STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

Certiorari to Laurens County
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-000696

KEVIN SHANE EPTING,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

RESPONDENT'S ISSUE PRESENTED

I. The PCR court correctly found Counsel was not ineffective for failing to object to the State's opening statement and closing argument where the assistant solicitor analogized Petitioner's factual situation to the story of *Little Red Riding Hood*, referring to the victim as the "grandmother" and Petitioner as the "big bad wolf."

II. The PCR court correctly found Counsel was not ineffective for failing to object to the State's closing argument because no Golden Rule violation occurred where the State analogized Petitioner's factual situation to the story of *Little Red Riding Hood*, stating "You are the woodman to take care of this matter. Do we want any other grandma's [sic] subjected to the big bad wolf?"

III. The PCR court correctly found Counsel was not ineffective for failing to object to the State's closing argument where the assistant solicitor's statement that the victim "had no motive to lie" did not constitute improper vouching.

IV. The PCR court correctly found Counsel was not ineffective for failing to object to the State eliciting testimony of Petitioner's prior driving offenses where evidence of the prior offenses did not suggest that he was guilty of burglary or that he had a propensity to commit the burglary.

STATEMENT OF THE CASE

Underlying Facts and Trial

On November 11, 2008, Marilyn Hopkins awoke to the sound of someone in her home. She went to the kitchen and found Petitioner at the china hutch going through her pocketbook. App. 90-91; 94. Ms. Hopkins recognized the burglar as Petitioner because he had been to her home before with her son and she recognized the tattoos on his arms and legs. App. 91-92. Ms. Hopkins confronted Petitioner and told him: "My son is off limits to my wallet and you will not go in my billfold." App. 94. Petitioner started walking toward Ms. Hopkins and began hitting and kicking her. App. 91. Petitioner left without taking the pocketbook or any money. App. 93. Ms. Hopkins suffered two black eyes, a knot on her head, bruises on her side, broken glasses, and was in a state of shock. App. 137. Ms. Hopkins admitted not calling the police right away because she was frightened. She later called her sister, who subsequently called the police the morning of November 11, 2008. App. 93; 123; 129; 137-138.

Deputy Galarza responded to the sister's call. App. 147-149. He took Ms. Hopkins' statement, whom he described as upset, nervous, and scared. App. 150-151. Ms. Hopkins described the situation, identifying Petitioner as the burglar and the one who assaulted her based on knowing him as neighbor, describing what he looked like, and accurately describing his tattoos. App. 149-159. Ms. Hopkins further identified Petitioner from a photo shown by Deputy Galarza. App. 157.

Petitioner was indicted by the February 2009 term of the Laurens County Grand Jury for first-degree burglary (2009-GS-30-190) and assault and battery of a high and aggravated nature (ABHAN) (2009-GS-30-191). Chip Howe, Esquire, represented him. On November 10-13, 2009, Petitioner proceeded to a jury trial before the Honorable D. Garrison Hill and found guilty as

indicted. Petitioner was sentenced to imprisonment for twenty years for burglary and ten years for ABHAN. All sentences were set to run concurrently.

A timely notice of intent to appeal was filed and the direct appeal perfected. Petitioner argued whether the trial court erred in refusing to allow evidence of third party guilt and refusing to allow defense counsel to cross-examine Ms. Hopkins on a 911 call she made regarding her son. 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. The remittitur was sent October 22, 2014.

Post-Conviction Relief Application

On February 23, 2015, Petitioner filed an application for post-conviction relief (2010-CP-30-128) alleging ineffective assistance of counsel. On February 19, 2016, Petitioner filed an Amendment. His grounds are consolidated as follows:

1. "Denied the Effective Assistance Counsel at Trial"
    a. "Counsel failed to competently argue pre-trial motions"
    b. "Counsel failed to investigate thoroughly"
2. "Denied the Effective Assistance of Counsel at Sentencing"
3. "Denied the Effective Assistance of Counsel of Appeal"
4. "Failed to object during the State's closing argument when the solicitor said the victim 'has no motive to lie.' See Trial Transcript, page 313, lines 12-17. This constituted improper burden shifting by the solicitor and improper vouching for the victim's credibility by the solicitor, especially in a he said/she said case with no forensic evidence indicating the Applicant committed the crime. Furthermore, the trial judge had prevented the Applicant from introducing third-party guilt evidence that the victim's son had assaulted the victim, when there was evidence demonstrating prior difficulties between the victim and her son and evidence that the victim believed her son may have previously stolen money from her wallet/billfold. The victim's desire to protect her son was the victim's

'motive to lie,' but the Applicant was prohibited from presenting evidence about third-party guilt and therefore could not respond to the victim having 'no motive to lie'"

5. "Failed to object during the State's opening statement when the solicitor, referring to the fairy tale 'Little Red Riding Hood,' called the Applicant 'the big bad wolf' and called the victim 'grandma.' See Trial Transcript, page 71, line 23 - page 79, line 2. This was improper use of a nickname;"
6. "Failed to object during the State's closing argument when the solicitor again called the Applicant 'the big bad wolf' and called the victim 'grandma.' See Trial Transcript, page 309, line 5 - page 317, line 22. This was improper use of a nickname;"
7. "Failed to object during the State's closing argument when the solicitor said, 'Do we want any other grandma's [sic] subjected to the big bad wolf?' See Trial Transcript, page 317, lines 20-21. This was a 'Golden Rule' argument which impermissibly appealed to the passion of the jurors by asking them to "speak up" for other elderly grandmothers who may potentially become victims of the Applicant or other people, because every juror has a grandmother;"
8. "Failed to ask the Court to prohibit the witnesses from mentioning the Applicant's prior record (other than the two (2) burglary convictions relied upon by the State to prove burglary 1st degree); and failed to object when the solicitor asked the Applicant about his driving offenses during cross examination (see Trial Transcript, page 216, lines 6-22) and when the solicitor asked defense witness Sharon Corley about the Applicant's driving offenses during cross-examination (see Trial Transcript, page 263, lines 21-25). It was bad enough that the jury heard about the Applicant's burglary convictions, but this testimonial evidence made the Applicant out to be a drunk."

Respondent made its Return on or about August 19, 2015. An evidentiary hearing into the matter was convened on June 8, 2016, at the Greenwood County Courthouse. Petitioner was present at the hearing and represented by Carson Henderson, Esquire. Justin Hunter, Esquire, of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Petitioner's trial counsel, Chip Howe, Esquire, also testified.

By Order of Dismissal filed July 14, 2016, the PCR court denied and dismissed Petitioner's application with prejudice. The PCR court found Counsel was not ineffective for failing to object to the State's closing argument where the solicitor stated the victim "has no motive to lie" because such a statement did not constitute improper vouching. App. 446-447. The

PCR court found Counsel was not ineffective for failing to object to the State's *Little Red Riding Hood* analogy in its opening statement and closing argument as such statements, when read in the context of an analogy, did not arouse the jurors' passions or prejudices to rise to the level of improper comments that would require reversal of the conviction. App. 447-448. The PCR court also found Counsel was not ineffective for failing to object to the State's closing argument asking, "Do we want any other grandma's [sic] subjected to the big bad wolf" as this comment was not a Golden Rule violation because it did not ask the jurors to place themselves in the victims shoes nor did it rise to the level of improper comments that would require reversal of the conviction. App. 449-450.

On July 25, 2016, Petitioner filed a Motion to Reconsider. Respondent made its Return on or about October 28, 2016. The PCR court issued an Order Denying Motion to Reconsider on March 10, 2017 and filed March 15, 2017.

Petitioner filed a timely notice of appeal and filed his Petition for Writ of Certiorari on October 30, 2017. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action is whether "any evidence of probative value" exists to sustain the post-conviction relief court's findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. *Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing *Sheppard v. State*, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, at 441, 334 S.E.2d at 814.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, at 689. An applicant must overcome this presumption in order to receive relief. *Cherry*, at 118, 386 S.E.2d at 625.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief.

Strickland, at 687. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625, citing *Strickland*, at 688. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. The PCR court correctly found Counsel was not ineffective for failing to object to the State's opening statement and closing argument where the assistant solicitor merely analogized Petitioner's factual situation to the story of *Little Red Riding Hood*, referring to the victim as the "grandmother" and Petitioner as the "big bad wolf."

Petitioner argues the PCR court erred in failing to grant post-conviction relief on the basis that Counsel failed to object to certain comments in the State's opening statement and closing argument. However, the PCR court properly found Counsel was not ineffective, as the brief comments did not require reversal. Certiorari should be denied.

Relevant Background and Findings Before PCR Court

During the State's opening statement, the assistant solicitor began by making an analogy between Petitioner's case and the story of *Little Red Riding Hood*, stating:

> 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 here. 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. 72, ll. 4-10. The assistant solicitor proceeded to outline the facts of the case, which alleged Petitioner broke into Ms. Hopkins' home and assaulted her while trying to take money from her pocketbook. App. 73-74.

During the State's closing argument, the assistant solicitor again analogized to the fairy tale referring to Ms. Hopkins as "the grandma" and Petitioner as "the big bad wolf" on two occasions. App. 309, 317.

At the PCR hearing, Counsel agreed the assistant solicitor was not just calling Petitioner a wolf but was making an analogy to his behavior in context of *Little Red Riding Hood.* App. 426. He testified "hindsight tells me I should've [objected]." App. 426, ll. 22-23. The PCR court found Counsel was not ineffective for failing to object to these brief comments. The PCR court

found the trial judge properly instructed the jury as to the nature of opening statements and closing arguments. App. 447-448. The PCR court further found the comments did inflame the passions or prejudices of the jury because **when read in context,** it was clear the Solicitor was simply making a factual analogy to a fairy tale. App. 448. The PCR court also found there was no prejudice because even if the 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. App. 448.

Deficiency

The PCR court correctly denied Petitioner's claim that Counsel was ineffective for failing to object to the State's one comment in its opening statement and two comments in its closing argument where the assistant solicitor referred to Petitioner as the "big bad wolf." A solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *State v. Webb*, 389 S.C. 174, 178-79, 697 S.E.2d 662, 664 (Ct. App. 2010) (citing *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 156 (Ct.App.2003)).

Here, the assistant solicitor's comments were not objectionable. First, the PCR court correctly held the comments were simply made to compare Petitioner's factual situation with a fairy tale – as both involve the home invasion of an elderly woman. This is not the case of a solicitor calling Petitioner disparaging or insulting names, but clearly, when read as a whole, is instead a case of the solicitor making an analogy to *Little Red Riding Hood.*

Two cases which involve much less benevolent comparisons were ruled as not improper. In *State v. Webb*, the State referred to the defendant in its opening and closing statement as a wild animal and a hyena looking for easy prey. The Supreme Court found "**[g]iven the facts of**

this case...the solicitor's comments did not infect the trial with unfairness so as to deprive Webb of a fair trial." *Webb*, 389 S.C. at 180 (emphasis added). The Court found the comments were not repeated through the trial and did not result in a denial of due process. The Court also noted there was strong evidence of Webb's guilt. *Id.* In *Randall v. State*, 356 S.C. 639, 591 S.E.2d 608 (2004), the solicitor made an analogy between drug dealers and cockroaches, as cockroaches "contaminate" "everything they touch" and "hate the light" (referring to the police). *Randall*, 356 S.C. at 642. The Court found these comments did not deprive Randall of a fair trial "given the facts of the case." *Id.* The Court found the argument only consisted of ten lines and did not so infect the trial with unfairness as to deprive the defendant due process." *Id.* 356 S.C. at 643.

Here, the PCR court correctly found the assistant solicitor's comments did not so infect the trial with unfairness as to deprive the defendant due process. Just as in *Webb* and *Randall*, the assistant solicitor here was merely making an analogy based on Petitioner's factual scenario, except in this case the assistant solicitor was making a much tamer analogy than the comparisons in *Webb* and *Randall* by comparing Petitioner's crime to the crime committed in *Little Red Riding Hood*. It is clear when reading the particular lines in context and given the facts of the case that the assistant solicitor was not improperly inflaming the passions of the jury by calling Petitioner "a wolf," but was simply making an analogy to a fairy tale with a similar fact pattern. Such brief comments are not objectionable and Counsel was not deficient for failing to object.

Prejudice

Furthermore, there is clear evidence Petitioner was not prejudiced by Counsel's failure to object to these comments. "Improper comments do not 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." *Webb*, 389 S.C. at 178-179 (citing *Randall*, 356 S.C.

at 642). The word "wolf" was used three times in the State's opening statement and twice in the State's closing argument. These brief mentions did not so infect the trial that the jury's verdict would be deemed unreliable. Furthermore, the trial judge properly informed the jury of the presumption of innocence and the burden of proof and there is nothing to suggest the jury reached its verdict improperly. Petitioner failed to prove the outcome of his trial would have been different had Counsel objected to these comments and certiorari should be denied on this ground.

II. The PCR court correctly found Counsel was not ineffective for failing to object to the State's closing argument because no Golden Rule violation occurred where the State analogized Petitioner's factual situation to the story of *Little Red Riding Hood*, stating "You are the woodman to take care of this matter. Do we want any other grandma's [sic] subjected to the big bad wolf?"

Petitioner argues the PCR court erred in failing to grant post-conviction relief on the basis that Counsel failed to object to the State's closing argument where the solicitor made an improper Golden Rule argument. The PCR court properly found Counsel was not ineffective, as no Golden Rule violation was committed. Certiorari should be denied.

Relevant Background and Findings Before PCR Court

During the State's closing argument, the assistant solicitor concluded his closing by continuing his analogy between Petitioner's case and the story of *Little Red Riding Hood*, stating:

> 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 that woodman. You are the woodman to take care of this matter. Do we want any other grandma's subjected to the big bad wolf?

App. 317, ll. 16-21.

At the PCR hearing, Counsel testified he should have objected, but also testified the comments did not ask the jurors to place themselves in the shoes of the victim. App. 421-422.

The PCR court found Counsel was not ineffective for failing to object to this comment. The PCR court found the comment, **when read in context**, was simply the State concluding the Little Red Riding Hood analogy made in its opening and was not an attempt to appeal to the passions or prejudices of the jury. App. 449-450. The PCR court found the comment was not asking the juror to place themselves in the victim's shoes. App. 450. Furthermore, the PCR court found the comment did not infect the trial with unfairness and cited to a case that held "the State may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law." See *State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975).

Deficiency

The PCR court correctly denied Petitioner's claim that Counsel was ineffective for failing to object to the State's closing argument where the assistant solicitor stated, "You are the woodman to take care of this matter. Do we want any other grandma's subjected to the big bad wolf." App. 317. A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. *Brown v. State*, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (citing *State v. Reese*, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct.App.2004) *aff'd in part and rev'd in part*, 370 S.C. 31, 633 S.E.2d 898 (2006) (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)). 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.* "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." *Id.*, 383 S.C. at 515-16, 680 S.E.2d at 914 (citing *State v. Reese*, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006)). 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.*, 383 S.C. at 516, 680 S.E.2d at 915.

The PCR court correctly held no Golden Rule violation occurred. At the PCR hearing, Petitioner misinterpreted the Golden Rule violation, arguing "if you're putting yourself in the shoes to protect grandma, all of us have a grandma." App. 422, ll. 9-11. Here, the State is not asking the jurors to place themselves in the shoes of the victim, Ms. Hopkins. This case is clearly distinguishable from cases where Golden Rule violations were found to have occurred. In *Brown*, the Court found counsel was ineffective for failing to object to the State's closing argument where the State asked the jurors to "speak up" for a three-year old sexual assault victim with its verdict. *Brown*, 383 S.C. at 515. In *Reese*, the Court found a Golden Rule violation occurred when the State asked the jury to "speak up" for the victim and telling them "you speak for her with your verdict." *Reese*, 370 S.C. at 37, overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). See also *Von Dohlen v. State*, 360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004) (holding a Golden Rule violation occurred when the State told the jury to "put yourself in Margaret's shoes, size six"). Petitioner's case is distinguishable because the State never asked the jury to speak up for Ms. Hopkins, place themselves in her shoes, or make a verdict based on her perspective.

The PCR court correctly found Petitioner's case was akin to *State v. Durden*. The Court in *Durden* held "the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law...." *Durden*, 264 S.C. at 92 (citing 23A C.J.S. Criminal Law § 1107). The Court further held the prosecuting attorney "may in effect tell [the jury] that the people look to

them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law." *Id.* The solicitor in this case did not commit a Golden Rule violation, but appealed to the jury to do their duty to enforce the law and reminded them that people look to them for protection against crime by stating "You are the woodman to take care of this matter." App. 317. The PCR court properly ruled the comment was not a Golden Rule violation, did not infect the trial with unfairness, and was proper according to the Court's ruling in *Durden*.

Prejudice

Furthermore, there is clear evidence Petitioner was not prejudiced by Counsel's failure to object to these comments. "Improper comments do not 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." *Webb*, 389 S.C. at 178-179 (citing *Randall*, 356 S.C. at 642). The Court in Brown found Brown was not prejudiced by his counsel's failure to object to the State's Golden Rule violation because "the solicitor's comments came at the very end of his closing argument and were limited in duration." *Brown*, 383 S.C. at 517. See also *Von Dohlen*, 360 S.C. at 613 (holding "the solicitor's single comment, although improper, did not so infect the trial with unfairness as to make the resulting conviction a denial of due process"). Regardless of the fact no Golden Rule violation occurred, the State's single comment in this case occurred at the very end of its closing and did not infect the trial with unfairness as to require reversal of Petitioner's conviction. Furthermore, the trial judge properly informed the jury of the presumption of innocence and the burden of proof and there is nothing to suggest the jury reached its verdict improperly. Petitioner failed to prove the outcome of his trial would have been different had Counsel objected to these comments and certiorari should be denied on this

ground.

III. The PCR court correctly found Counsel was not ineffective for failing to object to the State's closing argument where the assistant solicitor's statement that the victim "had no motive to lie" did not constitute improper vouching.

Petitioner argues the PCR court erred in failing to grant post-conviction relief on the basis that Counsel failed to object to the State's closing argument where the assistant solicitor argued Ms. Hopkins "has no motive to lie." App. 313. The PCR court properly found Counsel was not ineffective, as the remark did not constitute improper vouching. Certiorari should be denied.

Relevant Background and Findings Before PCR Court

During the State's closing argument, the assistant solicitor brought up the fact that the defense argued there were discrepancies between Ms. Hopkins' statement and what she told police officers. App. 312, ll. 17-25. The assistant solicitor argued Ms. Hopkins' version of facts had been consistent and had always pointed to Petitioner as her assailant. App. 313, ll. 1-11. The assistant solicitor then stated

> Well, let's look. Why would she lie about that? Why? They did everything they could to her. I mean, they cooked for her. They took her to the doctor. They cut her grass. There's no other reason that she would say that it happened, except that it happened. She has no motive to lie. No motive at all.

App. 313, ll. 12-17.

Petitioner alleged that since the trial judge prevented him from introducing third-party guilt evidence showing that the victim did have a motive to lie, this comment was an improper response by the State. At the PCR hearing, Counsel testified the trial judge denying Petitioner's request to present evidence of third party guilt hindered Petitioner's defense concerning the victim's motive. Counsel testified that he should have objected to the State's comment but testified that he cannot speculate as to whether Petitioner suffered unfair prejudice as a result. App. 425.

The PCR court found Counsel was not ineffective for failing to object because the State's remark did not rise to the level of improper vouching. The PCR court found there was no indication the solicitor's comment was based on personal assurances, the government's prestige, or by indicating there was information not presented to the jury to support the statement. App. 447. Furthermore, the PCR court found the statement did not infect the trial with unfairness as to result in a denial of due process. App. 447.

Deficiency

The PCR court correctly denied Petitioner's claim that Counsel was ineffective for failing to object to the State's comment in its closing argument that Ms. Hopkins had no motive to lie.

A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. *Smith v. State*, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007) (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). 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.* (internal citations omitted). A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *Matthews v. State*, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). However, "[a] solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." *Smith* at 523, 654 S.E.2d at 531-32 (*quoting Matthews* at 276, 565 S.E.2d at 768 (2002)). "A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The PCR court correctly found the assistant solicitor's comments did not constitute

improper vouching because the assistant solicitor did not imply his statement was based on personal knowledge or information outside the record. Likewise, the assistant solicitor did not place the government's prestige behind this statement that Ms. Hopkins has no motive to lie, did not make personal assurances, and did not indicate there is information not presented to the jury that would support the testimony. This case is distinguishable from actual vouching, such as in *Matthews* where the solicitor argued to the jury, "I don't trust any of these people **until I corroborate their testimony**. And **once I corroborate their testimony**, yes, I put them on the witness stand because they were the ones that were there, they were the ones that can tell it." *Matthews*, 350 S.C. at 275 (emphasis in original). In *Matthews*, the Court found counsel was ineffective for failing to object because the solicitor "led the jury to believe the government corroborated the witness' testimony before trial and found it credible" without support from anything within the record. *Id.* 350 S.C. at 276-277.

In the present case, the solicitor simply said Ms. Hopkins has no motive to lie, without ever giving personal assurances or implying to the jury his statement was made based on information not presented to them. This was proper pursuant to *Matthews*. Furthermore, the fact that Petitioner was precluded from raising third-party guilt as a defense, after a pre-trial hearing, has no bearing on whether the State committed improper vouching. The State's comment was not improper and the PCR court correctly found Counsel was not ineffective for failing to object.

Prejudice

Furthermore, there is ample evidence Petitioner was not prejudiced by Counsel's failure to object to these comments. The PCR court correctly found Petitioner was not prejudiced as it ruled the assistant solicitor's brief statement did not did not infect the trial with unfairness as to result in a denial of due process. In *Smith v. State*, the Court held although the solicitor

improperly used the pronoun "I" in his closing argument, the comments were limited and did not recur. The Court, however, held no prejudice resulted because the trial judge "cure[d] any possible prejudice caused by the solicitor's comments" by charging to the jury '[y]ou must not consider as evidence any statement of counsel made during the trial,' and instructed the jury members regarding their duty to 'pass upon the credibility or believability of the witnesses.'" *Smith*, 375 S.C. at 524. Assuming *arguendo* the solicitor's comment here constituted vouching, the brief and limited comment was based on the record and were not so egregious as to deny due process. Furthermore the trial judge's charges cured any possible prejudice, as the Court found in *Smith*, by making it clear to the jury that the jury is the sole judge of the facts and they may determine the facts only from sworn testimony of witnesses and exhibits. App. 324, ll. 10-24. In Petitioner's case, the trial judge charged the jury that the lawyers are not witnesses, what the lawyers say is not evidence, and the jurors should use their memory of the facts if it differs from that of the lawyers. App. 325, ll. 1-6. The trial just also charged the jury that they are to determine which testimony to believe and which not to believe, as they are the sole judges of the credibility of the evidence. App. 326, ll. 9-16. Thus, any alleged impropriety was cured by the trial judge's charges. Petitioner failed to prove the outcome of his trial would have been different had Counsel objected to these comments and certiorari should be denied on this ground.

IV. The PCR court correctly found Counsel was not ineffective for failing to object to the State eliciting testimony of Petitioner's prior driving offenses where evidence of the prior offenses did not suggest that he was guilty of burglary or that he had a propensity to commit the burglary.

Petitioner argues the PCR court erred in failing to grant post-conviction relief on the basis that Counsel failed to prohibit references and questioning about Petitioner's prior driving offenses. The PCR court properly found Counsel was not ineffective, as the brief questioning concerning Petitioner's prior DUI offenses did not suggest that he was guilty of burglary or that

he had a propensity to commit the burglary. Certiorari should be denied.

Relevant Background and Findings Before PCR Court

During the State's cross-examination of Petitioner, the State asked if he had a driver's license. App. 216, ll. 6-7. Petitioner replied he did not have a license because it had been suspended. App. 216, ll. 8-11. The State asked why his license was suspended and Petitioner replied that he had "a few" DUIs. App. 216, ll. 13-16. During the State's cross-examination of the defense's witness, Sharon Corley, the solicitor asked if Ms. Corley knew Petitioner did not have a license and that his license had been suspended for numerous DUIs. App. 263, ll. 21-25

The PCR court found Counsel was not ineffective for failing to object to these comments because they did not suggest Petitioner was guilty of the burglary or that he had a propensity to commit burglary.

Deficiency

The PCR court correctly denied Petitioner's claim that Counsel was ineffective for failing to object to the testimony from Petitioner and Ms. Corley about Petitioner's DUI convictions. First, Petitioner's reliance on Rule 609 SCRE is misplaced. It is clear after reading the entire record the testimony in question was not elicited from the State for the purposes of impeaching Petitioner with his criminal history. The State did not question Petitioner about his criminal history to impeach his credibility. During the trial, Ms. Hopkins testified she saw Petitioner the morning after the incident in their neighborhood selling tapes by his mother's car and driving his mother's car. App. 124, 125. Petitioner testified he was driving his truck that morning and did not drive a car. App. 206. Petitioner testified the morning after the incident he was driving his truck and running errands. App. 207-208. The testimony at issue begins with the solicitor following up on Petitioner's testimony about his truck, verifying that he was driving his truck at

the time. App. 216, ll. 1-5. The State asked if he had a driver's license, if the license was suspended. The State then asked why it was suspended, which prompted Petitioner to testify that he had DUIs. App. 216, ll. 6-20. Thus, when considering the context of the trial and the entire testimony, it is clear the State's questions flowed as natural follow-up questions and were not asked for the purpose of impeachment by prior convictions. The State did not ask about specific convictions and their dates, but only asked Petitioner about which car he was driving at the time. Petitioner's testimony that his license was suspended because he had DUIs was not the result of the State improperly introducing prior convictions under Rule 609.

Furthermore, the State's question eliciting Petitioner's response and the State's one question to Ms. Corley about Petitioner's DUIs were brief and did not recur throughout the trial. It was not unreasonable for Counsel to withhold objecting as to not draw more attention to the criminal past that Petitioner admitted. The State's questions were not objectionable and Counsel was not deficient for failing to object.

Prejudice

Furthermore, there is clear evidence Petitioner was not prejudiced by Counsel's failure to object to the testimony elicited by the State about Petitioner's prior DUIs. *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity."); *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (stating when a "previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced"). The PCR court correctly found Petitioner failed to prove prejudice as the DUI admission, when considering the context of the entire testimony, was not used to show Petitioner's criminal propensity or impeach Petitioner's credibility by way of prior convictions, but only came out after the State's natural follow-up

question to Petitioner's responses. Most importantly, the fact Petitioner has a few DUIs does not suggest he was more or less likely to have committed the burglary in question. It is very unlikely the two mentions of Petitioner's DUIs contributed to the jury convicting Petitioner for burglary and ABHAN. Petitioner failed to prove the outcome of his trial would have been different had Counsel objected to these comments and certiorari should be denied on this ground.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JUSTIN J. HUNTER
Assistant Attorney General
S.C. Bar # 101254

By: _____
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March 19, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAR 22 2018
S.C. SUPREME COURT

ON WRIT OF CERTIORARI
Appeal from Laurens County
Appellate Case No. 2017-000696

KEVIN SHANE EPTING, 245196

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Ms. Kathrine Haggard Hudgins
S.C. Commission On Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201-3300

This 19th day of March, 2018.

Carlotta L. Weaver
Legal Assistant for Petitioner

8th

ALAN WILSON
ATTORNEY GENERAL

PCR DIVISION: 803.734.3737
PCR FACSIMILE: 803.734.4113

March 19, 2018

The Honorable Daniel E. Shearouse
Clerk of Court — SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Kevin Shane Epting v. State of South Carolina
Appellate Case No.: 2017-000696
Lower Court Case No. 2015-CP-30-0128

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing in your office. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Justin J. Hunter,
Assistant Attorney General
S.C. Bar # 101254

JJH/clw
Enclosures

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division (without enclosure)

8th