

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable Brooks P. Goldsmith, Circuit Court Judge

KEVIN SHANE EPTING,

ORIGINAL

RECEIVED

OCT 30 2017

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000696

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when the prosecutor in opening statement and closing argument referred to the story of Little Red Riding Hood referring to the witness as the grandmother and Appellant as the big bad wolf?
2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when the prosecutor made an improper closing argument referring to Petitioner as the big bad wolf and telling the jurors, "But, at the end of Little Red Riding Hood and the big bad wolf, it turns out good. Because the woodman comes along and takes care of the wolf. Ladies and gentlemen, you are the woodman. You are the woodman to take care of this matter. Do we want any other grandma's subjected to the big bad wolf?"
3. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object when, in closing argument, the prosecutor told the jury that the witness had no motive to lie when the witness had a motive to lie and accuse Appellant rather than implicate her son?
4. Did the PCR judge err in refusing to find trial counsel ineffective for failing to settle Appellant's criminal record and prohibit reference and questioning about Appellant's prior driving offenses and the fact that he did not have a license as a result of driving offenses including numerous convictions for driving under the influence?

STATEMENT

In February of 2009, the Laurens County Grand Jury indicted Petitioner Epting for burglary first degree and assault and battery of a high and aggravated nature [ABHAN], indictments #2009-GS-30-0190, 0191. On November 10, 2009, Petitioner proceeded to jury trial before the Honorable D. Garrison Hill. Claude H. Howe, III, and D. Katherine Anderson represented Petitioner at trial. Ronald N. Fleming prosecuted the case. The jury returned verdicts of guilty. Judge Hill sentenced Petitioner to twenty (20) years for burglary and ten (10) years concurrent for ABHAN. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Epting, Op. No. 2012-UP-152 (Ct.App. filed March 7, 2012). A petition for rehearing was filed and then denied on May 12, 2012. A petition for writ of certiorari was filed with the South Carolina Supreme Court and the petition was granted on April 16, 2014. On October 22, 2014, the South Carolina Supreme Court dismissed the petition as improvidently granted.

On February 23, 2015, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on August 19, 2015. Petitioner filed an amended PCR application on February 17, 2016. On June 8, 2016, an evidentiary hearing was held before the Honorable Brooks P. Goldsmith. Carson M. Henderson represented Petitioner at the PCR hearing. Justin J. Hunter represented the State. In a written order signed July 7, 2016, Judge Goldsmith denied relief and dismissed the application. Petitioner filed a timely motion to reconsider on July 25, 2016. The State filed a return on October 28, 2016. On March 10, 2017, Judge Goldsmith denied the motion to reconsider. A timely notice of intent to appeal was served on March 20, 2017. This petition for writ of certiorari follows.

ARGUMENTS

1. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the prosecutor in opening statement and closing argument referred to the story of Little Red Riding Hood referring to the witness as the grandmother and Appellant as the big bad wolf.

During opening statement the prosecutor told the jurors, “Now, you’ve all heard the story of Little Red Riding Hood and the big bad wolf, I’m sure you have. I’d like to call this case the case of grandma and the big bad wolf. Grandma being Ms. Marilyn Hopkins sitting back there. She sort of reminds you of a grandma. She does to me. And sitting over here at the Defense table is Kevin Epting, the big bad wolf.” (App. p. 72, lines 4-10) The prosecutor referred to Petitioner as the big bad wolf four additional times in opening statement. (App. p. 73, lines 4-5; p. 75, lines 9-10; p. 78, lines 3-4; 23). The prosecutor additionally referred to the Petitioner as the big bad wolf in closing argument. (App. p. 317, lines 14-21). Throughout both the opening and the closing the prosecutor referred to the witness, Marilyn Hopkins, as grandma. Trial counsel did not object when the prosecutor referred to Petitioner as the big bad wolf.

During the PCR hearing trial counsel admitted that he should have objected when the prosecutor referred to Petitioner as the big bad wolf. (App. p. 426, lines 1-25). In the order of dismissal the PCR judge wrote:

This Court finds that Counsel was not ineffective for failing to object because,, when read in context, the solicitor’s comments involves his attempt to make a comparison between Applicant’s case and *The Little Red Riding Hood* fairy tale, as both involve the home invasion of an elderly woman.¹ This Court finds that the solicitor was not trying to inflame the passions or prejudices of the jury by calling Applicant a wolf because it was in the context of an analogy. This Court further finds that even if such comments were objectionable, the few times they were used during the State’s opening statement and closing argument did not so infect the trial that the jury’s verdict is deemed unreliable as the trial judge properly informed the jury of the presumption of innocence and the burden of

¹ At the time of trial the witness was 57 years old. (App. p. 85, lines 23-24).

proof. As such, this Court finds that applicant has failed to show that he was prejudiced by Counsel's actions in this regard.

(App. p. 448). The PCR judge erred. Trial counsel was deficient in failing to object when the prosecutor called Petitioner the big bad wolf five times in opening and again in closing. Petitioner was prejudiced by the deficient performance.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2052; Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the applicant must show counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687, 104 S.Ct. at 2052. Next, the applicant must show he was prejudiced by counsel's performance such that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Id. at 693, 104 S.Ct. at 2052.

In Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998), the South Carolina Supreme Court wrote

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Improper comments do not automatically require reversal if they are not prejudicial to the defendant. Johnson v. State, supra; 3 Wharton's Criminal Procedure § 353 (13th ed. 1991) (question is whether comment was sufficiently prejudicial or harmless). 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. Johnson v. State, supra (a solicitor's improper comments may be cured by the judge's instructions to the jury); State v. Copeland, supra; United States v. Wilson, 135 F.3d 291 (4th Cir.1998). The appellant has

the burden of proving he did not receive a fair trial because of the alleged improper argument. Johnson v. State, *supra*; State v. Copeland, *supra*. 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. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, *cert. denied*, 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997).

In Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010), the South Carolina

Supreme Court wrote:

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). However, “[s]olicitors are bound to rules of fairness in their closing arguments,” as we have explained:

While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice. State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)).

In Simmons the Court granted a new trial based on the fact that trial counsel failed to object when the prosecutor misstated the law in closing argument. In Vasquez the Court granted a new sentencing hearing based on the fact that trial counsel failed to object when the prosecutor characterized Vasquez, a Muslim, as a domestic terrorist and correlated his acts with the terrorist attacks of September 11th. While the prosecutor in the present case did not misstate the law and did not reference domestic terrorism and the attacks of September 11th, the Little Red Riding Hood analogy comparing the witness to the grandmother and referring to Petitioner as the big bad wolf was calculated to arouse to the jurors’ passions and prejudices. As counsel for Petitioner argued at the PCR hearing, all of us have grandmothers. (App. p. 422, lines 9-17).

In Randall the prosecutor analogized drug dealers to cockroaches. The Court found that the prosecutor’s comments did not so infect the trial with unfairness as to make the conviction a

denial of due process. The Court in Randall noted the overwhelming evidence of guilt and the cockroach analogy consisted of only ten lines of the transcript. The present case can be distinguished from Randall in three separate ways.

First, the improper reference in the present case was not brief. In the eight page opening statement the prosecutor called Petitioner the big bad wolf five separate times in addition to the reference in closing argument. Second, the present case was not a drug case but a case where a woman was burglarized and assaulted. The big bad wolf/grandmother analogy in the present case was far more prejudicial than the cockroach analogy in Randall. Third, unlike Randall, Petitioner's guilt was not overwhelming. The State presented no forensic evidence linking Petitioner to the crime. Petitioner presented an alibi defense. The State's case was based wholly on the identification by witness Hopkins. Curiously, Hopkins did not immediately report the incident. (App. p. 93, lines 2-8). The incident took place on November 11th at approximately 1:30 AM. (App. p. 149, lines 15-16). The police were not called until 3:00 PM on November 12th approximately 38 hours later. (App. p. 147, lines 22-25; p. 164, lines 5-8). Also, in her statement to police she said she saw someone at her china cabinet where she kept her wallet and then stated that her son Billy was "off limits to her wallet." (App. p. 109, line 11 – p. 110, lines 1-20). Hopkins admitted that her son knew where she kept her money and she had suspected him of taking money in the past. (App. p. 110, line 21 – p. 111, lines 1-14). The improper closing argument in the present case deprived Petitioner of a fair trial.

In State v. Webb, 389 S.C. 174, 697 S.E.2d 662, (Ct. App. 2010), in opening and closing argument the prosecutor told the jury that **the case** reminded him of hyenas and then in closing asked the jury to do their job and "cage this wild animal." The prosecutor in Webb did not call the defendant a hyena. In Webb the Court of Appeals found that the prosecutor's comments did

not deprive Webb of a fair trial, noting that, like Randall, there was strong evidence of Webb's guilt and the wild animal comment was not repeated throughout the trial. In the present case, as discussed above, there was not strong evidence of guilt and the prosecutor repeatedly referred to Petitioner as the big bad wolf. Petitioner demonstrated that he did not receive a fair trial as a result of the prosecutor's improper comments. The PCR judge erred in refusing to find counsel ineffective for failing to object to the comments. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different.

2. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the prosecutor made an improper closing argument referring to Petitioner as the big bad wolf and telling the jurors, "But, at the end of Little Red Riding Hood and the big bad wolf, it turns out good. Because the woodman comes along and takes care of the wolf. Ladies and gentlemen, you are the woodman. You are the woodman to take care of this matter. Do we want any other grandmas subjected to the big bad wolf?"

In closing argument the prosecutor told the jury, "But, at the end of Little Red Riding Hood and the big bad wolf, it turns out good. Because the woodman comes along and takes care of the wolf. Ladies and gentlemen, you are the woodman. You are the woodman to take care of this matter. Do we want any other grandmas subjected to the big bad wolf?" (App. p. 317, lines 16-21). This was the very last thing the jury heard before the judge instructed them with the law. Trial counsel admitted that he should have objected to this comment. (App. p. 421, line 7 – p. 422, lines 1-17).

In the order of dismissal the PCR judge wrote, "This Court finds that Applicant has failed to meet his burden of proving that counsel was ineffective in this regard. This Court finds that, when read in context, the solicitor was concluding the his *Little Red Riding Hood* analogy and

not appealing to the passions or prejudices of the jurors or asking them to place themselves in the victim's shoes." (App. pp. 449-450). The PCR judge additionally found that Petitioner failed to prove prejudice. The PCR judge erred.

As discussed is issue one above, the Little Red Riding Hood analogy was improper without the additional improper question of asking the jurors if they wanted other grandmothers subjected to the big bad wolf. The analogy was made even more prejudicial by the question posed by the prosecutor. The question was clearly calculated to arouse the jurors' passions and prejudices by asking the jury to protect all grandmothers.

In Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914-15 (2009), the South Carolina Supreme Court wrote:

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744.

" 'While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.' " State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)). " 'The solicitor's closing argument must, of course, be based on this principle.' " Id. "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice." State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006).

"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.”).

In Brown the Court found that counsel was ineffective in failing to object to the prosecutor’s “Golden Rule” argument asking the jury to speak up for the child victim. 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 because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than evidence), *aff’d in part and rev’d in part*, 370 S.C. 31, 633 S.E.2d 898 (2006) (affirming the Court of Appeals’ finding that the defendant was entitled to a new trial based on the solicitor’s “Golden Rule” closing argument in which he repeatedly asked jurors to “speak” for the murdered victim). The Court in Brown, however, found that Brown failed to prove prejudice, noting that the prosecutor’s comments were limited and there was overwhelming evidence of guilt. As discussed above is issue one, the prosecutor’s comments in the present case were not limited and there was not overwhelming evidence of guilt.

Asking the jurors if they wanted any other grandmothers subjected to the big bad wolf is more inflammatory than asking the jury to speak for a victim. In Tappeiner v. State, 416 S.C. 239, 252, 785 S.E.2d 471, 478 (2016), the South Carolina Supreme Court wrote:

Further, the solicitor’s remarks regarding whether the jurors would want Tappeiner babysitting their children or relatives improperly appealed to the jurors’ emotions, rather than the evidence in the record. *Cf. Brown*, 383 S.C. at 512, 517, 680 S.E.2d at 912, 915 (finding the solicitor improperly appealed to the jurors’ emotions during closing argument when telling them to “speak up” for the child victim and “make sure that the perpetrator is punished”). Thus, we further find there is evidence in the record to support the PCR court’s finding that trial counsel was deficient in failing to object to the solicitor’s emotional appeal at the conclusion of its closing arguments.

As in Tappeiner, the prosecutor's question to the jury appealed to the jurors' emotions rather than the evidence in the case. Counsel in the present case was ineffective in failing to object to the prosecutor's question to the jury in closing argument. Petitioner was prejudiced by the deficient performance.

In State v. Liberte, 336 S.C. 648, 654, 521 S.E.2d 744, 747 (Ct. App. 1999), the South Carolina Court of Appeals wrote:

A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

United States v. Monaghan, 741 F.2d 1434, 1441 (D.C.Cir.1984), cert. denied, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985); see also United States v. Hawkins, 595 F.2d 751, 754 (D.C.Cir.1978) (Prosecutors are not "at liberty to substitute emotion for evidence by equating, directly or by innuendo, a verdict of guilty to a blow against the drug problem."), cert. denied, 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 380 (1979); United States v. Barker, 553 F.2d 1013, 1025 (6th Cir.1977) ("[I]t is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted it will be impossible to maintain 'law and order' in the jurors' community."); cf. State v. Smart, 278 S.C. 515, 526, 299 S.E.2d 686, 692-93 (1982) (finding solicitor's closing argument urging that "law officers who risked their lives in [the defendant's] recapture would be aggrieved by a sentence less than death" and implying that "other citizens of Lexington County including himself would strongly disapprove of a life sentence," to be improper, noting that "[j]urors are simply not to consider the opinions of neighbors, officials or even other juries") (emphasis added), cert. denied, 460 U.S. 1088, 103 S.Ct. 1784, 76 L.Ed.2d 353 (1983), overruled in part on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); United States v. Radka, 904 F.2d 357, 361 (6th Cir.1990) ("Despite the devastation wrought by drug trafficking in communities nationwide, we cannot suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.'").

The prosecutor's Little Red Riding Hood analogy and then comment to the jury in closing that they are the woodman to take of the matter followed by the question, "Do we want

any other grandmas subjected to the big bad wolf?” improperly appealed to the jurors’ emotions, asking them to protect all grandmothers rather than judge the evidence presented. The comments were prejudicially improper. There is a reasonable probability that, but for counsel’s deficient performance, the outcome of the trial would have been different. The PCR judge erred in refusing to find both that trial counsel was deficient in failing to object to the improper closing argument and that Petitioner was not prejudiced by the deficient performance.

In the order of dismissal the PCR judge cited State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). Importantly, in the concurring opinion Justice Bussey wrote:

I concur in the opinion of Mr. Justice Littlejohn, but deem further comment appropriate as to question number three. There is abundant persuasive authority from other jurisdictions indicating that the latitude allowed a prosecutor in arguing before a jury is not nearly so broad as indicated by the text in 23A C.J.S. Criminal Law s 1107, quoted in the opinion of Mr. Justice Littlejohn, and there are numerous decisions holding arguments similar to that allegedly made by the prosecutor in this case to be improper. See for instance, Emerson v. State, 90 Ga.App. 323, 82 S.E.2d 882 and State v. Phifer, 197 N.C. 729, 150 S.E. 353.

Whether or not an argument is prejudicially erroneous depends in large measure upon the precise language used by the prosecutor and the context in which the utterances are made. We have the benefit of neither in the present case, nor of the trial transcript, and I am not convinced of any prejudicial error. On the other hand, I do not think this Court should go on record as approving the propriety of the argument allegedly made, such to my mind being prima facie improper. It is not amiss, I think, to call attention to the pertinent provisions of the American Bar Association Project on Standards for Criminal Justice relating to the argument of the prosecutor to the jury. Such appear to be supported by the better reasoned decisions from other jurisdictions. I quote the following from page 126 of the ‘Approved Draft, 1971.’

‘5.8 Argument to the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.’

State v. Durden, 264 S.C. 86, 93–94, 212 S.E.2d 587, 591 (1975). Unlike the Court in Durden, this Court has the benefit of the entire trial transcript, the exact words used by the prosecutor and the context of those words in order to find prejudicial deficient performance.

3. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when, in closing argument, the prosecutor told the jury that the witness had no motive to lie when the witness had a motive to lie and accuse Appellant rather than implicate her son.

During closing argument, discussing Marilyn Hopkins' identification of Petitioner, the prosecutor told the jury, "Why would she lie about that? Why?" (App. p. 313, lines 12-13). Additionally, the prosecutor said, "She has no motive to lie. No motive at all." (App. p. 313, lines 16-17). Prior to trial the prosecution moved to exclude evidence of a 911 call made by the witness two months earlier in which she reported that her son was acting up and punched a hole in the wall. (App. p. 34, line 9 – p. 35, 36, lines 1-25; p. 42, lines 18 – p. 43, p. 44, lines 1-9). The judge excluded evidence of the prior incident involving the son. (App. p. 46, line 24 – p. 47, p.48, lines 1-21).

During the direct examination of Ms. Hopkins the prosecutor asked if she recognized Deputy Galarza. (App. p. 98, lines 7-8). She responded yes and then testified, "He's the one I called when the episode occurred with my son, William Earl Sizemore." (App. p. 98, lines 12-13). She then went into a bit of the prior incident before the prosecutor stopped her. (App. p. 98, lines 16-19). Later, counsel for Petitioner argued that he should be able to question the witness about the prior incident involving her son because she opened the door to the questioning. (App.

pp. 112-121). The judge adhered to his earlier ruling excluding the evidence. This issue was raised on direct appeal and the conviction was affirmed.

During the PCR hearing trial counsel admitted that part of the defense was to argue that Ms. Hopkins had a motive to lie and identify Petitioner as the person who she saw in her home in order to protect her son. (App. p. 418, lines 1-4). Trial counsel admitted that he should have objected when the prosecutor told the jury in closing that Ms. Hopkins had no motive to lie. (App. p. 418, line 5 – p. 419, lines 1-25). In the order of dismissal the PCR judge wrote, “This Court finds that the State’s comment that the victim had “no motive to lie” does not rise to the level of improper vouching by the State.” (App. p. 447). The PCR judge also found that Petitioner failed to show prejudice. (App. p. 447). The PCR judge erred.

In Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002), the South Carolina Supreme Court wrote:

A solicitor may argue 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). A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction. Id. 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. Id.

Under the specific facts of the present case, where the motive to lie was excluded, the prosecutor’s statement that the witness had no motive to lie went beyond arguing credibility and constituted improper vouching. Trial counsel was ineffective in failing to object to the improper comment. Petitioner was prejudiced by the deficient performance. There is a reasonable

probability that, but for counsel's deficient performance, the outcome of the trial would have been different.

In Smith v. State, 375 S.C. 507, 523–24, 654 S.E.2d 523, 532 (2007) the South Carolina Supreme Court wrote:

In the instant case, the solicitor's comments were confined to facts established during trial and, in the context of the entire record, were not so egregious as to have "infected the trial with unfairness as to make the resulting conviction a denial of due process." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004), cert. denied, 544 U.S. 943, 125 S.Ct. 1645, 161 L.Ed.2d 511 (2005). Although the solicitor improperly used the pronoun "I" in his closing argument, these comments were limited and did not recur throughout his argument. Furthermore, there was also overwhelming evidence of Petitioner's guilt. See State v. McFadden, 318 S.C. 404, 416, 458 S.E.2d 61, 68 (Ct.App.1995) (holding the solicitor's comments did not infect the trial with unfairness to the extent that his conviction was a denial of due process where there was ample evidence of guilt in the record).

In contrast, the evidence in the present case was based solely on the testimony of Ms. Hopkins and her credibility was a crucial factor to be determined by the jury. The PCR judge erred in refusing to grant relieve trial counsel failed to object when, in closing argument, the prosecutor told the jury that the witness had no motive to lie when the witness had a motive to lie and accuse Appellant rather than implicate her son.

4. The PCR judge erred in refusing to find trial counsel ineffective for failing to settle Appellant's criminal record and prohibit reference and questioning about Appellant's prior driving offenses and the fact that he did not have a license as a result of driving offenses including numerous convictions for driving under the influence.

Petitioner testified at trial and denied the charges. (App. pp. 202-221). During cross examination the prosecutor asked Petitioner why his license was suspended and asked about numerous convictions for driving under the influence. (Tr. p. 216, lines 6-20). The prosecutor additionally questioned defense witness Sharon Corley about the

fact that petitioner did not have a license as a result of numerous DUI convictions. Trial counsel failed to object to the questioning. Although the jury also learned of Petitioner's prior burglary convictions, trial counsel did not believe the admission of the DUI convictions caused any issue in the case. (App. p. 422, line 23 – p. 423, lines 1-17). In the order of dismissal the PCR judge wrote, "This Court finds that Applicant has failed to meet his burden of proving that Counsel was ineffective for failing to object to the testimony concerning Applicant's DUI offenses. This Court finds that even if Counsel should have objected to the testimony, Applicant has failed to prove he was prejudiced." (App. p. 451). The PCR judge erred.

In State v. Scriven, 339 S.C. 333, 340–41, 529 S.E.2d 71, 74–75 (Ct. App. 2000), the South Carolina Court of Appeals discussed Rule 609, SCRE and wrote:

Under *Rule 609(a)(1)*, SCRE, evidence that an accused has been convicted of a crime, which was punishable by death or imprisonment in excess of one year, is admissible for impeachment if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. The party attempting to introduce the prior conviction for impeachment purposes has the initial burden of establishing the basis for its admission. See United States v. Cunningham, 638 F.2d 696 (4th Cir.1981). Furthermore, the rule requires the trial judge to balance the probative value of the evidence for impeachment purposes against the prejudice to the accused. See State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) (expressly approving the five-factor analysis generally employed in federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused, but noting that there may be other factors which a trial judge should, in the exercise of discretion, consider under the facts and circumstances of each particular case); see also United States v. Sanders, 964 F.2d 295 (4th Cir.1992).

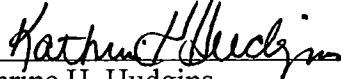
In Colf our supreme court determined the obligations of the trial court when considering the admission of prior convictions which are more than ten years old under Rule 609(b), SCRE. *341 Unlike 609(a)(1), Rule 609(b) requires a finding by the trial judge that the probative value of the impeachment evidence *substantially* outweighs the prejudice to the accused. It also requires that this finding be supported by specific facts and circumstances. The court recognized that Rule 609(b) raises a presumption against admissibility of remote prior convictions. Consequently, the court held that in a 609(b) analysis the trial

judge must carefully balance the interests involved and articulate for the record the specific facts and circumstances supporting its decision. In so ruling, the court adopted the reasoning of the Fourth Circuit Court of Appeals as expressed in United States v. Cavender, 578 F.2d 528 (4th Cir.1978) and United States v. Beahm, 664 F.2d 414 (4th Cir.1981).

There is nothing in the record to indicate that the prior convictions were admissible pursuant to Rule 609(a) or (b), SCRE. Trial counsel was ineffective in failing to object. There is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. Again, the State's case was based solely on the identification by Ms. Hopkins. The PCR judge erred.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issues.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of October, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

Honorable Brooks P. Goldsmith, Circuit Court Judge

KEVIN SHANE EPTING,

PETITIONER

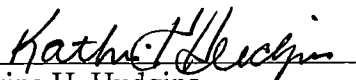
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

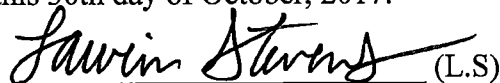
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Justin J. Hunter, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Kevin Shane Epting, #245196, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 30th day of October, 2017.



Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 30th day of October, 2017.



Notary Public for South Carolina
My Commission Expires: July 5, 2027.