

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Kristi Curtis, Circuit Court Judge

Case No. 2025-002451

Stanley Moultrie,

Petitioner,

vs.

The State of South Carolina,

Respondent.

REPLY TO RETURN ON PETITION FOR WRIT OF CERTIORARI

Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
SC Bar 72555
3710 Landmark Drive, Suite 113
Columbia, SC 29204
(803) 445-1333

Counsel for Petitioner

Ambree M. Muller
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803) 734-0386

Counsel for Respondent

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S.C. SUPREME COURT

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The State's Return does not address the fundamental problem at the heart of this case: the solicitor's explicit personal assurances regarding witness credibility invaded the jury's province and cannot be reconciled with this Court's settled precedent. The State's arguments fail on both the deficiency and prejudice prongs of *Strickland*, and the Court should grant certiorari to correct the Court of Appeals' misapplication of well-established law.

ARGUMENTS

I. The Court of Appeals Mischaracterized the Solicitor's Statements as Permissible Comments on the Evidence

The State contends that the solicitor's statements were merely "fair inferences drawn from her testimony" and did not constitute improper vouching. Return at 7. This characterization is demonstrably incorrect. The solicitor did not comment on inferences to be drawn from the victim's testimony. Instead, he made explicit personal assurances about her credibility that crossed the bright line established in *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001), *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001), and *State v. Thomas*, 287 S.C. 411, 339 S.E.2d 129 (1986).

The solicitor stated:

"What she showed on that stand was pure and genuine in every aspect in every way it could possibly be. This is not acting; she is about as real as it gets. The emotion you saw from that stand is genuine." (App. 228–229)

And more directly:

"I tell you right now that Ms. Messinger's testimony is by itself, if you find it credible—which in my opinion she was and for the reasons I've stated and y'all saw her up there—if you find her credible that testimony is enough by itself to support a conviction in this case." (App. 232)

These are not fair comments on the evidence or permissible arguments. They are explicit personal vouching for the witness's truthfulness. The solicitor did not say the jury could infer credibility from her demeanor. He told the jury she *was* credible, that her emotion *was* genuine, and that in his *personal opinion* she was believable. This is the precise form of improper vouching condemned in *Shuler, Kelly, and Thomas*. The State's effort to recharacterize these statements as "fair inferences" misconstrues both the language used and the holdings of this Court. A prosecutor may comment on the weight of testimony; a prosecutor may not express personal belief in the truthfulness of a witness. Here, the solicitor crossed that line unmistakably.

II. Trial Counsel Was Deficient for Failing to Object to Clear Prosecutorial Misconduct

The State seems to suggest that because the trial court gave a general instruction about juror responsibility for credibility determinations, trial counsel's failure to object was not deficient. Return at 7. This argument conflates the remedy with the error. Under *Strickland v. Washington*, 466 U.S. 668 (1984), trial counsel must provide reasonable assistance, which includes objecting to clear prosecutorial misconduct. *Humphries v. State*, 351 S.C. 362, 570 S.E.2d 160 (2002). The solicitor's statements were improper under this Court's precedent. A competent defense attorney would have objected and requested a curative instruction. The fact that the trial court might have given a general instruction later does not excuse counsel's failure to make a contemporaneous objection to flagrant misconduct.

Moreover, a general instruction to the jury that "arguments of counsel are not evidence", Return at 8, does not cure personal vouching by the prosecutor. Once the solicitor has used the imprimatur of the Government to assure the jury of the witness's credibility, a generic instruction cannot undo the damage. This Court has repeatedly recognized that vouching "can rarely be harmless." *State v. Thomas*, 287 S.C. at 413, 339 S.E.2d at 129. The State relies on *Hillerby v. State*, 431 S.C. 323, 847 S.E.2d 500 (Ct. App. 2020), to suggest the Court need not address deficiency. Return at 6. But *Hillerby* applies only when the answer is simple and favor the defendant. Here, deficiency is clear. Trial counsel should have objected to prosecutorial misconduct that violated this Court's precedent.

III. The Court of Appeals' Prejudice Analysis Fundamentally Misapplies *Strickland* and This Court's Precedent

The State argues that the evidence was "overwhelming" and therefore the error was harmless. Return at 8–9. This analysis misses the essential point: the solicitor made the victim's credibility the crux of the State's case and then removed it from the jury's independent assessment by personally vouching for it. The prejudice analysis cannot be conducted in a vacuum, as the Court of Appeals did.

A. The Evidence Was Not Overwhelming; It Depended Entirely on the Victim's Credibility

The State points to (1) surveillance video of poor quality; (2) a vehicle matching Petitioner's; (3) items recovered from his home; (4) cell phone location data; and (5) a photo lineup identification made a year before trial. Return at 8–9. None of this is overwhelming in the sense required by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). The

surveillance video quality was explicitly "too poor to tell exactly who the individual was." App. 138. There was no knife recovered, no DNA evidence, no forensic evidence, and no confession. The victim's identification occurred over a year before trial and could have been the product of the blurry video description or other suggestions.

Most critically, the State's own closing argument made abundantly clear that the case turned on the jury's acceptance of the victim's version of events:

"I tell you right now that Ms. Messinger's testimony is by itself, if you find it credible...if you find her credible that testimony is enough by itself to support a conviction in this case." App. 232.

The State made the victim's credibility outcome-dispositive, and then the solicitor personally assured the jury of that credibility. This is precisely the scenario where vouching is most prejudicial and where *Smalls'* exception for overwhelming evidence does not apply.

B. The Jury's Split Verdict Reinforces, Rather Than Refutes, Prejudice

The State emphasizes that the jury acquitted Petitioner of kidnapping while convicting him of armed robbery, suggesting this demonstrates the jury's independent judgment. Return at 8–9. But this argument works against the State.

The kidnapping and armed robbery charges arose from the same conduct and the same victim's testimony. If the solicitor's vouching for the victim's credibility did not improperly influence the jury, why did the jury reject the kidnapping charge? The split verdict indicates the jury struggled with the victim's testimony and was not wholly convinced, despite the solicitor's personal assurances. This suggests the jury might well have acquitted on both charges had trial counsel objected and prevented the improper vouching.

Alternatively, the split verdict demonstrates the jury's hesitation—making clear that the vouching was needed to push the jury over the line on robbery. The jury was on the fence, and the solicitor's improper personal assurances may have tipped the balance. Again, the split verdict buttresses the prejudice argument and does not undermine it.

C. The Trial Court's Framing Exacerbated the Prejudice

The State ignores a critical fact: the trial court told the jury that attorneys are "officers of the court...to help you in the search for the truth." App. 110. With that imprimatur, when the solicitor—an officer of the court—told the jury that Ms. Messinger's testimony was "pure and genuine in every aspect," the jury had every reason to believe he was relaying truth, not argument.

This heightened framing is not addressed by the Court of Appeals and undermines the State's argument that generic instructions cured the error. An instruction that advocates' arguments are not evidence cannot undo the unique weight carried by a prosecutor's personal assurance when that prosecutor has been identified to the jury as a truth-seeking officer of the court.

D. Prosecutorial Vouching "Can Rarely Be Harmless"

The State's prejudice analysis ignores this Court's teaching. In *State v. Thomas*, 287 S.C. 411, 339 S.E.2d 129 (1986), this Court stated: "Arguments of this kind can rarely be harmless." *Thomas*, 287 S.C. at 413. The Court of Appeals gave this principle short shrift, treating it as a mere "factor" while focusing on the circumstantial evidence. Return at 8–9. But this Court has made clear: vouching claims require careful scrutiny and cannot be dismissed simply by pointing to other evidence.

IV. The Court of Appeals' Decision Conflicts with This Court's Precedent on the Proper Role of Juries and the Prosecutor

The Court of Appeals treated vouching as something to be weighed against other evidence—a factor in a balancing test. But this Court's precedent treats vouching differently. It is not a trial error amenable to harmless-error analysis in the traditional sense. It is a structural error that usurps the jury's constitutional role as sole arbiter of witness credibility.

In *Shuler*, this Court explained:

"A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." *Shuler*, 344 S.C. at 630, 545 S.E.2d at 818.

The concern is not harmless error; it is institutional. When a prosecutor uses the authority of the Government to assure the jury of a witness's credibility, the jury is no longer exercising independent judgment. It is relying on the prosecutor's "personal opinion," which the jury reasonably believes carries the weight of the Government behind it. The Court of Appeals' approach—weighing the vouching against other evidence—transforms a violation of jury independence into a harmless-error question. That is inconsistent with this Court's precedent.

V. This Court Should Grant Certiorari to Correct the Court of Appeals' Misapplication of Established Law

The question presented is narrow and well-defined: Did the solicitor make improper personal assurances regarding witness credibility? The answer is unequivocally yes. Did trial counsel fail to object? Yes. Did this failure prejudice Petitioner? Yes, because the State

made the victim's credibility outcome-dispositive and then removed it from the jury's independent assessment.

The Court of Appeals' opinion conflicts with *Shuler, Kelly, Thomas, Humphries*, and *Smalls*. It misapplied the prejudice prong of *Strickland* by treating prosecutorial vouching as a harmless-error question when this Court has taught that it "can rarely be harmless." It failed to account for the trial court's framing that elevated the prosecutor's statements. And it misread the split verdict as evidence of jury independence when it actually suggests the jury needed the improper vouching to convict.

Mr. Moultrie is serving a life sentence without the possibility of parole for a crime of which he might have been acquitted had his counsel objected to clear prosecutorial misconduct. The issue is significant, the law is unsettled in application, and the error is clear.

CONCLUSION

This Court should grant the writ.

Respectfully submitted,

/s/ Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
SC Bar 72555
3710 Landmark Drive, Suite 113
Columbia, SC 29204
(803) 445-1333
elizabeth@franklinbestlaw.com

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