RECEIVED

May 05 2025

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS

Appellate Case No. 2021-000754

Carrol Tremayne Washington,

Respondent,

v.

State of South Carolina,

Petitioner.

REPLY

ALAN WILSON
Attorney General

D. RUSSELL BARLOW
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
Assistant Attorney General
S.C. Bar No. 104174

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

ARGUMENT

Respondent argues, in his Return to the State's Petition for a Writ of Certiorari, that the court of appeals correctly held the solicitor's comments in this case amounted to improper vouching. Like the court of appeals, Respondent has profoundly misinterpreted the solicitor's totally proper comments on Victim's credibility.

In the solicitor's closing argument, he extensively pointed out the consistency of Victim's testimony, the apparent sincerity of her demeanor on the stand, the lack of any motive for her to lie, and her limited sexual vocabulary and ignorance of sexual behavior—all of which are clearly references to evidence before the jury and are relevant to Victim's credibility—and he argued that a typical child would not be "capable of carrying on a lie to that degree for that long." He repeatedly asked the jurors to apply their own knowledge and experience concerning children's capabilities to Victim's story to determine her credibility. The solicitor's credibility argument covers multiple pages of the trial transcript.

Like the court of appeals, Respondent has chosen to address *none* of this context. Instead, like the court of appeals, he excerpts a few lines from the *conclusion* of the solicitor's extensive credibility argument and presents them as if they stood alone. (Ret.p.5). Like the court of appeals, Respondent ignores the phrases "to that degree," "for that long," and "to that extent," which appear in Respondent's *own* cherry-picked excerpt and which clearly *qualify* the challenged statement and contextualize it in reference to the solicitor's previous points.

Respondent, absurdly, interprets the solicitor's comments as nothing more than pronouncing his personal belief that all children of Victim's age are "physically incapable of lying." (Ret.pp.11–12). It is not clear where Respondent finds this "physically incapable" language; no such language appears in the transcript of the solicitor's comments. Anyone reading

the Return, as opposed to the actual transcript, would get the impression that the solicitor made out Victim as some kind of Pinocchio, whose body would physically react to thwart any attempt at lying. Even the court of appeals' grievous misreading of the solicitor's comments did not stray so far from reality as that.

Both the court of appeals and Respondent, by divorcing the conclusion of the solicitor's credibility argument from its proper context, mistakenly conclude that the solicitor offered no arguments other than unsupported assurances that Victim was not lying because children in general are incapable of lying. Even a cursory reading of the solicitor's total argument defeats that conclusion. (*See* Pet.pp.8–10). *If* the solicitor truly meant to rely on the (patently ridiculous) argument that children never lie, *why* did he waste so much effort recounting the consistencies between Victim's repeated statements over the years, the absence of any motive to lie, the fact that children of Victim's age are ignorant of sexual matters, and the shame evident in Victim's demeanor on the witness stand? Why address *any* of these points, only to then declare, "By the way, Victim cannot be lying because all children of Victim's age are simply incapable of lying?" And why include the qualifying phrases "to that degree," "for that long," "to that extent"? What did the solicitor mean by these phrases—to *what* degree? for *how* long? and to *what* extent? Both Respondent's Return and the court of appeals' opinion raise all these puzzling questions, but neither makes attempt to answer them.

The *only* sensible reading of the solicitor's challenged comments is in the context of his preceding arguments concerning Victim's consistency, motive, ignorance of sexual matters, and demeanor. The solicitor invited the jury to use their own common sense and life experience to judge whether a child of Victim's age would be capable of crafting a consistent story and maintaining it for years—of fabricating details of sexual abuse—of convincingly feigning shame

and sincerity on the stand—all without any clear motive or agenda. The solicitor's argument was *not* based on his personal belief that Victim was telling the truth. It was *not* based on suggestions of secret knowledge, known to the solicitor but unavailable to the jury. It was *not* based on the implication that Victim's testimony had been vetted by the prosecution and carried the imprimatur of the State. On the contrary, it was clearly based on the evidence in the record and on common-sense inferences therefrom. No reasonable juror would have understood it in any other way. Therefore, it was not improper vouching.

In addition, Respondent's Return totally fails to address the State's position, argued at length in the Petition, that the solicitor's use of "I submit" does not constitute the kind of first-person vouching that was condemned in *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001); and *State v. Reyes*, 432 S.C. 394, 853 S.E.2d 334 (2020). (*See* Pet.pp.14–17). Rather, Respondent appears to argue that every use of first-person pronouns in a solicitor's credibility argument *per se* amounts to improper vouching. This view is contrary to this Court's opinion in *State v. Busse*, 439 S.C. 104, 886 S.E.2d 208 (2023), which expressly held otherwise.

Discussing the deficiency standard, the Return acknowledges Counsel's testimony that he did not believe the solicitor's comments crossed the line from proper credibility argument into improper vouching. However, the Return chides Counsel for failing to articulate a strategic reason not to object. (Ret.p.15). Obviously, Counsel's reasonable belief that an objection would be meritless constitutes a valid strategic reason not to make the objection. The question, then, is whether Counsel's belief was reasonable, not whether Counsel had some independent strategic rationale unrelated to the merits of the objection.

In this case, Counsel's belief was reasonable. Even if this Court somehow ultimately decides to adopt the interpretation of the solicitor's argument advanced by Respondent and the

court of appeals, it cannot find Counsel was deficient unless *no* competent attorney would have shared Counsel's assessment of the solicitor's challenged comments. *See Dunn v. Reeves*, 594 U.S. 731, 739 (2021). As explained in the Petition, the distinction between proper argument and improper vouching is imprecise, so Counsel can only be found deficient if the challenged comments were so patently over-the-line that there could be absolutely no question of their impropriety. In this case, Counsel's reading of the solicitor's closing argument was shared by the PCR court. If Counsel was incompetent, then so was the PCR judge.[1]

Finally, Respondent repeats the court of appeals' rationale for distinguishing *Reyes*—which held the trial court's instruction on child credibility rendered the solicitor's vouching harmless—from the present case, in which a virtually identical instruction was given. Respondent does not even attempt to address the fact that *Reyes* held the instruction rendered the error harmless beyond a reasonable doubt, which is a far higher standard that the one applicable to PCR cases.

Neither Respondent nor the court of appeals have bothered to respond to the State's arguments concerning the context of the solicitor's challenged comments, the qualifying language present in the challenged comments, the solicitor's frequent appeals to the jurors' common sense and life experience, the reasonableness of Counsel's assessment of the solicitor's argument, and the important difference between the harmless error standard and the prejudice prong of *Strickland*. Instead, both Respondent and the court of appeals have offered a ridiculous caricature of the solicitor's well-supported and well-reasoned credibility argument, as if it amounted to nothing more than a bare declaration that children are incapable of lying (even "*physically incapable*,"

[1] Even if the Court ultimately deems that to be the case, it merely points to the need for greater clarity regarding the notoriously imprecise line between permissible argument and vouching. This Court should take this opportunity to grant the Petition for a Writ of Certiorari and conclusively settle the law on this point, for the benefit of bench and bar.

according to Respondent's reading). Respondent and the court of appeals then impugn the competency of both Counsel and the PCR court for failing to recognize the impropriety of this imaginary argument and claim that it so infected the trial with unfairness that Respondent was denied due process.

To perform their role appropriately, solicitors must have confidence that their reasonable arguments will not be grossly distorted and stripped of context by later reviewing courts. Defense lawyers, too, must have confidence in their own prerogative to make reasonable interpretations of prosecutors' sometimes ambiguous statements, without worrying that a future court will declare them ineffective for failing to immediately interpret those statements in the most damaging possible way. The court of appeals' decision has served only to exacerbate the existing confusion between permissible argument and improper vouching. This Court should grant the State's Petition for a Writ of Certiorari to correct the court of appeals' manifest error.

CONCLUSION

For all the foregoing reasons, the State requests this Court reverse the decision of the court of appeals.

Respectfully submitted,

ALAN WILSON
Attorney General

D. RUSSELL BARLOW
Senior Assistant Deputy Attorney General

ZACHARY W. JONES
Assistant Attorney General
S.C. Bar No. 104174

BY: _____
ZACHARY W. JONES

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

May 5, 2025