflict between Newmark and the two state’s witnesses existed. Id., at 109 – 10.

At Patterson’s trial, the state planned to call witness Wilson. Id. Newmark previously represented Wilson on “approximately four felony drug cases.” Id., at 110. While Newmark represented Wilson, they reviewed police reports together and had privileged communications about the facts underlying Wilson's arrest. Id. Wilson was later indicted on federal drug charges and was appointed a different attorney for his federal case. Id. Wilson's new attorney negotiated a plea agreement with the federal government in which Wilson agreed to cooperate in the prosecution of Patterson, and Patterson’s codefendant, for Artison's murder. Id. At Patterson’s trial, Wilson objected to being cross-examined by Newmark. Id.

Based on those circumstances, the state argued that Newmark's previous representation of Wilson created a potential conflict of interest because Newmark would have to discredit his former client during cross-examination which might jeopardize both Wilson's and Patterson's interests. Id. The state further argued that Patterson's waiver of conflict-free counsel was not sufficient to eliminate the potential conflict because Patterson could not waive Newmark's ethical obligations to Wilson. Id. Patterson argued that, because the state failed to demonstrate that Wilson's interests were adverse to Patterson's, no actual conflict or serious potential for conflict would arise from Newmark's representation of Patterson. Id. After considering those arguments, the trial court disqualified Newmark as Patterson’s attorney. Id.

The Minnesota Supreme Court held the trial court's disqualification of Newmark based on his previous representation of Wilson was proper. Patterson, at 111. A potential conflict of interest

existed due to Newmark's past representation of Wilson because Newmark learned confidential information about Wilson during that representation that would be relevant to his cross-examination of Wilson on Patterson's behalf. Id. The need for Newmark to cross-examine Wilson, with information that Newmark obtained during his past representation of Wilson, "created a substantial risk that confidential information would materially advance Patterson's defense." Id.

Despite Wilson not being on trial for the same charges, like a codefendant would be, the Minnesota Supreme Court still determined that Wilson and Patterson had "materially adverse" interests. Id. Furthermore, the Minnesota Supreme Court held the impact on Patterson's defense caused by the prior representation would have been severe because the limitation on Newmark's ability to effectively cross-examine Wilson would have materially harmed his representation of Patterson. Id. "Newmark's past representation of Wilson would have made it difficult for Newmark to effectively cross-examine Wilson on Patterson's behalf," as Newmark could not use information he learned while representing Wilson on cross-examination because it was subject to attorney-client confidentiality "thereby calling into question the fairness of Patterson's trial." Id., at 112.

The resulting prejudice from trial counsel's conflict of interest in this case was evident from the record. Trial counsel proceeded to trial without notifying Petitioner, Simms, or the trial court that he represented Simms in the past, despite evidence that trial counsel was aware he knew Simms prior to trial. App. 448, l. 17 – 449, l. 15. As a result, *Petitioner was not given a chance to waive his right to conflict-free representation.*

In fact, trial counsel never revealed his conflict of interest, it was Simms who revealed the prior representation to the trial court and Petitioner during cross-examination. App. 126, l. 23 – 127, l. 24. Simms simultaneously revealed that trial counsel knew of the abuse allegation against

Minor's father from his representation of Simms during her divorce because as Simms testified trial counsel "should know [about the abuse]" and that trial counsel had "everything on file." Id.

Petitioner's main defense was that he was mistakenly identified by Minor. App. 483, ll. 6 – 21. The key suspect that Petitioner pointed to as the true culprit was Christopher Thompson. App. 502, ll. 7 – 22. Petitioner needed to question Simms about her children's prior allegations of abuse against Thompson to effectively present the crux of his defense.

Due to trial counsel's prior representation of Simms, trial counsel was under a duty of confidentiality to not expose the information about the allegation of abuse regarding Minor's father that he learned while he represented her. App. 492, l. 15 – 494, l. 4. Trial counsel began questioning her about the allegation of abuse, but once it was revealed that he was using information he gained from the prior representation trial counsel prematurely ended that line of questioning, lest he be caught breaching that duty of confidentiality. App. 127, l. 9 – 128, l. 16.

Since Petitioner's entire defense relied on the line of questioning that pointed to Minor's father being the true culprit, trial counsel's conflict of interest adversely affected his performance and prejudiced Petitioner because his trial attorney "dampen[ed] the ardor of his defense in order to placate" Simms regarding crucial, material evidence. Gregory, supra.

2. Trial counsel provided ineffective assistance of counsel when he failed to object to the solicitor's closing argument because the solicitor improperly bolstered the complaining minor witness where the case was a credibility battle and where the trial court's jury instruction failed to inform the jury they were the sole arbiters of credibility and arguments of counsel were not evidence.

Relevant Facts

Petitioner's case was a "he said, she said" credibility battle. App. 89, ll. 11 – 13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. There was no physical evidence of abuse, no confession of guilt, and no eye-witness testimony alleging to have seen Petitioner abuse Minor. App. 478, l. 12 – 479, l. 1. Accordingly, the credibility of the witnesses was paramount.

In an effort to tip the scales in the state's favor, the solicitor made comments in his closing argument regarding the truthfulness of Minor and his personal belief that Minor was telling the truth. Those comments could only be reasonably interpreted as improper vouching of Minor's testimony.

The solicitor's closing statement excessively leaned on Minor's testimony. App. 343, l. 25 – 344, l. 15; App. 346, ll. 21 – 23; App. 347, ll. 8 – 9; App. 349, ll. 8 – 13; App. 354, ll. 14 – 354, l. 23; App. 356, ll. 2 – 7. The solicitor began his closing by imploring the jury to be a champion for Minor who was a "voice that crie[d] out from the dark begging to be heard, to be believed." App. 343, l. 25 – 344, l. 4. He continued, "Will you believe the soft voice of the meek whose message rings out the loudest, or are you going to believe the voice of the taker? The taker who has taken away so much from [Minor]?" App. 344, ll. 11 – 14.

That colorful language was just the setup, unfortunately, for the egregious vouching statements that came next. The solicitor repeatedly insinuated that Minor, like all “eight, nine, 10-year-old[s],” was *physically incapable of lying*. App. 346, ll. 21 – 23; App. 349, ll. 8 – 13. Then he went so far as to explicitly tell the jury he believed Minor’s testimony. The solicitor declared, “I submit to you [Minor] *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. 354, ll. 14 – 18. (emphasis added) He then reiterated “A child will fold under a cross-examination because *they’re not capable of lying to that degree.*” App. 354, ll. 21 – 23. (emphasis added). Trial counsel failed to object because he did not see any comments that “crossed the line.” App. 473, l. 14 – 474, l. 17.

The trial court’s jury instruction did not cure trial counsel’s failure to object, nor did it cure the resulting prejudice because it failed to explicitly instruct the jury that they were the sole arbiters¹ of credibility. The closest the trial court came to informing the jury they were the sole arbiters of credibility was when it said, “as jurors it is your duty to determine the affect, value, weight and truth of the evidence presented during this trial.” App. 358, l. 5 – 359, l. 16. The court reiterated that same sentiment when it said it was the jury’s duty to analyze and evaluate evidence and determine which evidence convinces them of its truth. App. 362, ll. 4 – 19.

That instruction did not tell the jury to ignore the attorneys’ opinions regarding the credibility of witnesses. The trial court also failed to explicitly inform the jury that arguments of counsel were not evidence. Therefore, even when the trial court informed the jury that it was their duty to judge the credibility of the witnesses and evidence, the solicitor’s comments that Minor

¹ In contrast, the judge did specifically say the jury was the exclusive judge of the “facts.” App. 358, l. 5 – 359, l. 16.

was literally incapable of lying had a reasonable likelihood of affecting the jury's credibility determinations; and thus, the outcome of Petitioner's trial. App. 346, ll. 21 – 23; App. 349, l. 8; App. 354, ll. 10 – 18. Accordingly, trial counsel's failure to object to the improper vouching by the solicitor was ineffective assistance of counsel that prejudiced Petitioner in this "he said, she said" case.

Discussion

Petitioner's case was a credibility battle between Minor and Petitioner. App. 89, ll. 11 – 13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. Accordingly, trial counsel's failure to object to the solicitor's improper vouching of Minor constituted deficient performance that prejudiced Petitioner because the solicitor's comments improperly bolstered the key witness' testimony where there was no physical evidence of abuse, no third-party witness testimony of guilty, and no instruction by the trial court that the jury was the sole arbiter of witness credibility. See State v. Reyes, 432 S.C. 394, 408 – 09, 853 S.E.2d 334, 342 (2020) (holding the trial court cured a solicitor's improper bolstering questions with instructions to the jury that it was the sole arbiter of witness credibility).

To establish ineffective assistance of counsel, a defendant must show trial counsel's performance fell below an objective standard of reasonableness and, trial counsel's ineffective assistance prejudiced the defendant's case. Strickland v. Washington, *supra*. Prejudice means that defense counsel's errors deprived the defendant of a fair trial whose result was reliable. Id.

Generally, "[t]he assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). The closing argument of a solicitor, "must be carefully tailored so as not to appeal to the personal biases of the jury." Smith v. State, 375 S.C.

507, 522, 654 S.E.2d 523, 531 (2007)(citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). The argument “must be confined to evidence in the record and the reasonable inference that may be drawn from the evidence.” Id. at 522 – 523, 654 S.E.2d at 531. Although a solicitor may argue the credibility of a witness based on the record and its reasonable inferences, a solicitor may not vouch for the credibility of a prosecution 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).

As explained by this Court, “[i]t is inappropriate for the State to assure the jury of a witness’ credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record.” Id. Generally, “[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.” Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The question for a reviewing court is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). A reviewing court examines the impropriety of the prosecutor’s closing argument in the context of the entire record. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2003), our Supreme Court held Gilchrist’s defense counsel provided ineffective assistance of counsel for failure to object to the solicitor’s opening statement where he informed the jury that the state’s key witness had a clean soul. The Court held that the solicitor’s statement was a personal assurance of the witness’ veracity, and trial counsel should have objected. Id. Further, the Court held defense counsel’s error prejudiced

Gilchrist because the witness the solicitor vouched for was the *prosecution's key witness*. Id. at 228, 565 S.E.2d at 285. (emphasis added)

This Court defined when a solicitor vouches for the credibility of a witness in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), *rev'd on other grounds*, Kelly v. State, 534 U.S. 246 (2002):

Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence is not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 368-69, 540 S.E.2d at 860 (quotation omitted). See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977 (2001) (“[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity[.]”) (citations omitted). Accordingly, “[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility.” Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (quoting Kelly, 343 S.C. at 369, 540 S.E.2d at 861).

In this case trial counsel provided deficient performance when he failed to object to the solicitor's numerous statements during closing argument that vouched for Minor's credibility and truthfulness. App. 343, l. 25 – 344, l. 15; App. 346, ll. 21 – 23; App. 347, ll. 8 – 9; App. 349, ll. 8 – 13; App. 354, ll. 14 – 354, l. 23; App. 356, ll. 2 – 7. Trial counsel stated that he did not object because, in trial counsel's mind, none of the solicitor's comments “crossed the line.” App. 473, l.

14 – 475, l. 17. However, the record clearly showed that the solicitor violated the holdings of Matthews v. State, *supra*, and Gilchrist v. State, *supra* when he *explicitly assured the jury* that Minor was “wholly credible.” App. 354, ll. 10 – 18. Even more egregious, the solicitor used first person pronouns when declaring Minor was “wholly credible” and claimed that Minor was literally incapable of lying. *Id.* Those comments were exactly the kind that South Carolina Courts have held to be improper. See Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (discouraging use of the pronoun “I” in closing argument).

As to prejudice, trial counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 692. When the solicitor told the jury that in his opinion Minor was “wholly credible” he improperly expressed his personal opinion regarding the complaining witnesses’ truthfulness. See Gilchrist, at 227, 565 S.E. 2d at 285 (2002). The solicitor’s opinion carried with it, “the imprimatur of the Government” and induced the jury to trust his judgment rather than its own view of the evidence. See Kelly, at 368, 540 S.E.2d at 860. The vouching in this case was particularly harmful because the solicitor knew the case would turn on whether or not the jury believed Minor’s testimony and he improperly told the jury during closing that Minor was incapable of lying.

The trial court was unable to cure the prejudice created by the solicitor’s improper vouching because trial counsel failed to object and request the trial court issue a curative instruction. *Cf.* Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) (finding a solicitor’s improper comments may be cured by the judge’s instructions to the jury). As a result, the solicitor’s improper comments during the state’s closing argument, “so infected the trial with unfairness as to make the resulting

conviction a denial of due process.” Vaughn, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

The trial court’s jury instruction did not cure the prejudice in this case because the jury was not informed that it was the “sole arbiter” of witness credibility. *Cf.* State v. Reyes, 432 S.C. 394, 408 – 09, 853 S.E.2d 334, 342 (holding that the solicitor’s improper vouching was harmless because the trial court instructed the jury that it was the sole arbiter of witness credibility). Moreover, this was case distinguishable from Reyes in two more key aspects. The impropriety here was far more egregious². App. 354, ll. 10 – 18; App. 349, l. 8; App. 354, ll. 21 – 23. The solicitor in this case explicitly assured the jury that Minor was “wholly credible” and incapable of lying, whereas in Reyes the solicitor simply asked the minor witness during direct examination if she knew to tell the truth while testifying. App. 354, ll. 10 – 18; Reyes, at 399 – 400, 853 S.E.2d at 337. In this case there was also no physical evidence of guilt, whereas in Reyes the *six-year-old minor* and Reyes tested positive for herpes simplex virus type one. Reyes, at 401, 853 S.E.2d at 337. Therefore, the jury instruction from the trial court given here did not cure the prejudice from the improper vouching as it did in the close call three-to-two decision in Reyes. Reyes, at 409, 853 S.E.2d at 342.

In State v. Tappeiner, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016), our Supreme Court held that trial counsel was ineffective for failing to object during the solicitor’s closing argument where she improperly vouched for the credibility of the minor witness because her comments amounted to her telling the jury that she believed the minor’s version of events. The Court determined that Tappeiner was prejudiced by his trial counsel’s ineffective assistance because the dearth of direct

² The solicitor also arguably made a “golden rule argument” at closing. App. 347, ll. 8 – 9. While he did not explicitly tell the jury to put themselves in Minor’s shoes, he did implicitly invite them to do so when he stated “I can’t imagine being in [Minor’s] shoes.” Id.; *See* State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009).

or circumstantial evidence, outside of the minor's allegation, meant that the evidence of Tappenie's guilt was not overwhelming. Id. at 253, 785 S.E.2d at 478. Accordingly, there was a reasonable probability that but for the solicitor's improper vouching the outcome of Tappenie's trial would have been different. Id. at 250, 785 S.E.2d at 476.

Here, the solicitor invaded the province of the jury and usurped its fact-finding function when he asserted that the state's key witness was incapable of lying. App. 354, ll. 10 – 18. That invasion into the jury's province was improper because "the jury is charged with assessing the credibility of witnesses." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

As in Tappenie, the evidence of Petitioner's guilt in this case was not overwhelming. Trial counsel admitted at the PCR hearing that the case was largely a "he said, she said" matter. App. 89, ll. 11 – 13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. Since there was no physical evidence of guilt nor third party witness testimony, the case came down to a credibility battle between the complaining witnesses and Petitioner. App. 478, l. 12 – 479, l. 1. Concordantly, trial counsel's ineffective assistance in failing to object to the solicitor's improper vouching of the state's key witnesses prejudiced Petitioner. App. 354, ll. 10 – 18.

Therefore, the PCR court erred when it found that trial counsel's failure to object to the solicitor's improper vouching of the state's key witnesses did not prejudice Petitioner. App. 518 – 521. Trial counsel's ineffective assistance of counsel created "a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests this Court grant certiorari to allow for full briefing of these issues.



Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2022.

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

May 25 2022

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
J. Mark Hayes, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2021-000754

Carrol Tremayne Washington,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE ISSUES PRESENTED

1. Whether Trial Counsel provided ineffective assistance of counsel for failing to diligently investigate into the complaining witness' mother for the existence of a conflict of interest and for failing to move for a mistrial at trial after he discovered that a conflict of interest existed because trial counsel represented the complaining minor witness' mother in her divorce?
2. Whether Trial Counsel provided ineffective assistance of counsel when he failed to object to the solicitor's closing argument because the solicitor improperly bolstered the complaining minor witness where the case was a credibility battle and where the trial court's jury instruction failed to inform the jury they were the sole arbiters of credibility and arguments of counsel were not evidence?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. The PCR court correctly found Trial Counsel was not ineffective during his cross-examination of the complaining minor's mother because he was not representing conflicting interests at that time and his prior representation of the witness did not negatively affect his representation of Petitioner.
2. The PCR 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 – Office of Appellate 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 Return 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), SCRPC; *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).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Strickland*, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. *Id.* Accordingly, courts must be wary of second-guessing counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

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

- I. **The PCR court correctly found Trial Counsel was not ineffective during his cross-examination of the complaining minor’s mother because he was not representing conflicting interests at that time and his prior representation of the witness did not adversely affect his representation of Petitioner.**

The PCR court’s finding that Trial Counsel was not ineffective due to a conflict of interest when cross-examining the victim’s mother, notwithstanding the fact Trial Counsel had represented the witness in a divorce proceeding many years earlier, was correct because Trial Counsel was not representing competing interests at the time of Petitioner’s trial and Petitioner failed to show that his representation was adversely affected by Trial Counsel’s prior representation.

Petitioner was accused of molesting a minor (“Victim”) on multiple occasions when she would come over to play at his apartment. At trial, the State called Nicole Simms, Victim’s mother, who testified Victim began behaving strangely in 2014 and did not want to visit the apartment complex where Petitioner lived anymore. (App.pp.114–22). On cross-examination, Trial Counsel asked Simms if her children ever hid in the closet to avoid visitation with Simms’ ex-husband, Christopher Thompson, and Simms acknowledged they did. (App.p.126, line 23–p.127, line 4). Trial Counsel then asked if Simms told investigators that one of her children was being molested by someone in Thompson’s family. (App.p.127, lines 5–7). Simms denied making that statement, claimed her oldest daughter told a counselor about “something” happening to Victim, and then stated, “You ought to know, because you was my divorce lawyer and you bringing up something in my divorce.” (App.p.127, lines 12–16). Trial Counsel and Simms began talking over one another, with Trial Counsel attempting to ask questions and

Simms insisting Trial Counsel was the lawyer who represented her in her divorce from Christopher Thompson. (App.p.127, line 17–p.128, line 2). After the trial court admonished Simms to wait for Trial Counsel to finish his question before answering, Trial Counsel asked again whether Simms ever told investigators that her oldest daughter had been abused by a family member. (App.p.128, lines 3–11). Simms again denied making such a statement, but she acknowledged stating her oldest daughter “did make an exaggeration about something happening to her little sister” at their father’s house. (App.p.128, lines 12–14). Trial Counsel did not ask Simms any more questions.

At the evidentiary hearing before the PCR court, Trial Counsel testified he learned after the trial that he had represented Nicole Simms in an uncontested divorce action in 2006 or 2007, when she was known as Nicole Thompson. (App.p.467, lines 2–9). Trial Counsel stated he did not recognize Simms during the trial because so much time had passed since the divorce proceeding and Simms had changed her name. (App.p.467, lines 10–18). Trial Counsel testified that Simms was not involved with Petitioner at the time of her divorce from Christopher Thompson and that no disputes as to custody or property arose during the representation. (App.p.467, line 18–p.468, line 15). Trial Counsel remembered being caught off guard when Simms told him he had been her divorce lawyer. (App.p.469, lines 4–13). Although he acknowledged Simms was the victim’s mother, Trial Counsel thought Simms’ testimony was not important to the outcome of Petitioner’s case. (App.p.481, lines 8–17).

An attorney who represents conflicting interests breaches the basic duty of loyalty; in such cases, a PCR applicant is not required to show prejudice in the traditional *Strickland* sense of “a reasonable probability the result of the proceeding would have been different.” *Gonzales v. State*, 419 S.C. 2, 9–10, 795 S.E.2d 835, 839 (2017), *abrogated on other grounds by Smalls v.*

State, 422 S.C. 174, 810 S.E.2d 836 (2018). Rather, prejudice is presumed if the applicant proves that counsel actively represented conflicting interests and that this actual conflict of interest adversely affected counsel’s performance. *Id.* at 10, 795 S.E.2d at 839. An “actual conflict of interest” occurs where a defense attorney owes duties to a party whose interests are adverse to those of the defendant, i.e., if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. *Id.* (citing *Jordan v. State*, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013)). The PCR applicant bears the burden of proving an actual conflict of interest existed and that it necessitates relief. *Id.* The mere possibility of a conflict is insufficient to impugn a criminal conviction. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836.

In this case, Simms was no longer a client of Trial Counsel; Trial Counsel stopped representing Simms in early 2007, many years before Petitioner’s arrest. Trial Counsel’s representation of Simms concerned a simple uncontested divorce, which did not involve any custody issues and which consequently had nothing to do with Victim, with Petitioner, or with any matter relevant to the State’s case against Petitioner. Based on these facts, the PCR court correctly found Trial Counsel did not “actively represent conflicting interests” because Trial Counsel owed no duty to Simms that could have negatively affected his representation of Petitioner. *See Gonzales*, 419 S.C. at 10, 795 S.E.2d at 839. Because the PCR court’s finding was based on evidence of probative value, it must be upheld pursuant to this Court’s deferential standard of review for PCR cases. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527.

Petitioner argues Trial Counsel still had a duty of confidentiality toward Simms, which adversely affected his performance by preventing him from adequately cross-examining her.

Petitioner claims his main defense at trial was that Victim mistakenly accused him of sexual abuse that was actually committed by Christopher Thompson. He argues Trial Counsel could not pursue that defense because his ongoing duty of confidentiality made him cut short his questioning of Simms after he realized Simms was his former client. This argument is conclusively refuted by the trial transcript. Even after Simms told Trial Counsel that he had represented her in her divorce from Christopher Thompson, Trial Counsel continued asking Simms whether she had ever accused Thompson of molesting her children, and Simms clearly replied she had not. (App.p.127, line 5–p.128, line 14). Evidently, Trial Counsel did *not* believe his questioning of Simms on this point violated the duty of confidentiality. This fact accords with Trial Counsel’s testimony at the PCR hearing that his earlier representation of Simms did not concern any issues related to Thompson’s custody of Simms’ children. Even assuming, *arguendo*, that Trial Counsel did have an ongoing duty of confidentiality toward Simms, such a duty clearly did not prevent him from trying to advance Petitioner’s defense theory. Therefore, the PCR court correctly found Petitioner failed to show that an actual conflict of interest adversely affected Trial Counsel’s performance. *See Gonzales*, 419 S.C. at 10, 795 S.E.2d at 839. Consequently, the presumption of prejudice articulated in *Gonzales* does not apply.¹

¹ In addition, cases like *Gonzales*, *Lomax*, and *State v. Gregory*, 364 S.C. 150, 612 S.E.2d 449 (2005), in which the South Carolina Supreme Court held prejudice must be presumed due to a conflict of interest, concerned “multiple concurrent representation,” i.e., the simultaneous representation of multiple clients during the same proceeding. Petitioner’s case, by contrast, concerns “successive representation,” i.e., representation of a client at a proceeding involving a previous client. The Supreme Court of the United States has recognized this distinction and has never extended the presumption of prejudice to cases of successive representation. *See Mickens v. Taylor*, 535 U.S. 162, 175–76 (2002) (declining to address whether the presumption of prejudice for cases involving multiple concurrent representation, where prejudice is highly probable and difficult to prove, should extend to cases involving successive representation, which do not present comparable difficulties). Therefore, even if Petitioner’s case involved an

In the absence of a presumption of prejudice, Petitioner must show, by a preponderance of the evidence, that the results of his trial would likely have been different but for Trial Counsel's alleged deficiencies. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Petitioner introduced no evidence to support his contention that, had Trial Counsel more thoroughly cross-examined Simms, Simms would have changed her testimony and accused Thompson of molesting Victim. *See Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 280 (2019) (holding mere speculation as to what a witness's testimony would have been cannot satisfy a PCR applicant's burden of showing prejudice). Therefore, because no actual conflict of interest justified a presumption of prejudice in this case, the PCR court correctly found Petitioner failed to meet his burden. This Court, therefore, should deny Petitioner's petition for a writ of certiorari as to this issue.

II. The PCR 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.

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). A solicitor may argue the credibility of the State's witnesses if the argument is based on the record or its reasonable

actual conflict of interest adversely affecting Trial Counsel's performance, it is not clear that Petitioner should be excused from making the traditional *Strickland* showing of prejudice.

inferences; however, 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). Improper comments do not automatically require reversal; an applicant must prove the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

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. 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. Therefore, the solicitor's comments did not constitute improper vouching, and Trial Counsel was not deficient for failing to object to them. *See id.*

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 deny Petitioner’s petition for a writ of certiorari as to this issue.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari.

Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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_____, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Newberry County

Honorable J. Mark Hayes, II, Circuit Court Judge

CARROL TREMAYNE WASHINGTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000754

BRIEF OF PETITIONER

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ISSUE PRESENTED

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?

STATEMENT OF THE CASE

A Newberry County grand jury indicted Petitioner on October 9, 2015 for first degree criminal sexual conduct (CSC) with a minor. App. 526-527. His case was called to trial on February 29, 2016 before the Honorable Donald B. Hocker, and a jury. Assistant Solicitors Dale Scott and Taylor Daniel represented the state. Charles Verner represented Petitioner. App. 1. On March 2, 2016, the jury found Petitioner guilty. App. 370, I. 19 – 371, I. 5. He was sentenced to the mandatory minimum of twenty-five years' imprisonment. App. 378, II. 16-22.

The Court of Appeals dismissed Petitioner's appeal after a review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Washington, 2018-UP-241 (S.C. Ct. App. filed June 13, 2018); App. 399-400.

On September 10, 2018, Petitioner filed an application for post-conviction relief (PCR) raising the claim argued in this brief. App. 401-419. The state filed a return to this application dated December 14, 2018. App. 423-429. With the assistance of counsel, Petitioner filed an amended application on January 8, 2021 again raising the claim argued in this brief. App. 431-434. An evidentiary hearing was held on January 27, 2021 before the Honorable J. Mark Hayes, II. App. 435. Brianna Schill represented the state. Ashley McMahan represented Petitioner.

By order filed June 21, 2021, the PCR court denied Petitioner relief. App. 505-525. On February 22, 2022, Petitioner filed a petition for writ of certiorari with the Supreme Court. The state filed a return to this petition on May 25, 2022. By order filed June 14, 2022, the Supreme Court transferred the appeal to this Court pursuant to Rule 243(1), SCACR. This Court granted the petition for writ of certiorari as to Petitioner's Question 2, but denied certiorari as to Question 1 by order filed April 5, 2024.

This brief of petitioner follows.

STATEMENT OF FACTS

Minor's grandmother lived in an apartment complex in Whitmire, South Carolina. Minor, who was ten years old at the time of trial, and her two sisters would frequently visit their grandmother on the weekends and during the summer months. App. 98, l. 2 – 99, l. 23. Petitioner lived in the same apartment complex as Minor's grandmother with his girlfriend, Tonya, and his girlfriend's ten year old son. App. 100, l. 11 – 102, l. 14; App. 290, l. 25 – 291, l. 5. Tonya and Minor's mother are second cousins. App. 100, ll. 11-18; App. 121, ll. 15-20.

Minor, her sisters, and several other neighborhood kids would often play at Tonya and Petitioner's apartment. App. 298, l. 24 – 299, l. 23. The children loved to play at the couple's apartment largely because the family had a Wii U, a videogame console. App. 202, ll. 8-25; App. 275, ll. 3-11. When the neighborhood children came over, including Minor, they would be "in and out playing" all day long. App. 277, ll. 12-16. Tonya, Minor's grandmother, and other neighbors would sit out on the porch and socialize while the children played. App. 278, l. 19 – 279, l. 12. Sometimes the children were inside playing videogames or dancing and other times they were outside playing baseball, basketball, football, and other sports. App. 277, ll. 22-24; App. 301, ll. 22-25.

Petitioner worked odd hours during the day, but if he was home, he was usually upstairs in a spare bedroom playing on his Xbox, another videogame console. App. 286, ll. 4-20; App. 287, ll. 24-25. Petitioner loves children and would occasionally play with the children when he was not working or playing on his Xbox. App. 280, ll. 5-6.

Minor claimed that when she was eight years old, while the children were playing hide and seek inside Tonya and Petitioner's apartment, Petitioner "took [her] to the bathroom" and "touched [her] heinie . . . under [her] pants." App. 203, l. 8 – 204, l. 17. Minor was very hesitant

and wavered regarding whether Petitioner touched her on the “outside” or “inside” of her “heinie.” The following exchange took place between Minor and the assistant solicitor:

Q: When he touched your heinie did he touch the outside of it.

A: Yes.

Q: Did he touch any other part of it?

A: *Now that I think about it, no.*

Q: No? [Minor] what was - - where did he touch your heinie?

A: In the - - inside of my pants.

Q: Inside of your pants, okay. Once he touched the inside under your pants what part of your heinie did he touch was the question.

A: Mostly the outside.

Q: Mostly? What was the other part that he touched?

A: Once he did it - - I felt pressure on my heinie, so *I thought the inside.*

Q: Did it feel like he touched the inside?

A: Yes.

App. 205, ll. 5-21 (emphasis added).

Minor later claimed that when Petitioner touched her it felt “hard” and “weird” and “cold.” App. 205, l. 24 – 207, l. 1. The solicitor then asked Minor the following leading question, “How many times did that happen where he put his hand on the inside of your heinie?” Minor responded “I think twice.” App. 207, ll. 9-14. However, Minor said she “kind of like forgot” how old she was when the second time happened, but then later claimed the “second time was like one month before I turned nine.” App. 207, l. 19 – 208, l. 208, l. 6.

Minor alleged that the second time happened in Tonya and Petitioner's upstairs bedroom while the other children were "mostly downstairs." She said another neighborhood child came into the bedroom before "it happened" to ask Minor a question and then after she left Petitioner "forced [her] to pull [her] pants down." App. 208, l. 7 – 209, l. 6; App. 212, l. 13 – 213, l. 2. However, Minor claimed on this occasion Petitioner "was just looking at [her]." App. 213, ll. 5-8.

Lastly, Minor explained a third occasion when Petitioner allegedly touched her "inappropriately." She claimed that while the other children were outside playing, she was inside with Petitioner who did "a hand movement that he does a lot." She said he was "pulling on . . . his pants" and she thought it meant he wanted her to pull her pants down. She was "terrified" but did not pull her pants down and nothing happened because by then she was "not that afraid to say no." App. 215, l. 5 – 218, l. 21.

Despite claiming Petitioner touched on her two occasions, Minor could not describe the second occasion and admitted she was "[k]ind of rusty on it." App. 219, l. 3 – 221, l. 21. She later contradicted herself and said Petitioner only touched her one time. App. 221, ll. 17-21.

Petitioner testified in his defense. He adamantly denied the allegations and firmly stated that he never touched Minor improperly. App. 311, ll. 13-24. He also said he was never alone with Minor in his apartment and that there were always children and adults in and out of the house. App. 309, l. 7 – 310, l. 10.

Tonya, Petitioner's girlfriend, also testified. She said she never witnessed any sort of "inappropriate behavior" between Petitioner and the neighborhood children who frequently came to visit and play. App. 280, ll. 13-19; App. 284, ll. 20-22; App. 288, ll. 11-12. She also testified

that even after these allegations surfaced, the other neighborhood kids still came over to play at her apartment. App. 281, l. 18 – 282, l. 4.

The Solicitor's Closing Argument

During his closing argument, the assistant solicitor improperly vouched for Minor's credibility.¹ App. 349, ll. 3-17. The solicitor exclaimed:

This [Minor's] story has been consistent from the very get go from the initial allegation to the times - - you all [are] going 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 its 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.

...

Is that something that you think the average nine, 10-year-old is capable of doing, coming in here and swearing on the Bible telling that story like that in front of you all. In front of everyone here. In front of that judge. **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.** And they tried to crack her under pressure. They have cross-examination at one of their - - 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. 349, ll. 3-17 (emphasis added); App. 354, ll. 10-23 (emphasis added).

¹ The solicitor also repeatedly argued in his opening statement and closing argument that under South Carolina law Minor's testimony does not need to be corroborated. App. 90, ll. 12-21; App. 351, ll. 8-19. The court likewise charged the jury "that the testimony of the victim need not be corroborated in prosecutions under Section 16-3-655 Code of Laws for South Carolina." App. 366, ll. 15-18. Trial counsel did not object to the solicitor's arguments or the court's erroneous charge. See State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (holding that instructing the jury that the victim's testimony need not be corroborated by additional evidence or testimony pursuant to S.C. Code Ann. § 16-3-657 is an impermissible charge on the facts and, therefore, unconstitutional).

Trial counsel did not object to the solicitor's closing argument.

PCR Proceedings

Charles Verner, Petitioner's trial counsel, testified at the evidentiary hearing that he reviewed the assistant solicitor's closing argument and, while the solicitor made "aggressive prosecutorial statements," he did not believe the statements "individually and collectively . . . crossed the line." App. 473, l. 14 – 474, l. 17. When specifically asked about the solicitor's argument in which he addressed Minor's credibility, Verner maintained he "looked at those statements" and did not believe the solicitor improperly vouched for Minor's credibility. He testified that he interpreted the solicitor's statements as "saying that children can be credible witnesses." He maintained the solicitor "did not say anything like we have, I have examined this child's story and it is correct or he is not arguing that he has vouched for or corroborated the statements of the victim. So I do not think that he is bolstering or corroborating the victim witness's testimony." App. 484, l. 16 – 485, l. 20. Accordingly, trial counsel did not object to the solicitor's argument.

The PCR court found the assistant solicitor did not improperly vouch for Minor's credibility during his closing argument. Accordingly, the court concluded trial counsel was not deficient for failing to object. While the court acknowledged the solicitor stated, "I submit to you she [Minor] was wholly credible," it maintained "the solicitor made no personal assurances as to the witness's credibility, nor did he directly or indirectly refer to any information outside of the record." App. 521. Finally, the court found Petitioner failed to prove he was prejudiced by counsel's failure to object to the solicitor's closing argument because the solicitor's statements did not so "infect the trial with unfairness as to make his [Petitioner's] conviction a denial of due process." App. 521.

STANDARD OF REVIEW

The standard of review in post-conviction relief (PCR) cases depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). The Court reviews questions of law de novo, with no deference to trial courts. Id. at 180-181, 810 S.E.2d at 839-840 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527).

ARGUMENT

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.

Introduction

Petitioner's case was a "he said, she said" credibility battle. App. 89, ll. 11-13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. There was no physical evidence of abuse, no confession of guilt, and no eyewitness testimony alleging to have seen Petitioner assault Minor. App. 478, l. 12 – 479, l. 1. Accordingly, the credibility of the witnesses was paramount. In an effort to tip the scales in the state's favor, the solicitor made comments in his closing argument regarding the truthfulness of Minor and his personal belief that Minor was telling the truth. Those comments could only be reasonably interpreted as improper vouching of Minor's testimony.

The solicitor's closing argument excessively leaned on Minor's testimony. App. 343, l. 25 – 344, l. 15; App. 346, ll. 21-23; App. 347, ll. 8-9; App. 349, ll. 8-13; App. 354, l. 14 – 354, l. 23; App. 356, ll. 2-7. The solicitor began his closing by imploring the jury to be a champion for Minor who was a "voice that cried out from the dark begging to be heard, to be believed." App. 343, l. 25 – 344, l. 4. He continued, "Will you believe the soft voice of the meek whose message rings out the loudest, or are you going to believe the voice of the taker? The taker who has taken away so much from [Minor]?" App. 344, ll. 11-14.

That colorful language was just the setup, unfortunately, for the egregious vouching statements that came next. The solicitor repeatedly insinuated that Minor, like all "eight, nine,

10-year-olds,” was *physically incapable of lying*. App. 346, ll. 21-23; App. 349, ll. 8-13. Then he went so far as to explicitly tell the jury he believed Minor’s testimony. The solicitor declared, “I submit to you [Minor] 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. 354, ll. 14-18. (emphasis added). He then reiterated, “A child will fold under a cross-examination because *they’re not capable of lying to that degree*.” App. 354, ll. 21-23 (emphasis added). Trial counsel failed to object because he did not see any comments that “crossed the line.” App. 473, l. 14 – 474, l. 17.

The trial court’s jury instruction did not cure counsel’s failure to object, nor did it cure the resulting prejudice because the charge failed to explicitly instruct the jurors that they were the sole arbiters of credibility.² The closest the trial court came to informing the jurors they were the sole arbiters of credibility was when it said, “as jurors it is your duty to determine the affect, value, weight and truth of the evidence presented during this trial.” App. 358, l. 5 – 359, l. 16. The court reiterated that same sentiment when it said it was the jury’s duty to analyze and evaluate evidence and determine which evidence convinces them of its truth. App. 362, ll. 4-19.

The instruction did not tell the jury to ignore the attorneys’ opinions regarding the credibility of witnesses. The trial court also failed to explicitly inform the jury that arguments of counsel were not evidence. Consequently, even when the trial court informed the jurors that it was their duty to judge the credibility of the witnesses and evidence, the solicitor’s comments that Minor was literally incapable of lying had a reasonable likelihood of affecting the jury’s credibility determinations, and thus, the outcome of Petitioner’s trial. App. 346, ll. 21-23; App. 349, l. 8; App. 354, ll. 10-18. Accordingly, trial counsel’s failure to object to the improper

² In contrast, the court did specifically tell the jury it was the exclusive judge of the “facts.” App. 358, l. 5 – 359, l. 16.

vouching by the solicitor was ineffective assistance of counsel that prejudiced Petitioner in this “he said, she said” case.

Discussion

Petitioner’s case was a credibility battle between Minor and Petitioner. App. 89, ll. 11-13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. Trial counsel’s failure to object to the solicitor’s improper vouching of Minor constituted deficient performance that prejudiced Petitioner because the solicitor’s comments improperly bolstered the key witness’s testimony in a case where there was no physical evidence of abuse, no eyewitnesses, and no instruction by the trial court that the jury was the sole arbiter of witness credibility. See State v. Reyes, 432 S.C. 394, 408-09, 853 S.E.2d 334, 342 (2020) (holding the trial court cured a solicitor’s improper bolstering questions with instructions to the jury that it was the sole arbiter of witness credibility).

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove “that counsel’s performance was deficient” and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability

sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

Generally, “the assessment of witness credibility is within the exclusive province of the jury.” State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). The closing argument of a solicitor, “must be carefully tailored so as not to appeal to the personal biases of the jury.” Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007) (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). The argument “must be confined to evidence in the record and the reasonable inference that may be drawn from the evidence.” Id. at 522-23, 654 S.E.2d at 531. Although a solicitor may argue the credibility of a witness based on the record and its reasonable inferences, a solicitor may not vouch for the credibility of a prosecution 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).

“It is inappropriate for the State to assure the jury of a witness’ credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record.” Id. Generally, “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.” Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The question for a reviewing court is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). A reviewing court examines the impropriety of the

prosecutor's closing argument in the context of the entire record. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2003), our Supreme Court held Gilchrist's counsel was ineffective for failing to object to the solicitor's opening statement where he informed the jury that the state's key witness had a "clean" soul, meaning he was worthy of belief. The Court held the solicitor's statement was a personal assurance of the witness's veracity, and trial counsel should have objected. Id. Further, the Court held counsel's error prejudiced Gilchrist because the witness was the prosecution's "key witness" and his "credibility was crucial to the government's case." Id. at 228, 565 S.E.2d at 285.

Our Supreme Court defined when a solicitor vouches for the credibility of a witness in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), *rev'd on other grounds*, Kelly v. State, 534 U.S. 246 (2002):

Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor's vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence is not presented to the jury but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 368-69, 540 S.E.2d at 860 (quoting United States v. Walker, 155 F.3d 180 (3d Cir. 1998)).

See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001), *cert. denied*, 534 U.S. 977 (2001) ("A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a

witness' veracity . . . ") (internal citations omitted). Accordingly, "because a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility." Gilchrist, 350 S.C. at 227, 565 S.E.2d at 285 (2002) (quoting Kelly, 343 S.C. at 369, 540 S.E.2d at 861).

In this case, trial counsel provided deficient performance when he failed to object to the solicitor's numerous statements during closing argument that vouched for Minor's credibility and truthfulness. See App. 343, l. 25 – 344, l. 15; App. 346, ll. 21-23; App. 347, ll. 8-9; App. 349, ll. 8-13; App. 354, ll. 14-354, l. 23; App. 356, ll. 2-7. Trial counsel stated that he did not object because, in trial counsel's mind, none of the solicitor's comments "crossed the line." App. 473, l. 14 – 475, l. 17. However, the record clearly showed the solicitor violated the holdings of Matthews and Gilchrist when he *explicitly assured the jury* that Minor was "wholly credible." App. 354, ll. 10-18. Even more egregious, the solicitor used first person pronouns when declaring Minor was "wholly credible" and claimed that Minor was incapable of lying. Those comments were exactly the kind that South Carolina courts have held to be improper. See Smith v. State, 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007), *abrogated by* Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (discouraging use of the pronoun "I" in closing argument).

As to prejudice, trial counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 692. When the solicitor told the jury that in his opinion Minor was "wholly credible," he improperly expressed his personal opinion regarding the complaining witness's truthfulness. See Gilchrist, at 227, 565 S.E. 2d at 285 (2002). The solicitor's opinion carried with it "the imprimatur of the Government" and induced the jury to trust his judgment rather than its own view of the evidence. See Kelly, 343 S.C. at 368, 540 S.E.2d at 860. The vouching in this case was

particularly harmful because the solicitor knew the case would turn on whether or not the jury believed Minor's testimony and he improperly told the jury during closing that Minor was incapable of lying.

The trial court was unable to cure the prejudice created by the solicitor's improper vouching because trial counsel failed to object and request the trial court issue a curative instruction. *Cf. Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997) (finding a solicitor's improper comments may be cured by the judge's instructions to the jury). As a result, the solicitor's improper comments during the state's closing argument, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Vaughn*, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)).

The trial court's jury instruction did not cure the prejudice in this case because the jury was not informed that it was the "sole arbiter" of witness credibility. *Cf. State v. Reyes*, 432 S.C. 394, 408-09, 853 S.E.2d 334, 342 (holding that the solicitor's improper vouching was harmless because the trial court instructed the jury that it was the sole arbiter of witness credibility). Moreover, this was case distinguishable from *Reyes* in two more key aspects. The impropriety here was far more egregious.³ App. 354, ll. 10-18; App. 349, l. 8; App. 354, ll. 21-23. The solicitor in this case explicitly assured the jury that Minor was "wholly credible" and incapable of lying, whereas in *Reyes* the solicitor simply asked the minor witness during direct examination if she knew to tell the truth while testifying. App. 354, ll. 10-18; *Reyes*, 432 S.C. at 399-400, 853 S.E.2d at 337. In this case, there was also no physical evidence of guilt, whereas in *Reyes*, the six-year-old complainant and Reyes both tested positive for herpes simplex virus type one. *Reyes*, 432 S.C. at 401, 853

³ The solicitor also arguably made a "golden rule argument" at closing. *See* App. 347, ll. 8-9. While he did not explicitly tell the jury to put themselves in Minor's shoes, he did implicitly invite them to do so when he stated, "I can't imagine being in [Minor's] shoes." *See State v. Harris*, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009).

S.E.2d at 337. Therefore, the jury instruction from the trial court given here did not cure the prejudice from the improper vouching as it did in the close call three-to-two decision in Reyes. Reyes, at 409, 853 S.E.2d at 342.

In Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016), our Supreme Court held that trial counsel was ineffective for failing to object during the solicitor's closing argument where she improperly vouched for the credibility of the minor witness because her comments amounted to her telling the jury that she believed the minor's version of events. The Court determined that Tappeiner was prejudiced by his trial counsel's deficient performance because the dearth of direct or circumstantial evidence, outside of the minor's allegation, meant that the evidence of Tappeiner's guilt was not overwhelming. Id. at 253, 785 S.E.2d at 478. Accordingly, there was a reasonable probability that but for the solicitor's improper vouching the outcome of Tappeiner's trial would have been different. Id. at 250, 785 S.E.2d at 476.

Here, the solicitor invaded the province of the jury and usurped its fact finding function when he asserted that the state's key witness was incapable of lying and "wholly credible." App. 354, ll. 10-18. That invasion into the jury's province was improper because "the jury is charged with assessing the credibility of witnesses." Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

As in Tappeiner, the evidence of Petitioner's guilt in this case was not overwhelming. Trial counsel admitted at the PCR hearing that the case was largely a "he said, she said" matter. App. 89, ll. 11-13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. Since there was no physical evidence of guilt nor any eyewitness testimony, the case came down to a credibility battle between Minor and Petitioner. Consequently, trial counsel's ineffective

assistance in failing to object to the solicitor's improper vouching of the state's key witness prejudiced Petitioner.

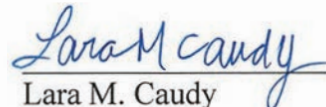
In conclusion, the PCR court erred when it found trial counsel's failure to object to the solicitor's improper vouching of the state's key witness was not deficient performance and did not prejudice Petitioner. App. 518-521. Counsel's deficient performance created "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688) (internal quotation marks omitted).

Respectfully, this Court should reverse Petitioner's conviction and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of June, 2024.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Newberry County

Honorable J. Mark Hayes, Circuit Court Judge

CARROL TREMAYNE WASHINGTON,

PETITIONER,

V.

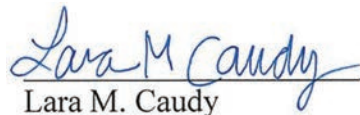
STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2021-000754

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above referenced case has been served upon Zachary W. Jones, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 11th day of June, 2024.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

RECEIVED

Jul 11 2024

SC Court of Appeals

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.

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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), SCRPC; *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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ATTORNEYS FOR RESPONDENT

July 11, 2024

RECEIVED

Jul 11 2024

SC Court of Appeals

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,

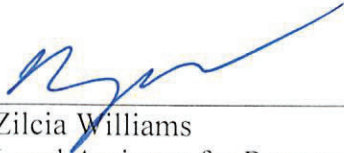
Respondent.

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.



Zilcia Williams
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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Carrol Tremayne Washington, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2021-000754

ON WRIT OF CERTIORARI

Appeal from Newberry County
J. Mark Hayes, II, Post-Conviction Relief Judge

Opinion No. 6095
Heard November 12, 2024 – Filed January 15, 2025

REVERSED

Appellate Defender Lara Mary Caudy, of Columbia, for
Petitioner.

Assistant Attorney General Zachary William Jones, of
Columbia, for Respondent.

GEATHERS, J.: In this post-conviction relief (PCR) action, Petitioner Carrol Tremayne Washington assigns error to the PCR court's dismissal of his PCR application, wherein he alleged ineffective assistance of counsel because trial counsel failed to object to the State's closing argument that improperly vouched for the complaining witness. We reverse.

FACTS/PROCEDURAL HISTORY

In March 2016, a jury found Washington guilty of one count of first-degree criminal sexual conduct (CSC) with a minor,¹ and he was sentenced to twenty-five years' imprisonment.

A year earlier, in March 2015, the minor victim (Victim) disclosed to her mother (Mother), Nicole Simms, that "Man" took her into a bathroom during a game of hide and seek and digitally penetrated her anus. Washington's nickname is "Man." Victim was eight-years-old at the time of the alleged abuse.² Shortly after Victim's disclosure, Mother contacted law enforcement to alert them of the allegations. Investigator Brad Epps of the Newberry Sheriff's Office presented Victim with a photo lineup, and she identified Washington as the person who molested her.

Victim alleged the abuse occurred when she was visiting her grandmother (Grandmother), Ethyl Simms, at her apartment in the Whitmore Apartments complex. While visiting Grandmother, Victim, along with many other children in the area, would often play in Tonya Dawkins's apartment in the same complex. Dawkins, Mother's second cousin, lived with her son and her boyfriend, Washington. The alleged abuse occurred in Dawkins's and Washington's apartment.

At trial, Mother testified about Victim and her disclosure, and Grandmother testified about Victim's visits to her home. Mother testified that in spring 2014, Victim began to refuse to go to Grandmother's home and to have behavioral problems like crying and acting up in school. Investigator Epps testified about Mother's report of abuse and Victim's selection of Washington's photo in the lineup. S.B., a minor who also played in Dawkins's apartment, testified that she saw Victim and Washington in the bathroom together during a game of hide and seek.³ Trina

¹ "A person is guilty of [CSC] with a minor in the first degree if . . . the actor engages in sexual battery with a victim who is less than eleven years of age . . ." S.C. Code Ann. § 16-3-655(A)(1) (2015). "'Sexual battery' means . . . any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2015).

² Victim also alleged two other occasions in which Washington acted in an inappropriate manner but did not touch her. Washington was not indicted for anything related to these two occasions.

³ S.B. did not specify when she witnessed this interaction.

Elfering, who conducted Victim's forensic interview, testified Victim identified her buttocks as the area where Washington touched her.

Candice Hopkins, who knew Washington and Victim, testified her children would often go to Dawkins's apartment. Hopkins stated that after she questioned her children, none made any allegations against Washington and that Washington had a positive reputation. Hopkins also testified that she had known Mother for many years and that Mother had a reputation for being a "fabricator."⁴ On cross-examination, Hopkins admitted she had a prior conviction for giving false information. Dawkins testified that she had never heard about or seen Washington acting inappropriately with any child and that neighborhood children still often came over to her apartment, even after neighbors became aware of Victim's allegations. Finally, Washington testified he never inappropriately touched Victim and had never been alone with Victim.

During closing arguments, the State argued,

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.

(emphases added).

In giving the jury instructions, the trial court provided,

You are to consider only the testimony which has been presented from this witness stand, any exhibits which have been made a part of the record in this case and any stipulations of counsel. . . . As I also told you, in every . . . case tried in this [c]ourt before a jury, the jury becomes the sole and exclusive judge of the facts in this

⁴ This testimony was not corroborated.

case. . . . As jurors it is your duty to determine the [e]ffect, value, weight and truth of the evidence presented during this trial. . . . Necessarily, you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.

The trial court also informed the jury of the special considerations when reviewing the credibility of a child witness (e.g., age of child, ability of child to observe and remember facts, child's ability to understand and answer questions, whether child can understand the difference between lying and telling the truth).⁵ The jury deliberated for an hour and twenty minutes, returning a verdict of guilty. Washington appealed his conviction, and this court dismissed the appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967).

Washington timely filed a PCR application alleging, among other things, that trial counsel provided ineffective assistance by failing to object to the State's improper vouching when addressing Victim's credibility during its closing arguments. During the PCR hearing, trial counsel testified that he did not object to the solicitor's statements because "I did not see . . . where any of the statements individually are clearly improper[,] and I did not see collectively where they crossed the line either." Trial counsel further stated, "[I]t is my opinion that the [State] [was] not vouching for the credibility of the witness."

The PCR court dismissed Washington's PCR application. The court first found the statements did not amount to improper vouching and thus trial counsel's performance was not deficient, reasoning "the solicitor used the evidence and record to attempt to counter the defense's theory that the [V]ictim either misremembered the incident or was coached into making the allegation." The PCR court further reasoned, "Although the solicitor state[d] at one point, 'I submit to you [Victim] was

⁵ The trial court also charged the jury with language from section 16-3-657 of the South Carolina Code (2015)—"The testimony of the victim need not be corroborated in [CSC] prosecutions." Two months after this trial concluded, our supreme court overruled its precedent and held that it is impermissible to use section 16-3-657 as a jury charge. *State v. Stukes*, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) ("Based on the foregoing, we overrule our precedent to the extent it condones the use of section 16-3-657 as a jury charge."). However, this instruction complied with the law at the time.

wholly credible,' the solicitor made no personal assurances as to the witness's credibility, nor did he directly or indirectly refer to any information outside of the record." The PCR court additionally found Washington failed to prove the comments prejudiced him because he did not show "the comment infected the trial with unfairness as to make his conviction a denial of due process." This appeal followed.

ISSUE ON APPEAL

Did the PCR court err in finding trial counsel provided effective assistance despite failing to object to the solicitor's improper vouching of the minor witness during the State's closing argument?

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). "However, [we] will reverse the [PCR] court's decision if it is controlled by an error of law." *Milledge v. State*, 422 S.C. 366, 374, 811 S.E.2d 796, 800 (2018). "We review questions of law de novo, with no deference to trial courts." *Smalls*, 422 S.C. at 180–81, 810 S.E.2d at 839.

LAW/ANALYSIS

To prevail in an ineffective assistance of counsel claim, PCR applicants must show "(1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." *Speaks v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). Deficiency "is measured by an objective standard of reasonableness." *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 102 (2013). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). A PCR applicant establishes prejudice by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* at 697. "In determining whether [a PCR] applicant has proven prejudice, the PCR court should consider

the specific impact counsel's error had on the outcome of the trial." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843.

During closing argument, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Smith v. State*, 375 S.C. 507, 523, 654 S.E.2d 523, 531–32 (2007) (citation omitted) (quoting *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004)), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 n.2 (2018). However, "[a] solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." *Smith v. State*, 375 S.C. at 522–23, 654 S.E.2d at 531.

Additionally, "[i]t is improper for a judge or a prosecutor to bolster a witness's credibility by stating to the jury his or her view that the witness is likely being truthful." *State v. Reyes*, 432 S.C. 394, 401, 853 S.E.2d 334, 338 (2020). "Credibility is a determination for the jury." *Id.* at 404, 853 S.E.2d at 339. Moreover, "[a] solicitor may not vouch for the credibility of a State's 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). "A prosecutor improperly vouches for a witness'[s] 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." *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004). "In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine 'whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"" *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (quoting *Vaughn*, 362 S.C. at 169–70, 607 S.E.2d at 75)).

We hold the PCR court erred in finding trial counsel was not deficient by failing to object to the State's closing argument because the State improperly vouched for Victim's credibility. Trial counsel testified at the PCR hearing that he did not object to the comments because he did not believe the comments amounted to vouching for Victim. Though this court does not seek to second-guess the reasonable decisions of trial counsel, trial counsel still must articulate a *valid* strategy for his decisions. *See Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) ("[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." (emphasis added)). "[C]ounsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Matthews*, 350 S.C. at 276, 565 S.E.2d at 768.

The State's comments were clearly improper vouching. The State stated, "I submit to you [Victim] was wholly credible" followed by assurances that all children of Victim's age are not capable of lying and that children would "fold" under cross-examination if they were lying. The State's assurances were broad, unsubstantiated claims unrelated to anything raised during the trial. *See Matthews*, 350 S.C. at 276, 565 S.E.2d at 768 ("A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record."). Although Victim's credibility and the possibility that her allegation was false certainly were at issue, the State did not confine its statements to the consistency of Victim's testimony or a characterization of the evidence from trial.⁶ *See Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence."); *State v. Busse*, 439 S.C. 104, 111, 886 S.E.2d 208, 212 (2023) ("[T]he State should not inject the personal views or opinions of its representative as to the credibility of a witness into the jury's thought process."); *see also Matthews*, 350 S.C. at 276–77, 565 S.E.2d at 768 ("The solicitor's summation led the jury to believe the government corroborated the witness'[s] testimony before trial and found it credible. The solicitor did not support this vouching with anything within the record, such as corroboration by other witnesses or physical evidence. The solicitor improperly vouched for the witness.").

Further, the State used first-person language at the start of the comments—"I submit"—that suggested to the jury that the State held the opinion that Victim was telling the truth. *See Busse*, 439 S.C. at 112, 886 S.E.2d at 212 (stressing that "prosecutors must be cautious *how* they use the first person"); *see also Reyes*, 432 S.C. at 405, 853 S.E.2d at 340 (holding questions in which the solicitor used the first-person pronoun "we" when questioning the minor witness about telling the truth

⁶ We note the beginning of the State's statement—"I submit to you [Victim] was wholly credible."—was framed in the past tense. The verb "was" at the beginning of the comment could be read as a reference back to Victim's testimony during the trial. *See State v. Busse*, 439 S.C. 104, 114, 886 S.E.2d 208, 213 (2023) (discussing that when "[v]iewed in the proper context," the solicitor's use of the past tense during the closing arguments "was actually to lead the jury to focus on the evidence presented to them, not to improperly harken back to his unique knowledge of some event or proceeding outside their presence"). However, the context of the State's overall comments make clear the State was not referring only to Victim's testimony. The State followed its statement that Victim was wholly credible with assurances that Victim was not capable of lying at all because children are not capable of lying.

were improper); *State v. Kelly*, 343 S.C. 350, 369 n.12, 540 S.E.2d 851, 860–61 n.12 (2001) (finding a solicitor's questions were improper vouching when the solicitor phrased his questions to the witness in the first person—"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?' (emphases added)), *rev'd and remanded on other grounds*, 534 U.S. 246 (2002). The solicitor's opinion of the witness's credibility "carries with it the imprimatur" of the State and "may induce the jury to trust the [State's] judgment rather than its own view of the evidence." *Busse*, 439 S.C. at 112, 886 S.E.2d at 212 (quoting *Kelly*, 343 S.C. at 369, 540 S.E.2d at 860).

Finally, trial counsel's failure to object was prejudicial because there was no physical evidence of the alleged CSC and the only other evidence in the case required an assessment of the relative credibility of the witnesses. *See Tappeiner*, 416 S.C. at 253, 785 S.E.2d at 478 (holding that because the case was "entirely dependent on a credibility determination" and "[g]iven the dearth of evidence" beyond the victim's allegations, the court could not "say evidence of [the defendant's] guilt was overwhelming"; therefore, "but-for the improper vouching for [the v]ictim's credibility, there is a reasonable likelihood the outcome of the trial would have been different, and [the defendant] was thus prejudiced by trial counsel's failure to object"). Evidence of Washington's guilt was not overwhelming. Other than Victim's and Washington's testimonies, the only evidence presented to the jury was Victim's refusal to go to Grandmother's home, her behavioral problems, and her report of sexual abuse that identified Washington as the perpetrator. There is no physical evidence or corroborating evidence. *Cf. Chappell v. State*, 429 S.C. 68, 78, 81, 837 S.E.2d 496, 501, 503 (Ct. App. 2019) (holding that a blind expert witness's testimony improperly bolstered the minor victim's credibility "when she testified, 'Children don't often lie about sexual abuse incidents,' because a comment on the credibility of a class of persons to which the victim belongs is a comment on the credibility of the victim" and that "our courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant's guilt or relied solely on the victim's testimony to establish the details of the crime"). At most, S.B.'s testimony that she saw Washington and Victim in the bathroom together during a game of hide-and-seek undercut Washington's testimony that he was never alone with Victim. However, S.B. did not see touching of any kind. Thus, in a case that turned on a credibility determination with little circumstantial evidence and no physical evidence, the State's comments granted Victim's testimony the imprimatur of credibility from the State and infected the trial with unfairness such that there was a reasonable probability that the outcome would have been different had trial counsel properly objected to these comments.

We take a moment to address the potential curative effect of the trial court's instructions to the jury that it alone bore the burden of weighing witness credibility and that it must consider only the testimony presented from the witness stand. In *Reyes*, our supreme court held the State's improper bolstering of a minor witness's credibility was cured by the trial court's jury instructions that the jury was responsible for determining credibility and "[c]rucially" that the credibility of a minor witness should be assessed through a "more suspect lens, thus removing any improper influence that arose from the solicitor's questioning." 432 S.C. at 408, 853 S.E.2d at 342. The State's comments in *Reyes* were "fleeting"⁷ and occurred at the

⁷ The exchange in *Reyes* was as follows:

Solicitor: Okay. Do you know that while you're here, *we* only talk about things that are the truth?

Minor: Yeah.

Defense: Your Honor, just for the record, I want to preserve my objection.

Trial Court: All right. As to the bolstering. Yeah, I think that the person can testify on their own behalf, just not another party.

Solicitor: Minor, do you know the difference between the truth and a lie?

Minor: (Nods head.)

...

Solicitor: Okay. So you understand that when *we're* in here, *we're* going to talk about the truth. Do you understand that?

...

Minor: Yes.

start of the minor witness's testimony. *Id.* at 407, 853 S.E.2d at 341. Also, in *Reyes*, defense counsel contemporaneously objected to the questioning as bolstering. *Id.* at 400, 853 S.E.2d at 337.

Here, the jury instructions cannot cure the improper vouching by the State. First, the comments were extensive, and they posited not only that Victim was credible, but also that it was impossible for her to be untruthful. Unlike in *Reyes*, this vouching was not fleeting and it occurred during the summation of the case. Even though the crucial instruction in *Reyes*—to view Victim's testimony through a more suspect lens due to her minor status—was given here, it did little to cure the improper vouching because the vouching did not happen during Victim's testimony. Second, trial counsel did not object *at all*. We have difficulty imagining how jury instructions could be curative when the jury was never made aware of the improper vouching. See *Tappeiner*, 416 S.C. at 251, 785 S.E.2d at 477 ("In assessing the propriety of remarks made during the State's closing argument, appellate courts must determine 'whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."' (quoting *Vaughn*, 362 S.C. at 169–70, 607 S.E.2d at 75)); *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* to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction." (emphasis added)).

CONCLUSION

For the foregoing reasons, the PCR court's order dismissing Washington's PCR application is

REVERSED.

KONDUROS and MCDONALD, JJ., concur.

Solicitor: Okay. Judge, at this time, I would move her as qualified to testify.

Reyes, 432 S.C. at 400, 853 S.E.2d at 337 (omissions in original).

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 committed 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,”

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

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.

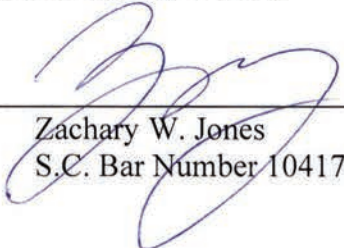
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January 30, 2025

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.



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The South Carolina Court of Appeals

Carrol Tremayne Washington, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2021-000754

ORDER

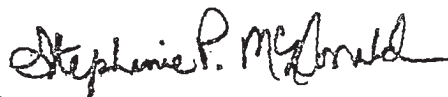
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:
Zachary William Jones, Esquire
Lara Mary Caudy, Esquire
The Honorable J. Mark Hayes, II

FILED
Feb 19 2025
