STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Chesterfield County

Honorable Roger E. Henderson, Circuit Court Judge

GARTHAREE HINSON,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2018-001469

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Did the lower court err in granting post-conviction relief by finding trial counsel ineffective for failing to object to the solicitor's purported vouching where the closing argument in question did not constitute vouching, and where the remarks did not so infect the trial with unfairness as to make the resulting conviction a denial of due process where the solicitor and the court repeatedly admonished the jury it was their duty to determine witness credibility, and where the unaffected evidence firmly established Hinson's guilt?

RESPONDENT'S QUESTION PRESENTED

Whether there was evidence to support the PCR court's finding that counsel provided ineffective assistance, where counsel admitted the solicitor improperly vouched for the credibility of a key witness by telling the jury, inter alia, the witness was "telling you the absolute truth," and counsel did not object?

STATEMENT OF THE CASE

Trial facts

The respondent, Gartharee Hinson, was tried for armed robbery, kidnapping, and assault and battery of a high and aggravated nature (ABHAN) before the Honorable Steven H. John and a jury from September 15 – 16, 2014 in Chesterfield County. App. 1. Melvin Cockrell, III, represented the respondent and Kenard Redmond represented the state. App. 321, l. 21; App. 348, l. 18; App. 1.

The state alleged that a robbery was plotted by Richard Smith (Smith), Richard Martin (Martin), Maurice Anderson, and respondent. The facts presented at trial were that Smith owed Chris Merriman, the complainant, forty dollars for drugs. App. 76, l. 18 – 77, l. 16. The complainant, who lived near the Piggly Wiggly in Chesterfield, said Smith brought the money by his house. App. 77, ll. 11-16; App. 159, ll. 15-22.

After Smith left, two masked men with guns appeared at the complainant's house and demanded his "stash." App. 63, l. 20 – 64, l. 13; App. 65, ll. 13-14. The taller robber, whose identity was obscured by an overall or jumpsuit, a ski mask, and a hat, pistol-whipped the complainant. App. 69, ll. 9-13; App. 65, ll. 21-24. The other robber forced the complainant's family into a bedroom and held them at gunpoint. App. 55, l. 18 – 56, l. 25; App. 157, l. 18 – 158, l. 20; App. 162, ll. 13-15. The complainant loaded his car with electronics for the robbers to take. App. 56, ll. 3-4; App. 68, ll. 20-24. The neighbors became suspicious and called police, and the robbers ran off when they heard sirens. App. 69, ll. 16-22; App. 56, l. 24 – 57, l. 1.

The complainant claimed he recognized the tall robber's voice "from when I was a kid." App. 64, ll. 18-20; App. 66, ll. 4-20; App. 70, ll. 8-12. According to the complainant, he told Officer Jordan, "**I thought I knew who it was, but I wasn't sure. I said I had not seen him in**

so long that it might not be him." App. 70, ll. 10-12 (emphasis added). There was no evidence the complainant ever got a more recent opportunity to hear respondent's voice. Nevertheless, at trial the complainant identified the taller robber as respondent. App. 72, ll. 23-25.

Respondent spoke with police and agreed that he went to the Piggly Wiggly with Maurice Anderson, Smith, and Martin, but explained that he stayed in the parking lot and denied being involved in the robbery. App. 114, l. 23 – 115, l. 3; App. 116, ll. 1-3. Respondent said the men left him in Chesterfield and went back to Charlotte. App. 117, ll. 14-17.

The testimony of Martin was the linchpin of the state's case. According to Martin, Smith and the respondent were the "masterminds" of the robbery. App. 162, ll. 17-20. Martin claimed he was merely along for the ride from Charlotte to Chesterfield, but that when he went to the complainant's house with respondent, the respondent gave him a gun and told him to participate in the robbery. App. 152, l. 23 – 156, l. 5.

According to Martin, when they heard sirens, Martin ran and was picked up by Smith and Maurice Anderson. App. 159, l. 22 – 160, l. 14. Martin was unable to explain why respondent had been left behind if he was the ring leader. App. 169, l. 16 – 170, l. 9. Martin's testimony was self-serving and contradictory. At times, he claimed he never pointed a gun at anyone. At other times, he said that he did. App. 161, ll. 20-21; App. 163, l. 25 – 164, l. 6. Martin professed remorse and contended he only did what respondent "insisted." App. 159, ll. 5-10; App. 163, l. 25 – 164, l. 2.

Martin, who had recently been convicted of breaking and entering in North Carolina, had pending charges for this offense. App. 163, ll. 1-12; App. 151, ll. 11-14. However, he claimed he had not been promised anything in exchange for his testimony but was merely testifying, "Because of the situation and I felt like something should be done about it." App. 151, ll. 19-22.

In his closing argument, the solicitor told the jury, "**I** would submit to you that Richard Martin's testimony was extremely credible . . ." App. 206, ll. 3-4. The solicitor said, "Mr. Martin told you he had no idea of what was going to be the outcome of his case. **He is telling you the absolute truth**." App. 208, ll. 12-14 (emphasis added).

The solicitor continued, "**I** don't want a witness to get up here and lie or whatever. **I** want a witness to tell the truth, and if something has to be explained, so be it." App. 209, ll. 15-17 (emphasis added).

No physical evidence connected the respondent to the crime scene. Although the robbers were not wearing gloves, nothing was dusted for fingerprints. App. 129, ll. 7-11. Officers found a cell phone, two guns, a hat, a mask, a wallet, coveralls, and keys near the crime scene. App. 89, l. 21 – 90, l. 4; App. 101, ll. 3-9. However, none of the evidence was submitted to SLED for forensic testing. App. 132, ll. 14-25. Although Martin claimed the respondent was the tall man wearing the coveralls during the robbery, the coveralls instead belonged to Maurice Anderson. App. 156, ll. 21-22; App. 111, ll. 8-16.

Respondent was convicted of armed robbery, kidnapping, and the lesser included offense of first degree assault and battery. App. 225, l. 22 – 226, l. 12. He was sentenced to concurrent terms of twenty-one years, twenty-one years, and ten years, respectively. App. 231, ll. 12-23.

After Martin testified against respondent, the solicitor allowed Martin to do pretrial intervention (PTI) for his own armed robbery and kidnapping charges, despite the fact that the solicitor believed, "I'm probably violating the [PTI] statute." App. 352, ll. 5-11; App. 164, ll. 14-17.

PCR Hearing

Respondent timely filed an application for post-conviction relief (PCR) and alleged, inter alia, "Counsel failed to object to the State's improper vouching for witnesses during closing remarks." App. 276 – 286. A hearing was held on January 16, 2018, before the Honorable Roger E. Henderson. App. 297. Respondent was represented by Lance Boozer and the state was represented by Johnny James. App. 297.

PCR counsel argued that defense counsel was ineffective for failing to object when the solicitor vouched for Martin's credibility in closing. PCR counsel asked defense counsel what his strategy was regarding Martin, and defense counsel said it was to completely discredit him as a liar who was "getting something" for his testimony. App. 335, l. 7 – 336, l. 1. Defense counsel agreed that the solicitor's remarks in closing did constitute vouching for Martin's credibility, but he made no objection.[1] App. 336, ll. 2-15.

In summation, PCR counsel argued that defense counsel failed to object to "improper vouching" pursuant to *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001) and *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001). App. 355, ll. 14-25. PCR counsel argued that *Kelly* was squarely on point with this case and that the solicitor's comments here were "clear cut"

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[1] Defense counsel claimed he did not object because he did not want to "infuriate the jury." App. 337, ll. 2-3. But counsel objected only three times total during the entire two-day trial. *See* App. 58, l. 25; App. 113, ll. 13-14; App. 116, ll. 22-25. Although the court ultimately ruled for the respondent on the vouching issue, a review of the record reveals every single item of evidence offered by the state was admitted without objection. App. 33, ll. 11-25. Counsel did not request a pretrial hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964) regarding respondent's statement to police officers placing himself at the Piggly Wiggly prior to the robbery, and one was never held. (Although respondent denied going to the complainant's house and denied being involved in the robbery, the state used respondent's statement in which he placed himself at the nearby Piggly Wiggly as evidence of guilt). Counsel did not challenge the state when it introduced the identification of appellant's voice without laying a proper foundation. App. 264 – 265.

vouching. App. 356, l. 20 – 357, l. 17. PCR counsel argued that here, "the State with its prestige and power" gave a "personal opinion that, the witness who is one of their main witnesses," "He is telling you the absolute truth." App. 357, ll. 10-16. The PCR court took the matter under advisement.

Order granting relief

The PCR judge subsequently issued an order granting respondent relief and ordering a new trial, finding defense counsel was ineffective for failing to object to the solicitor's improper vouching during closing argument. App. 365 – 374. The PCR court's order quoted Martin's testimony as follows:

> Q. Do you have pending charges?
>
> A. Yes, I do.
>
> Q. And let's get this out in front here first. Have you been promised anything in exchange for your testimony?
>
> A. No, sir.
>
> Q. And why did you agree to testify here in (sic) behalf of the State?
>
> A. Because of the situation and I felt that something should be done.

App. 368.

> Q. And, again, and this is the last time I'll ask you. Has I or the State promised you anything in exchange for your testimony?
>
> A. No.
>
> Q. And you basically are testifying today not knowing what will happen on your case?
>
> A. Yes, sir.

App. 368.

The PCR court's order also observed that, "During closing remarks to the jury, the State asserted: 'Then you heard from Mr. Martin, and Mr. Martin told you that he had no idea of what was going to be the outcome of his case. *He is telling you the absolute truth.*'" App. 369. (emphasis in original). The PCR court's order also noted that, "The State went on: '*I don't want a witness to get up here and lie or whatever. I want a witness to tell the truth, and if something has to be explained, so be it.*'" App. 369 (emphasis in original).

The PCR court's order cited *State v. Kelly* and *State v. Shuler*, *supra*, and observed that improper vouching is prohibited.[2] App. 369 – 370. "A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness," the PCR court wrote. App. 369. The PCR court continued, "this Court finds the State's comments in closing argument relating to Martin constituted improper vouching. This Court further finds counsel should have objected and counsel failed to articulate a valid strategic reason for failing to do so." App. 370. The PCR court continued, "This Court finds counsel's failure to object prejudiced [respondent] and that his failure to object fell below an objective standard of reasonableness. This failure to object led to a reasonable probability that the outcome of the trial would have been different had he objected." App. 370.

Petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRE and respondent filed a return to the state's motion. App. 375 – 380; App. 382 – 383. The court issued an order denying petitioner's Rule 59(e) motion. App. 384. Petitioner filed a petition for writ of certiorari.

Respondent now files this return.

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2 In *Kelly*, 343 S.C. at 369, 540 S.E.2d at 860-61, this Court found the solicitor's questions improperly bolstered the witness's credibility, although it ultimately found the error to be harmless. In *Shuler*, 344 S.C. at 630-31, 545 S.E.2d at 818-19, this Court found that unlike in *Kelly*, there was no error where the "Solicitor did not comment he had personal knowledge [the witness] was telling the truth. The Solicitor merely asked general questions, not in the first person . . ."

ARGUMENT

There was evidence to support the PCR court's finding that counsel provided ineffective assistance, where counsel admitted the solicitor improperly vouched for the credibility of a key witness by telling the jury, inter alia, the witness was "telling you the absolute truth," and counsel did not object.

Certiorari should be denied because there was evidence to support the PCR court's finding that counsel was ineffective, since counsel did not object to the solicitor's improper vouching for the credibility of a key witness. "The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (citing *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984)).

Deficient performance

In closing argument, the solicitor repeatedly used the pronoun "I" when assuring the jury the state's key witness was credible. Counsel did not object.

"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." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). "Thus, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness." *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476-77 (2016).

Kelly and *Schuler*, the cases cited by the PCR court, are useful in analyzing this case. "Typically, vouching occurs when the prosecution comments on a witness's credibility in its opening statement or closing argument." *State v. Kelly*, 343 S.C. 350, 369, 540 S.E.2d 851, 860

(2001), *rev'd on other grounds by Kelly v. South Carolina*, 534 U.S. 246 (2002). "A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

The improper bolstering and vouching in *Kelly* occurred when the solicitor asked a witness, "What did **I** tell you that **I** absolutely required regarding your testimony to this jury today?" and "Did **I** tell you to tell the truth to this jury." *Kelly*, 343 S.C. at 368, 540 S.E.2d at 860 (emphasis added). Because the solicitor linked himself to the witness' credibility, this Court "found the jury could have perceived the assistant solicitor held the opinion the witness was, in fact, telling the truth. The witness' testimony, therefore, carried with it the imprimatur of the government, and this bolstering may have induced the jury to trust the State's judgment about the witness." *Shuler*, 344 S.C. at 630, 545 S.E.2d at 818.

In *Shuler*, this Court explained that in *Kelly*, the solicitor "improperly phrased his questions in the first person." *Id.* Here, as in *Kelly*, the solicitor's use of the first person was improper. The solicitor told the jury, "**I** would submit to you that Richard Martin's testimony was extremely credible . . ." App. 206, ll. 3-4. "**I** don't want a witness to get up here and lie or whatever. **I** want a witness to tell the truth, and if something has to be explained, so be it." App. 209, ll. 15-17 (emphasis added). Here, the solicitor said, "He is telling you the absolute truth." App. 208, l. 14.

The solicitor's statements, "I don't want a witness to get up here and lie," and "I want a witness to tell the truth" when he was pushing Martin's credibility insinuated that he knew better than the jury what the truth was, since he—and by extension the government—would not put up

a witness who was lying. This was an improper assertion by the solicitor that it was his independent judgment the witness was telling the truth.

The alleged vouching in *Schuler* was based on the solicitor's questioning of its chief witness about his federal plea agreement which required him to testify truthfully at Schuler's trial. This Court followed the rule in the majority of jurisdictions that the admission of plea agreements containing perjury provisions and "truthtelling" provisions did not result in improper bolstering. *State v. Shuler*, 344 S.C. at 629, 545 S.E.2d 805 at 818.

"The instant case is distinguishable from *Kelly* because the Solicitor did not comment he had personal knowledge [the witness] was telling the truth. The Solicitor merely asked general questions, **not in the first person**, about the truthtelling provision in the plea agreement." *Id.* at 630, 545 S.E.2d at 818 (emphasis added). "At no point during cross examination or closing argument did the Solicitor imply special knowledge or guarantee [the witness'] veracity." *Id.* at 629, 545 S.E.2d at 818.

Here, there was no plea agreement. The solicitor did couch Martin's credibility in the first person. The solicitor did imply special knowledge of Martin's veracity.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687-88.

"The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings." *Cherry*, 300 S.C. 115, 386 S.E.2d 624; *Webb*, 281 S.C. 237, 314 S.E.2d 839. The Supreme Court "will uphold the findings of the PCR judge when there is any evidence of probative value to support them." *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

Here, there was evidence of probative value to support the judge's finding counsel's performance was deficient. The PCR court heard that trial counsel had no valid reason for his failure to object to the solicitor's improper remarks in closing argument. Trial counsel admitted the remarks were improper.

Prejudice

Under the second prong of *Strickland*, a PCR applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Where credibility is outcome determinative, evidence of guilt is not overwhelming and improper vouching may result in prejudice. *Tappeiner v. State*, 416 S.C. 239, 253, 785 S.E.2d 471, 478 (2016).

In *Gilchrist v. State*, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2002), this Court found prejudice where defense counsel failed to object when the solicitor vouched for the credibility of a state's witness, Etheridge, in opening statements. We "find that prejudice clearly flowed from counsel's error. In the instant case, Ethridge was the State's **key witness**, and therefore his credibility was crucial to the government's case." *Id.* at 227-28, 565 S.E.2d at 285 (emphasis

added). *Accord Matthews v. State*, 350 S.C. at 277, 565 S.E.2d at 769 ("counsel's failure to object prejudiced his client by allowing the solicitor to vouch for the credibility of a key State's witness").

Here, respondent was prejudiced when the solicitor vouched for the credibility of the state's key witness, Martin. The case turned largely on the credibility of Martin, a convicted burglar. There was no forensic evidence linking respondent to the crime. Respondent did not confess to the crime. Although the complainant identified respondent as the taller robber, the taller robber's identity was obscured because he wore a ski mask, coveralls, and a hat. The coveralls belonged to Maurice Anderson, who was also at the Piggly Wiggly with Martin that day—they did not belong to respondent. The complainant admitted he was uncertain about his voice-based identification of respondent because they had not seen each other in many years.

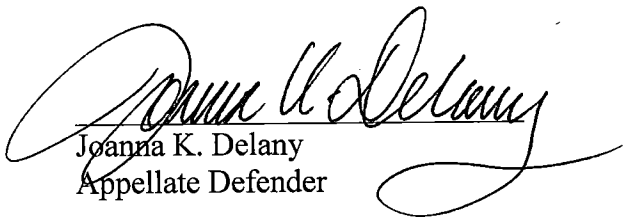
In its petition, the state argues the solicitor's comments did not constitute vouching, and that even if they did, the court's jury instructions cured any error. However, these were standard jury instructions. The trial court did not give a curative instruction or tell the jury not to consider the remarks.

Martin was the state's key witness. The state's case was dependent on him. The solicitor did something he should have known was improper when he placed the government's prestige behind a scoundrel like Martin, and counsel failed to object.

"Any evidence" of probative value is sufficient to uphold the PCR judge's findings. *Cherry*, 300 S.C. 115, 386 S.E.2d 624; *Webb*, 281 S.C. 237, 314 S.E.2d 839. Respectfully, certiorari is not warranted here.

CONCLUSION

For the reasons above, the petition for writ of certiorari should be denied.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR RESPONDENT

This 8th day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Honorable Michael G. Nettles, Circuit Court Judge

Gartharee Jequa Hinson,

Respondent

V.

State of South Carolina,

Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Johnny James, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Gartharee Jequa Hinson, #272766, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 8th day of July, 2019.

Joanna K. Delany
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR RESPONDENT
this 8th day of July, 2019.

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