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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Certiorari to Hampton County  
Perry M. Buckner, Trial Judge  
Eugene C. Griffith, Jr., PCR Judge

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Appellate Case No. 2023-001946

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SIDNEY HOLMES,

APPELLANT,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**BRIEF OF RESPONDENT**

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### **STATEMENT OF ISSUE ON APPEAL**

Trial counsel erred in failing to object to the solicitor's closing comment that vouched for the credibility of the only eyewitness who testified at trial and actually identified the shooter as this constituted impermissible bolstering that prejudiced the defense because petitioner presented an alibi defense and no overwhelming proof (neither direct evidence nor substantial circumstantial evidence) was submitted by the state establishing petitioner's guilt on the charges filed against him.

### **RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL**

The PCR court properly found trial counsel was not ineffective for not objecting to the solicitor's closing comments when (1) counsel articulated a valid reason for not objecting, (2) the comments were tied to the evidence and did not constitute improper vouching, and (3) the comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.

## STATEMENT OF THE CASE

Appellant is presently confined in the South Carolina Department of Corrections serving a cumulative fifty-one-year sentence. In April 2016, the Hampton County Grand Jury indicted Appellant for murder (2015-GS-25-00265), unlawful carrying of a pistol (2015-GS-25-00266), discharging a firearm at or into a dwelling or a structure (2015-GS-25-00267), and possession of a weapon during the commission of a violent crime (2015-GS-25-00268). On March 13, 2017, Appellant proceeded to a jury trial before the Honorable Perry M. Buckner, III. Robert Hughes, Esquire, represented Appellant, and Randolph Murdaugh and R. Alexander Murdaugh, Esquires, prosecuted the case. The jury convicted Appellant as indicted, and Judge Buckner sentenced him consecutively to forty years for murder, five years each for possession of a weapon and discharging a weapon, and one year for unlawful carrying of a pistol.

Appellant filed a timely notice of appeal that was perfected by Appellate Defender Susan B. Hackett through filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed pursuant to Anders. The remittitur was sent December 13, 2018.

On December 12, 2018, Appellant filed an application for PCR alleging he was being held in custody unlawfully due to ineffective assistance of counsel. Respondent filed a return requesting an evidentiary hearing. On August 13, 2021, an evidentiary hearing convened before the Honorable Eugene C. Griffith, Jr. Appellant was present and represented by James K. Falk, Esquire. Assistant Attorney General Samantha J. Weidauer represented Respondent. Following the hearing, Judge Griffith issued an order on December 7, 2023, denying and dismissing the PCR application. Appellant filed this petition for a writ of certiorari, and Respondent filed a return opposing it. After the matter was transferred, the Court of Appeals issued an order granting certiorari.

## STATEMENT OF FACTS

On August 1, 2015, Steve Cochran (Victim), the maintenance man at Hampton Garden Apartments, was fatally shot after running off a group of men who were drinking. At trial, Zandra Bryant testified she was at the apartment complex that evening and saw a group of people outside drinking. She saw Victim approach and tell the group to leave; they left, but Bryant testified they appeared to be upset about leaving. About twenty minutes later Bryant “observed an individual walk from behind the building, stop directly in front of [Victim], and just start[] shooting.” Bryant identified Appellant as the shooter, whom she knew as “Banger.” Bryant stated she initially did not provide Appellant’s name to police because she was scared. However, she clarified that Appellant ran right past her and she recognized him. (App. 55-61, 65).

Victim suffered four gunshot wounds, including a fatal one to his chest. (App. 104-05, 107). Five Perfecta shell casings were recovered from the scene, and testing revealed they were fired from the same gun. (App. 121, 153). The State also presented a jail call placed using Appellant’s pin number; in the call he asked, “Did you sell that whistle” or “Did you get rid of that whistle?” (App. 165). An investigator testified the term “whistle” is street slang for a firearm. (App. 165-66). Additionally, the State presented a video from Walmart showing Appellant purchasing Perfecta ammunition about a month before this shooting. (App. 177-87).

During closing argument, the solicitor argued:

So we know he had a gun at some point in time. Then, a lady who I have got all the admiration in the world for, that woman is scared to death her entire life. She’s got four children that live out there. She is scared of these people, but she had the guts to walk into this courtroom and she had the guts to tell the truth. The truth being that Sidney Holmes walked up and shot Steve Cochran because he was teed off with him for running him off earlier. How she had the guts to do it, I don’t know, but I admire her.

(App. 243). Trial counsel did not object. The jury convicted Appellant as indicted.

## STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**The PCR court properly found trial counsel was not ineffective for not objecting to the solicitor's closing comments when (1) counsel articulated a valid reason for not objecting, (2) the comments were tied to the evidence and did not constitute improper vouching, and (3) the comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process.**

Appellant asserts counsel was ineffective for not objecting to the solicitor's closing comments that allegedly impermissibly vouched for the credibility of the State's only eyewitness. He further contends this failure to object was prejudicial because the State's case hinged on the eyewitness identification testimony. However, counsel articulated a valid reason for not objecting to this passing comment. More specifically, counsel—who was in the position to observe the jury, as any good trial lawyer would do—testified the jury was bored by the solicitor's closing argument, and in his assessment an objection would have attracted the bored jury's attention. Further, the comments were tied to the evidence and did not constitute improper vouching. Finally, this mere passing statement in an otherwise boring closing argument did not so infect the trial with unfairness as to result in a denial of due process.

“There is a strong presumption trial counsel provided adequate assistance.” Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, “the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.” Green, 351 S.C. at 192, 569 S.E.2d at 322. “A reasonable probability is one sufficient to undermine confidence in the trial's outcome.” Id.

**A. Trial counsel articulated a valid reason for not objecting and thus was not deficient.**

At the PCR hearing, trial counsel agreed the solicitor vouched for the credibility of Bryant's testimony. (App. 324-25). When asked why he did not object, counsel replied:

The reason why I didn't is because the person talking was Randolph Murdaugh. Randolph Murdaugh was a long-winded person who would basically lull a jury to sleep. He would have moments of extreme passion but most of the time he was monotone and would basically lull a jury.

Now, the last thing I wanted to do was to wake up a juror and go, Hey, you needed to listen to this, this was important. No curative instruction in the world would have prevented a jury from hearing what he just said.

The only thing I had going for me as far as the jury ignoring it was the fact that the jury was thinking about other things while he was talking. And Mr. Murdaugh would ramble on and on, and that helped me.

(App. 325). Based on the foregoing testimony by counsel, the PCR court properly found counsel articulated a valid reason for not objecting and thus was not deficient. See Gilchrist v. State, 350 S.C. 221, 226-27, 565 S.E.2d 281, 284 (2002) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Notably, the PCR court found credible "counsel's testimony that the jury was bored and seemingly tuning out during the State's closing argument and an objection might have 'woken them up,'" and this Court should defer to the PCR court's credibility finding. (App. 356). See Thompson, 423 S.C. at 247, 814 S.E.2d at 493 (noting appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court"); Foye, 335 S.C. at 589, 518 S.E.2d at 267 ("Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses.").

Here, counsel was in a position at trial to assess the jury's reaction to the State's closing

argument. Based on his perception, counsel determined the jury was bored and not listening to the solicitor. Counsel's assessment that objecting to this passing statement would have drawn more attention to it and "awakened" the jury was a reasonable assessment, and his decision to not object for this reason was a reasonable trial strategy—especially when the statement itself was not improper vouching. Thus, the PCR court properly found counsel articulated a valid reason for not objecting and was not deficient.

**B. The comments were directly tied to the evidence and thus did not constitute improper vouching.**

"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." State v. Busse, 439 S.C. 104, 109, 886 S.E.2d 208, 211 (2023). Improper vouching occurs "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." Id. "The legal concept of 'vouching' prohibits a prosecutor from giving the jury any indication she knows something about the credibility of a witness that the jury does not know, or that is based on an event or proceeding outside the presence of the jury." Id.

Initially, although trial counsel agreed at the PCR hearing that the solicitor's closing argument contained vouching, trial counsel's testimony is not conclusive. Rather, Strickland requires the Court to objectively review the record to see if, in fact, the statement was objectionable, and whether counsel's failure to object fell below prevailing professional norms. Strickland, 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). In other words, it would be error for the Court to rely only on counsel's post-hoc testimony about his performance. See Harrington v. Richter, 562 U.S. 86, 109-10 (2011) ("After an adverse verdict at trial even the most experienced

counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind."'). Ultimately, the Court must determine whether there was a legitimate objection to make in order to assess whether counsel was deficient. Further, even if there was a valid objection, the Court is still tasked with determining whether counsel's decision to not object was reasonable under prevailing professional norms based on the circumstances presented at the time—including the bored jury—and whether the solicitor's comment "so infected the trial with unfairness as to violate due process." (App. 324-25).

Here, the solicitor was commenting on the credibility of the witness based on the evidence presented—which is permitted under the law. See Busse, 439 S.C. at 111, 886 S.E.2d at 212 ("[A] prosecutor is *expected* to comment on the credibility of the witnesses when making a closing argument." (emphasis added)). Specifically, the solicitor's noted his admiration for Bryant's "guts" to testify against Appellant even though she was afraid. (App. 243). This statement was a reasonable inference from Bryant's testimony that she did not initially identify Appellant—whom she knew—to police because she was afraid. (App. 60-61). Although the solicitor's use of first-person may have been problematic, his expressed admiration for Bryant's "guts" to testify was based on reasonable inferences from evidence presented—and not from anything other than the evidence admitted. Contra id. at 109, 886 at 211 ("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."').

The statement here is akin to the statements made by the solicitor in Busse, a criminal sexual conduct case. There, the solicitor stressed during closing argument the importance of the

minor victim's testimony that the defendant had erectile dysfunction. *Id.* at 108, 886 S.E.2d at 210. In doing so, the solicitor argued, "What I want you to ask yourselves, and *what was compelling to me*, how does she know that." *Id.* (emphasis added). On appeal, the Supreme Court of South Carolina considered whether the trial court erred in sustaining the defendant's objection to the foregoing statement. Ultimately, the court concluded that although the use of first-person was problematic, the prosecutor did not overstep his role because his statements were directly tied to the evidence presented:

In this case, even with the unnecessary use of "to me," we see minimal risk the jury would perceive the deputy solicitor stepped out of his role as an advocate. The point of his statement was to highlight the importance of evidence that the victim knew Busse suffered from erectile dysfunction. The deputy solicitor was correct to stress that if being sexually assaulted was the only way she knew that, the State's case was essentially proven. The deputy solicitor's statement, therefore, was directly tied to evidence admitted at trial. By using the phrase "was compelling to me," the deputy solicitor did no more than tell the jury he believed that this evidence—heard by the jury—was important to the jury's decision. That is not vouching.

*Id.* at 111-15, 886 S.E.2d at 213-14

Here, the solicitor's comments to the jury did not cross the line into improper vouching. Admittedly, the use of first-person in the phrases "a lady who I have got all the admiration in the world for" and "How she had the guts to do it, I don't know, but I admire her" may be problematic. In context, however, the closing argument indicated that the solicitor's admiration for Bryant was based on evidence before the jury. Specifically, Bryant testified she initially did not provide Appellant's name to police because she was scared—especially after witnessing him shoot another individual. (App. 65). Based on this testimony—which counsel cross examined her about (App. 61-64)—the solicitor's admiration for her "guts" to testify "was directly tied to evidence admitted at trial" and "did no more than tell the jury he believed that this evidence—heard by the jury—was

important to the jury's decision." The foregoing thus did not constitute improper vouching, and thus the PCR court properly found Appellant did not prove deficiency.

**C. Because these passing statements did not so infect the trial with unfairness as to violate due process, the PCR court properly found Appellant did not prove prejudice.**

"To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we 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). In determining whether an improper comment prejudiced a defendant, "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986).

Assuming arguendo trial counsel was deficient for not objecting—which the State does *not* concede—this passing statement that the solicitor found Bryant admirable did not so infect the trial with unfairness as to violate due process. See Darden, 477 U.S. at 168 (finding prosecutor's improper comments—which included statements such as "He shouldn't be out of his cell unless he has a leash on him" and "I wish that I could see him sitting here with no face, blown away by a shotgun"—did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process"). Rather, this mere passing statement was made during the context of a closing argument that counsel credibly testified was boring the jurors. (App. 356). Thus, the PCR court properly found Appellant did not prove prejudice.

**CONCLUSION**

Based on the foregoing, this Court should affirm.

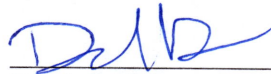
Respectfully Submitted,

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This 9<sup>th</sup> day of March, 2026.