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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Newberry County
Honorable J. Mark Hayes, Circuit Court Judge

Opinion No. 6095 (S.C. Ct. App. Filed January 15, 2025)

Lower Court Case No. 2018-CP-36-00414

CARROL TREMAYNE WASHINGTON,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPELLATE CASE NO. 2025-000559

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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QUESTION PRESENTED

Whether the Court of Appeals correctly held trial counsel was deficient for failing to object to the state's closing argument because the state improperly vouched for the minor witness; Respondent was prejudiced because there was no physical or corroborating evidence and the case was dependent on a credibility determination; and the jury instructions did the cure the improper vouching because the state's comments were extensive, occurred during the summation of the case, and the jury was never made aware of the improper vouching because counsel did not object?

STATEMENT OF THE CASE

A Newberry County grand jury indicted Respondent on October 9, 2015, for first degree criminal sexual conduct with a minor after Minor claimed Respondent sexually assaulted her when she was eight years old. App. 526-527. Respondent's case was called to trial on February 29, 2016, before the Honorable Donald B. Hocker, and a jury. Dale Scott and Taylor Daniel represented the state. Charles Verner represented Respondent. App. 1.

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. Respondent lived in the same apartment complex as Minor's grandmother with his girlfriend, Tonya, and Tonya's ten year old son. Tonya and Minor's mother are second cousins. App. 98, l. 2 – 102, l. 14; App. 121, ll. 15-20; App. 290, l. 25 – 291, l. 5.

Minor, her sisters, and several other neighborhood kids would often play at Tonya and Respondent's apartment. 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. Tonya, Minor's grandmother, and other neighbors would sit out on the porch and socialize while the children played. Sometimes the children were inside playing videogames or dancing and other times they were outside playing baseball, basketball, football, and other sports. App. 277, l. 12 – 279, l. 12; App. 301, ll. 22-25.

Respondent 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, l. 4 –

287, l. 25. Respondent 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 Respondent's apartment, Respondent "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 Respondent 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 Respondent 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 Respondent'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 Respondent "forced [her] to pull [her] pants down." However, Minor claimed on this occasion Respondent "was just looking at [her]." App. 208, l. 7 – 213, l. 8.

Lastly, Minor explained a third occasion when Respondent allegedly touched her "inappropriately." She claimed that while the other children were outside playing, she was inside with Respondent 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 Respondent touched on her two occasions, Minor could not describe the second occasion and admitted she was "kind of rusty on it." She later contradicted herself and said Respondent only touched her one time. App. 219, l. 3 – 221, l. 21.

Respondent testified in his defense. He adamantly denied the allegations and firmly stated he never touched Minor improperly. 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 – 311, l. 24.

Tonya, Respondent's girlfriend, testified that she never witnessed any sort of "inappropriate behavior" between Respondent 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.

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

> 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. 354, ll. 10-23 (emphasis added).

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

On March 2, 2016, the jury found Respondent guilty as indicted. App. 370, l. 19 – 371, l. 5. He was sentenced to the mandatory minimum of twenty-five years' imprisonment. App. 378, ll. 16-22.

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[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. Respondent's 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).

The Court of Appeals dismissed Respondent'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, Respondent filed an application for post-conviction relief (PCR). App. 401-419. The state filed a return to this application dated December 14, 2018. App. 423-429. With the assistance of counsel, Respondent filed an amended application on January 8, 2021. App. 431-434. An evidentiary hearing was held on January 27, 2021, before the Honorable J. Mark Hayes, II. Brianna Schill represented the state. Ashley McMahan represented Respondent. App. 435.

Charles Verner, Respondent's trial counsel, testified at the evidentiary hearing that he reviewed the state's closing argument and, while the solicitor made "aggressive prosecutorial statements," Verner 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. He testified that he interpreted the solicitor's statements as "saying that children can be credible witnesses." Verner 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, Verner did not object to the state's argument.

By order filed June 21, 2021, the PCR court denied Respondent relief. App. 505-525. The court found the state did not improperly vouch for Minor during its 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." Finally, the court found Respondent failed to prove he was prejudiced by counsel's failure to object to the state's closing argument because the solicitor's statements did not so "infect the trial with unfairness as to make his [Respondent's] conviction a denial of due process." App. 521.

On February 22, 2022, Respondent filed a petition for writ of certiorari with this Court. The state filed a return to this petition on May 25, 2022. By order filed June 14, 2022, this Court transferred the appeal to the Court of Appeals pursuant to Rule 243(l), SCACR. The Court of Appeals granted certiorari by order filed April 5, 2024.

After further briefing and oral argument, the Court of Appeals reversed the decision of the PCR court. Washington v. State, Op. No. 6095 (S.C. Ct. App. filed January 15, 2025) (Howard Adv. Sh. No. 3 at 48); Washington v. State, 445 S.C. 233, 911 S.E.2d 536 (Ct. App. 2025). The Court of Appeals held the PCR court erred in finding trial counsel was not deficient for failing to object to the state's closing argument because the state improperly vouched for Minor. Washington, 445 S.C. at 242, 911 S.E.2d at 540. The court determined the state's comments "were clearly improperly vouching." It reasoned that the state did not confine its statements during closing argument to the consistency of Minor's testimony or a characterization of the evidence from trial. Rather, the state made "broad, unsubstantiated claims unrelated to anything raised during the trial." Id. at 242, 911 S.E.2d at 540-41. Specifically, the assistant solicitor "stated, 'I submit to you [Minor] was wholly credible' followed by assurances that all children of [Minor's] age are not capable of lying and that children would 'fold' under cross-examination if they were lying." Id. at 242, 911 S.E.2d at 540.

Moreover, the court emphasized that the state used the first person at the beginning of the comments—"I submit"—which "suggested to the jury that the state held the opinion that [Minor] was telling the truth." Id. at 243, 911 S.E.2d at 541 (citing State v. Busse, 439 S.C. 104, 114, 886 S.E.2d 208, 213 (2023); State v. Reyes, 432 S.C. 394, 405, 853 S.E.2d 334, 340 (2020); and State v. Kelly, 343 S.C. 350, 369 n.12, 540 S.E.2d 851, 860-61 n.12 (2001)).

Finally, the Court of Appeals held "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." Id. at 243-44, 911 S.E.2d at 541 (citing Tappeiner v. State, 416 S.C. 239, 253, 785 S.E.2d 471, 478 (2016)). The court concluded the evidence of Respondent's guilt was not overwhelming. The only evidence presented, besides Minor's and Respondent's testimonies, was Minor's refusal to go to her grandmother's home, her behavioral problems, and her report of sexual abuse that identified Respondent as the perpetrator. Id. at 244, 911 S.E.2d at 541-42 (citing 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 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.")). The court emphasized that S.B. did not see touching of any kind and thus, at most, her testimony that she saw Respondent in the bathroom with Minor during a game of hide and seek undercut Respondent's testimony that he was never alone with Minor. Id. at 244, 911 S.E.2d at 542. Accordingly, the court found the

solicitor's comments granted Minor's testimony the imprimatur of credibility from the state and so infected the trial with unfairness such that there is a reasonable probability the outcome would have been different if trial counsel had properly objected to the solicitor's comments. Id. at 244, 911 S.E.2d at 542.

The Court of Appeals further held 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 evidence presented from the witness stand did not cure the improper vouching by the state. The court reasoned that the state's "comments were extensive, and they posited not only that [Minor] was credible, but also that it was impossible for her to be untruthful." The court distinguished this case from State v. Reyes, 432 S.C. 394, 853 S.E.2d 334 (2020), where this 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 that the credibility of a minor witness should be assessed through a "more suspect lens." The Court of Appeals emphasized that the state's comments in Reyes were "fleeting" and occurred at the start of the minor witness's testimony. Additionally, in Reyes, defense counsel contemporaneously objected to the questioning as bolstering. Id. at 244-45, 911 S.E.2d at 542.

The Court of Appeals held that even though the crucial instruction in Reyes—to view Minor's testimony through a more suspect lens due to her minor status—was given in this case, the instruction did little to cure the improper vouching because the vouching did not happen during Minor's testimony. Id. at 245, 911 S.E.2d at 542. Additionally, Respondent's counsel did not object *at all*. Id. The court stated, "We have difficulty imagining how jury instructions could be curative when the jury was never made aware of the improper vouching." Id. (citing Tappeiner, 416 S.C. at 251, 785 S.E.2d at 477).

On January 30, 2025, the state filed a petition for rehearing with the Court of Appeals. App. 622-637. The Court of Appeals denied the petition for rehearing by order filed February 19, 2025. App. 638. On March 21, 2025, the state filed a petition for writ of certiorari to the Court of Appeals with this Court.

This return follows.

ARGUMENT

The Court of Appeals correctly held trial counsel was deficient for failing to object to the state's closing argument because the state improperly vouched for the minor witness; Respondent was prejudiced because there was no physical or corroborating evidence and the case was dependent on a credibility determination; and the jury instructions did the cure the improper vouching because the state's comments were extensive, occurred during the summation of the case, and the jury was never made aware of the improper vouching because counsel did not object.[2]

Introduction

The state's case against Respondent was entirely dependent on the credibility of Minor. There was no physical or other corroborating evidence. App. 89, ll. 11-13; App. 478, l. 12 – 479, l. 1. Recognizing this, the solicitor made extensive comments during his closing argument regarding Minor's credibility and his personal belief that Minor was telling the truth. The solicitor further assured the jury that Minor was incapable of lying. These comments could only reasonably be interpreted as improper vouching for Minor.

The solicitor began his closing argument 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." 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. 343, l. 25 – 344, l. 14.

This 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,

[2] Petitioner's Issues 1-3 are consolidated in Respondent's return.

10-year-olds," was physically incapable of lying. App. 346, ll. 22-23; App. 349, ll. 8-13. Then he went so far as to explicitly tell the jury that he believed Minor. 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.*" He then reiterated, "A child will fold under a cross-examination because *they're not capable of lying to that degree.*" App. 354, ll. 14-23 (emphasis added). Trial counsel did not object to this improper vouching because he did not believe the comments "crossed the line." App. 473, l. 14 – 474, l. 17.

The Court of Appeals correctly held trial counsel was deficient for failing to object to the state's closing argument because the solicitor's remarks were clearly improper vouching. Respondent was prejudiced by counsel's deficient performance, as the Court of Appeals found, because the case was dependent on Minor's credibility given there was no physical or other corroborating evidence to support Minor's allegations. But for the state's improper vouching, there is a reasonable probability the outcome of Respondent's trial would have been different.

In order to show ineffective assistance of counsel as a ground for relief, an applicant 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. An applicant 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).

"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)). "A solicitor's closing argument 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 inferences that may be drawn from the evidence." Id. at 522-23, 654 S.E.2d at 531 (citing Copeland, 321 S.C. at 324, 468 S.E.2d at, 624). 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).

"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. Zealous advocacy crosses the line and becomes improper vouching, however, when the prosecutor indicates to the jury—even implicitly—that her argument as to the credibility of a witness is based on anything other than the evidence admitted." State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023).

"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." Matthews,

350 S.C. at 276, 565 S.E.2d at 768. "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) (citing State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)).

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), this 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.

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 (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, the Court of Appeals correctly held trial counsel was deficient by failing to object to the solicitor's comments during closing argument that improperly vouched for Minor's credibility. Trial counsel stated he did not object because he did not believe the solicitor's comments "crossed the line" or amounted to vouching. However, counsel did not articulate any valid strategy for not objecting. See Matthews, 350 S.C. at 276, 565 S.E.2d at 768 ("[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."). The record shows the solicitor clearly vouched for Minor when he *explicitly assured the jury* that Minor was "wholly credible." Even more egregious, the solicitor used the first person when declaring Minor was "wholly credible" and claimed Minor was incapable of lying. These comments are 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); State v. Busse, 439 S.C. 104, 112, 886 S.E.2d 208, 212 (2023) (emphasizing that "prosecutors must be cautious *how* they use the first person"); State v. Reyes, 432 S.C. 394, 405, 853 S.E.2d 334, 340 (2020) (holding questions in which the solicitor used the first person pronoun "we" when questioning the minor witness about telling the truth were improper); State v. Kelly, (finding a solicitor's questions were improper vouching when the solicitor phrased his questions to the witness in the first person).

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

In Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016), this Court held trial counsel was deficient for failing to object during the solicitor's closing argument because she improperly vouched for the credibility of the minor witness. The Court concluded the solicitor's comments amounted to her telling the jury that she believed the minor's version of events. The Court determined Tappeiner was prejudiced by counsel's deficient performance because the dearth of evidence, outside of the minor's allegation, meant the evidence of Tappenier's guilt was not overwhelming. Id. at 253, 785 S.E.2d at 478. Accordingly, the Court held there was a reasonable

probability that but for the solicitor's improper vouching, the outcome of Tappenier's trial would have been different. Id. at 250, 785 S.E.2d at 476.

As in Tappeiner, the evidence of Respondent's guilt was not overwhelming. Trial counsel admitted at the PCR hearing that the case was largely a "he said, she said" matter. Since there was no physical evidence or other evidence to corroborate Minor's allegations, the case was dependent on a credibility determination between Minor and Respondent. See Chappell v. State, 429 S.C. 68, 78, 81, 837 S.E.2d 496, 501, 503 (Ct. App. 2019) ("[O]ur 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."). Consequently, trial counsel's deficient performance in failing to object to the solicitor's improper vouching prejudiced Respondent.

The Court of Appeals correctly held 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 court give 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). Moreover, the jury instructions as given did not cure the prejudice. This case is easily distinguishable from Reyes because, as the Court of Appeals recognized, the impropriety here was far more egregious. The solicitor's comments were extensive and 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 "we're going to talk about the truth." Reyes, 432 S.C. at 400, 853 S.E.2d at 337. In this case, as discussed, there was no physical evidence of guilt, whereas in Reyes, the minor and Reyes both tested positive for herpes simplex virus type 1. Id. at 401, 853 S.E.2d at 337. Therefore, the jury instructions given here did not cure the prejudice from the

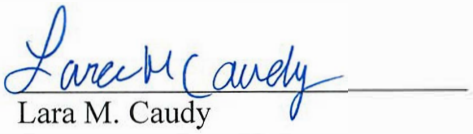
improper vouching as it did in the close call three-to-two decision in Reyes. Id. at 409, 853 S.E.2d at 342.

Accordingly, the PCR court erred when it found trial counsel's failure to object to the solicitor's improper vouching of Minor was not deficient performance and Respondent was not prejudiced. 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 deny the state's petition for writ of certiorari. In the alternative, this Court should affirm the decision of the Court of Appeals.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests this Court deny the state's petition for writ of certiorari. In the alternative, Respondent requests this Court affirm the decision of the Court of Appeals.

Respectfully Submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR RESPONDENT

This 24th day of April, 2025.