

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable J. Mark Hayes, Circuit Court Judge

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SEP 21 2018

S.C. SUPREME COURT

DWAYNE LEE RUDD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000091

PETITION FOR WRIT OF CERTIORARI

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## **ISSUE PRESENTED**

Whether trial counsel provided ineffective assistance when she failed to object to the solicitor's improper vouching of the trustworthiness of the state's key witnesses during closing arguments, where Petitioner's case hinged on the credibility battle between him and the state's key witnesses?

## STATEMENT

During the October 2013 term, the Aiken County Grand Jury indicted Petitioner for five counts of criminal sexual conduct with a minor in the third degree and five counts of criminal sexual conduct in the second degree. App. 688 – 707.

Petitioner's trial was held on December 9 – 12, 2013, in front of the Honorable James R. Barber, and a jury. App. 1. Aimee J. Zmroczek and Robert L. Bank represented Petitioner. Id. Ashley A. Hammack and Kevin N. Molony represented the state. Id.

Petitioner was found guilty of three counts of criminal sexual conduct with a minor in the third degree and five counts of criminal sexual conduct in the second degree. App. 462, l. 4 – 463, l. 16.

Judge Barber sentenced Petitioner to fifteen years' imprisonment on each count of criminal sexual conduct with a minor in the second degree and five years' imprisonment for each criminal sexual conduct with a minor in the third degree. App. 471, l. 12 - 472, l. 14. All of Petitioner's sentences were run concurrent except one criminal sexual conduct with a minor in the third degree charge. App. 472, ll. 15 – 17. On the sole criminal sexual conduct with a minor in the third degree charge that ran consecutive, the five-year sentence was suspended with probation for three years. App. 472, ll. 9 – 14.

Petitioner filed an application for post-conviction relief on June 10, 2016. App. 476 – 505. The state filed its return on December 16, 2016. App. 507 – 514.

Petitioner's post-conviction relief hearing was held on September 18, 2017 in front of the Honorable J. Mark Hayes. App. 516. Lance S. Boozer represented Petitioner. Id. Julie A. Coleman represented the state. Id.

On January 2, 2018, Judge Hayes filed an order of dismissal denying Petitioner's post-conviction relief application. App. 662 – 687. Judge Hayes found that the failure to impeach, Esther Timmerman's testimony with her prior inconsistent statement and the failure to object to the solicitor's improper comments at closing "may have" constituted deficient performance; however, Petitioner failed to prove how he was prejudiced by those deficiencies. App. 675 – 676; App. 683.

This Petition for Writ of Certiorari follows.

## ARGUMENT

Trial counsel provided ineffective assistance when she failed to object to the solicitor's improper vouching of the trustworthiness of the state's key witnesses during closing arguments, where Petitioner's case hinged on the credibility battle between him and the state's key witnesses.

### **Relevant Facts**

The state alleged the facts as follows. Petitioner, from 2011 to 2013, groped and digitally penetrated his two daughters, the complaining witnesses, Minor 1 and Minor 2. App. 99, l. 19 – 100, l. 9.

On May 23, 2013, police officers were called to Petitioner's home regarding the aforementioned allegations. App. 30, ll. 2 – 14. Petitioner was arrested seventeen days later. App. 40, ll. 8 – 10.

Petitioner's trial was held on December 9 – 12, 2013, in front of the Honorable James R. Barber, and a jury. App. 1. His case boiled down to a credibility battle between Petitioner and the complaining witnesses. App. 607, ll. 21 – 24; App. 607, l. 25 – 608, l. 4; App. 531, ll. 18 – 22.

At trial Minor 1 and Minor 2 testified against Petitioner. App. 119, l. 1; 156, l. 1. Other than the complaining witnesses, there were no other witnesses to the alleged misconduct and there was no physical evidence of abuse. App. 384, ll. 29 – 24.

During closing, the solicitor improperly vouched for the credibility of the two complaining witnesses. She told the jury that, "If those girls weren't telling you the truth then, ladies and gentlemen, let's give them an academy award." App. 443, ll. 8 – 10. Trial counsel failed to object to the solicitor's improper vouching of *the state's key witnesses* and Petitioner was found guilty on all charges. App. 462, l. 4 – 463, l. 13.

At Petitioner’s post-conviction relief (PCR) hearing, Aimee Zmroczek, Petitioner’s first chair counsel, testified that she should have objected to the solicitor’s improper vouching. App. 621, ll. 2 – 6. Zmroczek testified that she should have objected because the solicitor’s comment was, “absolutely vouching,” for the complaining witnesses’ credibility. App. 621, ll. 8 – 12.

Trial counsel admitted she could have objected and did not know why she failed to object. App. 621, ll. 15 – 17. Zmroczek agreed with that the comment was especially hurtful in the present context because Petitioner’s case was a, “swearing contest.” *Id.* App. 621, ll. 18 – 20.

PCR counsel asked trial counsel how she would have handled the improper comment now that she realized her mistake. App. 622, ll. 2 – 3. Trial counsel responded, “the first thing I would have done is ask for a mistrial,” and if that was denied she, “would have asked that [the comment] be stricken from the record and... then [for] a subsequent jury instruction regarding stricken testimony.” App. 622, ll. 4 – 9.

PCR counsel followed by asking, “then in your opinion, this rises to such - - sort of egregious level you’d ask for a mistrial?” App. 622, ll. 10 – 12. To which Zmroczek responded, “Absolutely.” App. 622, l. 13.

In Judge Hayes’ Order of Dismissal, he found that although trial counsel “may have” provided deficient performance for failing to object to the solicitor’s improper vouching, “this Court finds there is no resulting prejudice given the totality of the evidence against [Petitioner].” App. 683.

That was an error and that error prejudiced Petitioner.

## **Discussion**

Petitioner’s case was a credibility battle between the two complaining witnesses and Petitioner. App. 607, ll. 21 – 24. Due to the absence of physical evidence and third-party witness

testimony, the crux of the case was whether the jury believed Petitioner or the two complaining witnesses.

Petitioner testified at his PCR hearing that, “the only evidence... that they had to convict me was the testimony of [the complaining witnesses]. And based on those testimonies, the whole case hinged on credibility; that they believe [the complaining witnesses] or they believe me.” App. 531, ll. 18 – 22. Therefore, trial counsel’s failure to object to the improper vouching by the solicitor during closing, which invaded the province of the jury and bolstered the credibility of the state’s two key witnesses, constituted ineffective assistance. That ineffective assistance prejudiced Petitioner because his case hinged on the credibility battle between the complaining witnesses and himself.

To establish ineffective assistance of counsel, Petitioner must show trial counsel’s performance fell below an objective standard of reasonableness and, but for counsel’s errors, there is a reasonable probability that the outcome at trial would have been different. Strickland v. Washington, 466, U.S. 668 (1984).

The closing argument of a solicitor, “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 argument “must be confined to evidence in the record and the reasonable inference that may be drawn from the evidence.” Id. at 522-523, 654 S.E.2d at 531. Although a solicitor may argue the credibility of a witness based on the record and its reasonable inferences, a solicitor may not vouch for the credibility of a prosecution witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

As explained by this Court, “[i]t 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. Generally, “[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 question for a reviewing court is whether the prosecutor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). A reviewing court examines the impropriety of the prosecutor’s closing argument in the context of the entire record. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

In Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2003), this Court held that trial counsel provided ineffective assistance of counsel for failure to object to the solicitor’s opening statement where he informed the jury that the state’s key witness had a clean soul. This Court held that the solicitor’s statement was a personal assurance of the witness’ veracity, and trial counsel should have objected. Id. Further, this Court held trial counsel’s error prejudiced Gilchrist because the witness for whom the prosecutor vouched was the *prosecution’s key witness*. Id. at 228, 565 S.E.2d at 285. (emphasis added)

This Court defined when a solicitor vouches for the credibility of a witness in State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001), *rev’d on other grounds*, Kelly v. State, 534 U.S. 246 (2002):

Vouching constitutes an assurance by the prosecuting attorney of the credibility of a Government witness through personal knowledge or by other information outside of the testimony before the jury. . . . A prosecutor’s vouching for the credibility of a government witness raises two concerns: (1) such comments can convey the impression that evidence is not presented to the jury but known to the prosecutor,

supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and (2) the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Id. at 368-69, 540 S.E.2d at 860 (quotation omitted). See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977 (2001) (“[A] solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness . . . . Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity[.]”) (citations omitted). Accordingly, “[b]ecause a jury must make its own assessment on the credibility of witnesses, it is inappropriate for the State to assure the jury of a government witness's credibility.” Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002) (quoting Kelly, 343 S.C. at 369, 540 S.E.2d at 861).

During Petitioner's post-conviction relief hearing, trial counsel admitted she should have objected. App. 621, ll. 15 – 17. Trial counsel agreed that the solicitor's comment was especially hurtful because Petitioner's case was a, “swearing contest.” Id.

Trial counsel opined that to provide effective assistance she should have asked for a mistrial, and if that was denied, she should have asked for the comment to be struck from the record and a curative instruction given. App. 622, ll. 4 – 9. Moreover, in the Order of Dismissal the PCR court did not find that trial counsel provided effective assistance. Therefore, since trial counsel failed to object to the solicitor's improper vouching of *the state's key witnesses*, she provided ineffective assistance. Gilchrist, at 285, 565 S.E.2d at 285.

As to prejudice, trial 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. When the solicitor told the jury that the complaining witnesses deserved,

“an academy award,” if they were lying, she improperly expressed her personal opinion regarding the complaining witnesses’ truthfulness<sup>1</sup>. Gilchrist, at 227, 565 S.E. 2d at 285 (2002). The solicitor’s opinion carried with it, “the imprimatur of the Government” and induced the jury to trust her judgment rather than its own view of the evidence. Kelly, at 368, 540 S.E.2d at 860. The vouching in this case is particularly harmful because the solicitor knew the case would turn on whether or not the jury believed the complaining witnesses’ testimony and she improperly told the jury during closing that *the state’s key witnesses* were telling the truth.

The trial court was unable to cure the prejudice created by the solicitor’s improper vouching because trial counsel failed to object and request the trial court issue a curative instruction, as she now knows she should have done. *Cf. 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). The solicitor’s improper comment during the state’s 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) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

The solicitor invaded the province of the jury and usurped its fact-finding function when she asserted that the state’s key witnesses were trustworthy. That invasion into the jury’s province was improper because “the jury is charged with assessing the credibility of witnesses.” Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002).

Therefore, the PCR court erred when it found that trial counsel’s failure to object to the solicitor’s improper vouching of the state’s key witnesses did not prejudice Petitioner because,

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<sup>1</sup> The prejudice from solicitor’s vouching of the complaining witnesses’ testimony was exacerbated by another comment she made at closing where she gave her opinion on how the jury should interpret a recording of a phone call between Petitioner and a family member. The solicitor stated, “He’s not talking about lying or stealing or doing something years ago. You know exactly what he’s talking about. He’s talking about what he did to these girls.” App, 444, ll. 5 – 8.

“there [was] a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

**CONCLUSION**

Based on the foregoing reasons, Petitioner respectfully requests this Court reverse his convictions and remand his case for a new trial, or in the alternative, grant certiorari to allow for full briefing on this issue.



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Victor R Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of September, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Aiken County

Honorable J. Mark Hayes, Circuit Court Judge

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DWAYNE LEE RUDD,

PETITIONER

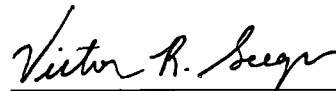
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STATE OF SOUTH CAROLINA,

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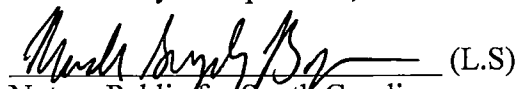
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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, 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 Dwayne Lee Rudd, #358140, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 21st day of September, 2018.



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Victor R Seeger  
Appellate Defender

SUBSCRIBED AND SWORN TO before me    ATTORNEY FOR PETITIONER  
this 21st day of September, 2018.

 (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 26, 2028