ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Lexington County

William P. Keesley, Circuit Court Judge

SCOTT PARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001320

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to testimony from child abuse specialist Heather Smith regarding a theoretical profile of a typical male adolescent victim of sexual abuse, tailored to the facts of Petitioner's case, introduced for the sole purpose of advancing expert opinion testimony on the credibility of the complainants and to imply the guilt of Petitioner?

II.

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to the Solicitor's improper "Golden Rule" closing argument where he impermissibly appealed to the passions of the jurors by arguing, *inter alia,* that if jurors found Petitioner not guilty they would be complicit in the continued sexual abuse of children and where the Solicitor asked jurors to consider if Petitioner's behavior was something the jurors would have done, or if it was something that "a child molester" would have done?

STATEMENT

Indictments

In April, 2009 the Lexington County Grand Jury indicted Petitioner, Scott Parker, on five counts of second-degree criminal sexual conduct with a minor. App. 534 – App. 548.

Trial and Direct Appeal

On October 4, 2010, Petitioner proceeded to trial before the Honorable R. Knox McMahon and a jury. App. 1. Petitioner was represented by John W. Locklair, III, and the State was represented by Deputy Solicitor David Graham and Assistant Solicitor Kate E. Whetstone.

The jury returned a verdict of guilty on all charges. App. 391, ll. 4 – App. 392, ll. 14. Judge McMahon sentenced Petitioner to four twenty year sentences for the counts of second-degree criminal sexual conduct with a minor, and a consecutive twenty year term for second-degree criminal sexual conduct with a minor arising out of a position familial or custodial authority. App. 406, ll. 19 – App. 408, ll. 12.

The South Carolina Court of Appeal affirmed Petitioner's conviction and sentence in an unpublished opinion. *State v. Parker*, 2012-UP-592 (S.C. Ct. App. filed October 31, 2012).

PCR and Evidentiary Hearing

On January 8, 2013, Petitioner filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. App. 411 – App. 421. On May 3, 2013, the State filed a Return. App. 422 – App. 428. On April 14, 2014, an evidentiary hearing was held before the Honorable William P. Keesley. App. 429 – App. 505. Petitioner was represented by Anna Good, and the State was represented by Walt Whitmire. Judge Keelsey denied Petitioner's application by an order filed on June 3, 2014. App. 516 – App. 533.

This Petition for writ of certiorari follows.

ARGUMENT

I.

Petitioner's Sixth Amendment rights were violated when counsel failed to object to testimony from child abuse specialist Heather Smith regarding a theoretical profile of a typical male adolescent victim of sexual abuse, tailored to the facts of Petitioner's case, introduced for the sole purpose of advancing expert opinion testimony on the credibility of the complainants and to imply the guilt of Petitioner.

Relevant Facts

On January 9, 2009, Minor 2, then age 14, arrived with his mother, Christal Hernandez, at a DJJ/DSS mandated physiological evaluation when he claimed that Petitioner had sexually abused him and his cousin, Minor 1, then age 16. App. 148, ll. 21-23. Minor 2 was undergoing a mental health evaluation as a result of him making sexual advances towards his ten year old sister. App. 112, ll. 19 – App. 112, ll. 10.

Minor 2's therapist, Heather Scoggins, then notified law enforcement of Minor 2's allegations. App. 137, ll. 21 – App. 138, ll. 3. At the suggestion of Scoggins, Hernandez also called law enforcement. *Id.* Law enforcement interviewed Minor 1 at his high school. App. 171, ll. 21 – App. 172, ll. 6. After being told that Minor 2 had come forward, Minor 1 also alleged Petitioner sexually abused him. *Id.*

Trial Testimony of Minor 1

At trial, both complainants testified. Minor 2 took the stand first and detailed his unstable young single parent home. App. 95, ll. 3-19. His mother was fifteen when she gave birth to him and had a string of failed marriages and relationships. App. 139, ll. 3-20; App. 156, ll. 10-14. Minor 2 claimed that Petitioner was a family friend who lived nearby and became close with complainants. App. 96, ll. 12 – App. 98, ll. 3. Minor 2 alleged that the sexual abuse began in the

summer of 2006 and continued until the summer of 2008 when his mom banned him from seeing Petitioner because he had stopped providing her with monetary support. App. 103, ll. 15-17.

Minor 2 admitted to having previously made false allegations of child abuse in 2007 against his mother when she confronted him about fighting at school. App. 115, ll. 17 – App. 116, ll. 21. Minor 2 also claimed that Petitioner had given him and Minor 1 gifts, cell phones, money, and taken them to Frankie's Fun Park and on other excursions during the time that Petitioner was allegedly sexually abusing them. App. 114, ll. 14-24. Minor 2 stated that both he and Minor 1 saw Petitioner as a father figure. *Id.* Minor alleged he had avoided reporting Petitioner because he feared that people would believe he was a homosexual; he also did not want to get Petitioner in trouble or for the gifts and trips to stop. App. 113, ll. 20 – App. 114, ll. 17.

On cross-examination, Minor 2 admitted that he initially did not fully disclose Petitioner's alleged abuse. App. 119, ll. 18 – App. 120, ll. 11. Minor 2 also admitted that he recanted the allegations against his mother once he was put in a DSS group home where he became suicidal. App. 124, ll. 3 – App. 125, ll. 6. Counsel also crossed Minor 2 about inconsistencies in his recollection of specific instances of abuse. App. 129, ll. 2-18.

Hernandez testified to Petitioner's relationship with the minor children. App. 140, ll. 17 – App. 141, ll. 18. She alleged that she had instructed Minor 2 to tell her if Petitioner was ever inappropriate and that until disclosing the abuse before the mental health examination, Minor 2 had always denied any abuse. App. 147, ll. 3-23.

On cross-examination, Hernandez admitted she had not previously mentioned to either law enforcement or Scoggins her new allegation that Petitioner regularly called Minor 2 or that she had ordered Petitioner to stop calling Minor 2. App. 149, ll. 2-18. Hernandez also revealed that she had re-married again and that Minor 2's biological father was now incarcerated for

failure to pay child support. App. 149, ll. 23 – App. 150, ll.14. Hernandez further conceded that the now incarcerated father had initially been given custody of her children, but that he was subsequently arrested for providing alcohol and marijuana to Minor 2. App. 150, ll. 4 – App. 152, ll. 22.

Testimony of Minor 1

Minor 1 testified that he also had an unstable single parent home and that he frequently lived with Hernandez and Minor 1. App. 170, ll. 22 – App. 171, ll. 10. His mother was a cocaine addict and had lost her parental rights for two of her five children. App. 191, ll. 10-25. Minor 1 testified that Petitioner was a friend of the family and that he saw Petitioner as a sort of uncle. App. 163, ll. 4-23. Minor 1 also claimed that Petitioner began to sexually abuse him and Minor 2 around the July of 2006 until sometime in the first half of 2008. App. 167, ll. 7-24.

As with Minor 2, Minor 1 claimed Petitioner gave him gifts, money, and was a surrogate father to him. App. 170, ll. 22-25. Minor 1 admitted that he still loved Petitioner despite the allegations. App. 171, ll. 2-6. Minor 1 recalled that law enforcement interrogated him at school regarding the allegations against Petitioner. *Id.* at ll. 11-20. Minor 1 alleged that he was reluctant to agree with allegations against Petitioner because he did not want people to have a different opinion of Minor 1 and because he cared for Petitioner. App. 173, ll. 5-9.

On-cross examination, Minor 1 conceded that he denied any sexual abuse by Petitioner when his mother first asked him. App. 174, ll. 9-15. Minor 1 also conceded that during the law enforcement investigation, he passively accepted what the police were explaining to him about the abuse and about the initial disclosure by Minor 1. *Id.* at ll. 18-24. Minor 1 admitted that since the sexual abuse was first reported, **he had doubled the number of incidents of sexual conduct** by Petitioner. App. 175, ll. 20 – App. 176, ll. 9 (*emphasis added*).

Testimony of Heather Smith

The State's final witness was Heather Smith of Lexington County Children's Advocacy Center. She provided opinion testimony on a theoretical profile of a male adolescent victim of sexual abuse. Smith was qualified as an expert in the field of child sexual abuse without challenge from defense counsel. App. 326, ll. 13 – App. 327, ll. 8. Smith claimed that adolescents living in single parent homes with domestic "stressors" such as: domestic violence, substance abuse issues, or general instability are more likely to be victimized. App. 327, ll. 16-23. During her testimony, Smith never referenced a single authoritative treatise or any recognized experts whose methods she relied upon when forming her opinions.

Smith then opined that such adolescents are especially vulnerable because they are "seeking out something to replace maybe what they are not getting in the home environment. So often they will seek out people that they can be attached to, people that can help them, and they can trust and feel comfortable with." App. 327, ll. 24 – App. 328, ll. 4. She then hypothesized that adolescents tend to deliberately disclose the abuse when they either: feel secure revealing it; are sufficiently tired of the abuse; or they are mad at the abuser for withholding something the child wants. App. 328, ll. 10 – App. 329, ll. 17.

Smith posited that adolescents often develop a relationship with their abuser and can feel special because they are receiving attention, love, and gifts from them. *Id.* Smith offered that in her "experience of treating over a thousand children and talking to a thousand children in my career, typically children are afraid that that bond that they have with the person who is abusing them will be broken." App. 330, ll. 9-13. When prompted by the State, Smith conjectured that: "boys don't like to tell about sexual abuse because there is an added stigma for them that their sexuality will be

questioned in some way. So if they have been sexually abused, especially by a man, then they are forever labeled as, you know, not being normal or not -- or being gay." App. 332, ll. 3-10.

Smith then pontificated that delayed disclosure is more common in cases of chronic abuse because the child becomes attached to the perpetrator and develops a relationship. App. 333, ll. 4-18. Smith then reiterated that some adolescents she has interviewed recall wanting a relationship with someone they can trust; while others required gifts and bribes to keep the abuse secret. App. 334, ll. 22-25. She alleged the focus on monetary reward is often due to a "depleted home environment." App. 355, ll. 3-6. Finally, Smith stressed that delayed disclosure is the norm because most children do not want to talk about the abuse or break the abuser's trust, but only come forward once they can no longer accommodate the abuse. App. 335, ll. 8 – App. 337, ll. 18.

On cross-examination, defense counsel inquired again about Smith's professional credentials allowing her to re-emphasize her background and practical experience. App. 338, ll. 3 – App. 340, ll. 20. Smith admitted that she had not interviewed either Minor. App. 342, ll. 16-20. Smith further admitted that there is a small percentage of false reports, accounting for roughly two to five percent of all allegations. *Id.* at ll. 5-15.

On re-direct examination, Smith assured the jurors that while a previous incident of false disclosure was an area of concern, in the present case since Minor 2 was no longer being investigated for sexually abusing his sister, his disclosure regarding Petitioner was credible. App. 344, ll. 9-16. Smith specifically claimed, ""typically [the end of the investigation into Minor 2] would indicate to me ***that there had not been a false allegation made*** [with respect to Petitioner]." *Id.* (*emphasis added*). Counsel did not object to this testimony.

State's Closing Argument

The State's closing argument mirrored Smith's testimony. App. 352, ll. 11 – App. 355, ll. 6. The State applied her supposedly hypothetical profile to the complainants in order to reinforce their reliability; noting that complainants came from unstable single parent homes without father figures. App. 352, ll. 8 – App. 354, ll. 20. In keeping with Smith's profile, the State posited that Petitioner provided them with relationship that they were missing and that his gifts and money were an effort to buy their silence. *Id.*

The State also directly mentioned Smith twice: ". . . the love [Petitioner] gave them. That's what Heather Smith was talking about, the last witness, when she was talking about accommodation. Why do they let it happen . . . . Because those boys were searching for something, and [Petitioner] knew it and he abused it and he took advantage of it." App. 355, ll. 2-10. With the second reference the State egregiously assured the jurors the complainants were credible because ". . . Smith, the expert, told you in the last question I asked her ***that once that issue that might [cause complainants] to make a false allegation is gone, there would be no reason for them to sustain it for this long***." App. 358, ll. 4-8 (*emphasis added*).

PCR Evidentiary Hearing

Defense counsel stated at the PCR hearing that his strategy with respect to Smith's testimony was to use her expertise to support the defense's allegations of false disclosure. App. 484, ll. 11 – App. 485, ll. 10. Counsel confessed that he erred in not challenging Smith's qualifications and testimony: "she seemed qualified. Obviously, in hindsight, you know, ***I wish I would have objected saying she can't go to the truth***, but she never did that, so it didn't matter, but ***in light of what the Court of Appeals said, obviously, that was, you know, we're supposed to watch out for that***." App. 485, ll. 14-20 (*emphasis added*).

Counsel believed that Petitioner's case turned on the credibility of complainants and their mothers. App. 497, ll. 7-13. On cross-examination, counsel retracted his earlier assessment of Smith's testimony, conceding that Smith's testimony regarding the length of time between Minor 2 's false disclosure and the disclosure in Petitioner's case indicated "that there had not been a false allegation made," was an improper comment on Minor 2 's credibility. App. 496, ll. 3-23.

Order of Dismissal

In denying Petitioner relief, the PCR court summarily concluded that counsel was not ineffective for failing to challenge the testimony or qualifications of Smith. Without providing its reasoning, the court determined that Petitioner failed to prove that Smith's testimony improperly bolstered the complainants' credibility. App. 529.

The PCR court held that "Counsel provided sound reasoning for not objecting [to Smith's testimony]. Counsel noted that her testimony was in part helpful for the defense. Victim had previously recanted his false allegations of child abuse against his mother." *Id.* Further, the Order of Dismissal, citing to *State v. Schumpert*, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993), stated that relevant law at the time of the trial supported the trial court's qualification of Smith as an expert in child sexual abuse. *Id.*

Discussion

Defense counsel rendered ineffective assistance of counsel when he failed to object to Smith's opinion testimony on the theoretical profile of a male adolescent child abuse victim because, as he admitted during the PCR hearing, her testimony's only purpose was to impermissibly bolster the credibility of the complainants. Assessing the validity of the complainants' explanations for their actions is not a revelvant subject for expert testimony, but rather a matter for the jurors and is within the ability of an average trier of fact to understand.

The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The United States Supreme Court established the constitutional right to *effective* assistance of counsel in *Powell v. Alabama*, 287 U.S. 45 (1932). To establish ineffective assistance of counsel, the Petitioner must satisfy a two-prong test set forth in *Strickland.* "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

The second prong of the *Strickland* test requires a showing that the deficient performance of counsel prejudiced the petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694); see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficient Performance

Defense's counsel's failure to object to Heather Smith's testimony on the profile of adolescent male child abuse victims constituted deficient performance because Smith's testimony impermissibly bolstered the complainants' credibility and was not a proper subject for expert opinion testimony. *State v. Douglas,* 380 S.C. 499, 671 S.E.2d 606 (2009); *see also Strickland,* 466 U.S. at 692.

Rule 702 of the South Carolina Rules of Evidence governs the admission of expert testimony as an exception to general rule that witnesses must testify from personal knowledge:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an ***expert by knowledge, skill, experience, training, or education***, may testify thereto in the form of an opinion or otherwise.

(*emphasis added*). Expert opinion testimony on the ultimate issue in a case is not objectionable because it embraces an ultimate issue to be decided by the trier of fact, but such testimony must be otherwise admissible. Rule 704, SCRE, *State v. Wilkins*, 305 S.C. 272, 276, 407 S.E.2d 670, 672 (*citing* Rule 704, SCRE).

The purpose of Smith's opinion testimony was to bolster the credibility of complainants by crafting a carefully tailored hypothetical profile of an adolescent male child abuse victim designed to encompass the complainants and the facts of Petitioner's case. *Douglas,* 380 S.C. 499, 671 S.E.2d 606 (finding that it was unnecessary for the trial court to qualify the interviewer as an expert, but that the interviewer did not vouch for the victim's veracity where she never stated she believed the victim and gave no other indication concerning the victim's veracity); *see State v. Tapp,* 398 S.C. 376, 728 S.E.2d 468 (2012). The South Carolina Supreme Court has held that it is improper for an expert to comment on the veracity of a child's accusations of sexual abuse. *State v. Dawkins,* 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); *see State v. Dempsey,* 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child); *see also State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011).

Smith's testimony went beyond explaining the dynamics of delayed disclosure. App. 335, ll. 7-23. Her testimony was also distinguishable from permissible rape trauma testimony, in that Smith

did not interview the complainants or make specific findings related to them. *Cf. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (expert testimony on trauma of rape victim admissible). Rather Smith's role had characteristics of both a "victimologist" and a forensic interviewer in that she crafted a victim profile deliberately tailored to the factual circumstances of Petitioner's case to rationalize the weaknesses in the complainants' accounts and to imply that because complainants fit her profile, they must be telling the truth and Petitioner was guilty.

Weighing the credibility of complainants' testimony was the sole responsibility of the jury and nothing in complainant's testimony went beyond the ordinary knowledge of the jury such that any expert testimony was necessary. *Douglas,* 380 S.C. at 504, 671 S.E.2d at 609; *State v. Kromah,* 401 S.C. 340, 357, 737 S.E.2d 490, 499 n. 5 (2013). Therefore, Smith's testimony served only to impermissibly bolster the credibility of complainants' explanations with the authority of court sanctioned expertise. *Smith v. State,* 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010).

Further, regardless of the status of the law on forensic interviewer or "victimologist" testimony at the time of Petitioner's trial, Smith's testimony ran afoul of long established prohibitions on witness bolstering. Accordingly, defense counsel had an obligation to object to excludable and improper testimony, or his decision to no object must be based on an objectively reasonable trial strategy. *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260 (2001) (counsel deficient in criminal sexual conduct case for failing to object to introduction of inadmissible evidence); *see also Roseboro v. State,* 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness").

Counsel claimed that he did not object to Smith's testimony because he sought to use her to develop helpful testimony regarding false reporting. App. 483, ll. 14-20. This did not happen and,

given counsel's questioning of Smith, it was not an objectively reasonable trial strategy. Counsel freely acknowledged at the PCR hearing his terror in attacking expert witnesses:

> They're not your average lay witness that, to be quite honest, most of the time you can run over and bully around because they're scared.... The expert's been on the witness stand. They're comfortable. They understand their material very well because they are an expert and they obviously have good qualifications for a judge to allow them to be an expert. ***So I just think you got to tread lightly when dealing with them because you open too many doors. They – they're trained to rehash the points that they want to get rehashed in front of the jury.***

App. 483, ll. 21 – App. 484, ll. 10 *(emphasis added).* Counsel did not reveal any strategic reasons as to why he did not conduct any *voir dire* of Smith to determine the parameters of her testimony or for his decision not to object to her testimony as impermissibly bolstering the complainants' credibility. App. 485, ll. 11-22.

Despite defense counsel's purported strategy, the trial record revels Smith was able to manipulate counsel's cross-examination to further bolster complainants' credibility by highlighting the low percentage of false disclosure while reiterating to the jury her extensive professional experience. App. 340, ll. 14 – App. 342, ll. 15. Counsel's clumsy cross-examination also opened the door to Smith claiming on redirect that false allegations are rarely maintained all the way through trial. App. 343, ll. 1 – App. 344, ll. 17. Contrary to the findings of the PCR court, such testimony was, in fact, particularly damaging to Petitioner given that the defense's theory was that one of the complainants had made a false allegation of abuse in the past to deflect blame and had done so again in the present case to extort Petitioner. App. 440, ll. 2-13; App. 477, ll. 4 -14; App. 529.

Accordingly, the PCR court erred in finding that "[c]ounsel provided sound reasoning for not objecting" because trial counsel's performance was not reasonable "under prevailing professional norms." App. 529; *Strickland,* 466 U.S. at 687-88; *Roseboro,* 317 S.C. at 294, 454 S.E.2d at 313.

Prejudice

Counsel's deficient performance prejudiced Petitioner because his failure to object to Smith's impermissible testimony vouching for the credibility of the complainants "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler,* 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland,* 466 U.S. at 692); *Edmond* v. *State,* 341 S.C. 340, 348, 534 S.E.2d 682, 686 (2000).

The complainants' and their mothers' believability was crucial to the State's case since there was no physical evidence of sexual abuse or third party witnesses. These individuals had obvious credibility problems. Smith's testimony was paramount to the State's case as her theoretical profile of a typical male adolescent victim of sexual abuse was tailored to so closely mirror the complainants and the facts of the case that its primary objective was to simply bolster the credibility of the complaints by implication. *State v. Ellis*, 245 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) (noting that "[a]n officer's improper opinion which goes to the heart of the case is not harmless.");

Moreover, counsel failed to subject the State's case "to meaningful adversarial testing," in not conducting *voir dire* to learn Smith's qualification and to have some idea of the parameters of Smith's testimony. This is tantamount to deficient legal representation where prejudice is presumed. App. 592, ll. 17-22; *See Nance* v. *Ozmint,* 367 S.C. 547, 626 S.E.2d 878 (2006) (finding that trial counsel's failure to investigate, plan, and present a defense constituted "a classic example of a complete breakdown in the adversarial process."); *see also Frett* v. *State,* 298 S.C. 54, 378 S.E.2d 249 (1988) (finding that counsel's ineffectiveness was so pervasive as to exempt a particularized prejudice analysis).

Accordingly, trial counsel's performance prejudiced Petitioner's right to a fair trial since it "undermine[d] confidence in the outcome of [Petitioner's] trial" because without any evidence

supporting Petitioner's defense theory of false allegations or evidence contradicting the State's expert witness's testimony on the typical profile of an adolescent victim of child abuse and the rarity of false disclosure, Petitioner's right to a fair trial was adversely affected by trial counsel's deficient performance. *See Strickland,* 466 U.S. at 694; *see also Cherry,* 300 S.C. at 117-18, 386 S.E.2d at 625.

Therefore, the PCR judge erred in holding that trial counsel provided effective assistance of counsel because there is a reasonable probability that but for trial counsel's deficient performance, Petitioner would have received a fair trial. App. 610 – App. 618; *Strickland,* 466 U.S. at 694.

II.

Petitioner's Sixth Amendment rights were violated when counsel failed to object to the solicitor's improper "Golden Rule" closing argument where he impermissibly appealed to the passions of the jurors by arguing, inter alia, that if jurors found Petitioner not guilty they would be complicit in the continued sexual abuse of children and where the solicitor asked jurors to consider if Petitioner's behavior was something the jurors would have done, or if it was something that "a child molester" would have done.

Relevant Facts

State's Closing Argument

As noted in the previous argument, the State's closing argument applied Smith's theoretical profile to the complainants to stress their credibility and the guilt of Petitioner. App. 352, ll. 8 – App. 354, ll. 20. The State also highlighted how Petitioner would stay at a hotel when his camper was under repair, hypothetically asking: "I think [Minor 1] told you that when they went [to the hotel], there was always a single bed. *Why was that? Is that normal? Is that something you would do? Or is it something a child molester like [Petitioner] would do ... ".* App. 356, ll. 19-22.

Deputy Solicitor Graham, without objection from defense counsel, concluded the State's closing argument with the following:

> ***If you believe those boys made this story up*** because of gifts and because they stopped getting them when their mothers said, you can't go over there anymore, and then they waited six more months to tell the story, and they somehow got together and made it up, ***then find him not guilty. Find him not guilty. That's your job.***
>
> ***But if you think they are lying and you don't believe them, find him not guilty. Let him go. The Masters Inn will always have a room available with a single bed.***
>
> ***Twenty-five feet away from you sits a predator, a child molester, who thought he had found the perfect victims in [the complainants]***. He was wrong. Let ***your*** verdict shatter the silence that he was counting on. Tell him he is guilty. Convict him of five counts of criminal sexual conduct with a minor. ***Don't let the complainants be the perfect victims.***

App. 360, ll. 11 – App. 361, ll. 3 *(emphasis added).*

PCR Hearing

Defense counsel claimed it is his normal practice not to object to statements made in closing argument. App. 486, ll. 1-10. When asked about the comments detailed above, counsel confessed, "some of the comments that they made in hindsight, maybe I should have objected." *Id.* at ll. 16-17. On cross-examination, counsel reiterated that, after noting that the statements in closing arguments happened quickly, "in hindsight, the [Master's Inn statement] with the bed, I probably should have on that one, that there will always be an open bed, that's probably the one. The rest I probably would have still let go, but on that one, probably I should have objected." App. 497, ll. 18-22.

Order of Dismissal

In denying Petitioner's relief, the PCR court held that the State's closing argument characterizing the Petitioner as a predator, even if objectionable, did not render the trial unfair. App. 530. Moreover, the PCR court concluded that the State arguing "the Masters Inn will always have a room available with a single bed," was not a Golden Rule argument and was not sufficiently prejudicial to merit reversal. App. 531. The PCR court also concluded that the State's closing argument was a fair comment on the evidence and reflected the State's version of the case. App. 530; App. 532.

Discussion

In making closing arguments, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State,* 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). This includes arguing the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *State* v. *Caldwell,* 300 S.C. 494, 388 S.E.2d 816 (1990). However, closing arguments must stay within the record and reasonable inferences drawn therefrom. *State v. Cooper,* 334 S.C. 540, 514 S.E.2d 584 (1999). Further, in keeping with their obligation to seek justice, and not simply a conviction, a solicitor's closing argument must be carefully tailored to avoid appealing to the personal bias of jurors, or to arouse a juror's passion or prejudice. *State v. Linder,* 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981).

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State,* 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." *Humphries v. State,* 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "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." *Id; See State v. Hornsby,* 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997) ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.").

Based on the State's closing argument, it is clear that the solicitor intentionally and unnecessarily injected prejudicial comments into Petitioner's trial. Contrary to the conclusions of the

PCR court, the State's used an impermissible "Golden Rule" closing argument which encouraged jurors to depart from neutrality; to compare themselves to a man the State declared a pedophile; and to decide the case on the basis of personal interest and bias rather than evidence. *See State* v. *Reese,* 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct. App. 2004) (recognizing that a "Golden Rule" argument which suggests to jurors to put themselves in the shoes of one of the parties is generally impermissible), *aff'd in part and rev'd in part,* 370 S.C. 31, 633 S.E.2d 898 (2006) (affirming that the defendant was entitled to a new trial based on the solicitor's "Golden Rule" closing argument).

Defense counsel had a duty to object to the solicitor's improper closing remarks. *See State* v. *McDaniel,* 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (finding the solicitor's use of the word "you" forty-five times during closing argument asking the jurors to put themselves in the place of the victim constituted reversible error and warranted a new trial); *see also Von Dohlen* v. *State,* 360 S.C. 598, 611, 602 S.E.2d 738, 745 (2004) (noting "Other courts, including our own Court of Appeals, uniformly have condemned and prohibited golden rule arguments in criminal and civil settings").

The PCR court erred in finding that the Master's Inn comments were a valid "inference on the evidence presented that supported the State's theory of the case" and were not an impermissible Golden Rule argument. App. 530 – App. 531; *State* v. *Northcutt,* 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). Accordingly, defense counsel's failure to object to the impermissible statements in closing argument constitutes performance falling below "prevailing professional norms." *Strickland,* 466 U.S. at 687-88.

Prejudice

As to prejudice, 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. Petitioner was unable to have the trial judge mitigate the prejudice of the solicitor's improper comments as counsel failed to object or request a curative instruction. *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).

These improper comments, taken together, had a significant impact on the trial that strengthened the state's suboptimal case. The State's closing argument explicitly asked the jurors to put themselves in Petitioner's position: ***"Is that something you would do? Or is it something a child molester like [Petitioner} would do?"*** App. 356, ll. 19-22 *(emphasis added).* Further, the State challenged the jurors that if they found Petitioner not guilty, they would be condoning child sexual abuse: ***"But if you think they are lying and you don't believe them, find him not guilty. Let him go. The Masters Inn will always have a room available with a single bed. Twenty-five feet away from you sits a predator, a child molester"*** App. 360, ll. 18-23 (*emphasis added*); *Northcutt,* 372 S.C. 207, 222-223, 641 S.E.2d 873, 881-882 (2007) (State's closing argument equating a not guilty verdict with the jury declaring "open season on babies in Lexington County" was prejudicial and required reversal).

The sheer number of objectionable comments made by the State in closing arguments which either; improperly bolstered State's witnesses or appealed to the prejudices of jurors, call into question the trustworthiness of the verdict. *Id* (multiple improper arguments in State's closing required reversal because sentence was imposed under the influence of passion and prejudice). The PCR court erred because the solicitor's improper comments during closing argument "so infected

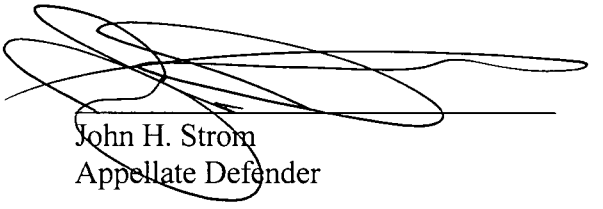
the trial with unfairness as to make the resulting conviction a denial of due process." *Vaughn,* 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004); App. 530 – App. 531.

Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 566 – App. 581; *Cherry,* 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

For the foregoing reasons, the Court should grant certiorari, allow further briefing, and ultimately reverse Petitioner's convictions.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 20th day of Februrary, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
William P. Keesley, Circuit Court Judge

SCOTT PARKER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001320

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of February, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of February, 2015.

Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.