

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Kristi F. Curtis, Circuit Court Judge

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May 03 2021

S.C. SUPREME COURT

JON W. JARRARD, SR.,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2020-000675

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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ARGUMENT I

Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the testimony of a forensic interviewer regarding the process she used for the forensic interview, which included an indirect comment on Minor’s veracity, and by failing to object to the forensic interview itself, which contained multiple comments by the forensic interviewer that she believed Minor. In the alternative, to the extent trial counsel’s objection preserved this issue for direct appeal, appellate counsel violated Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of appellate counsel by failing to raise this issue on appeal.....1

ARGUMENT II

In violation of Petitioner’s right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments, trial counsel failed to object to the testimony of a forensic interviewer, who was qualified as an expert in child sexual assault examinations, that improperly bolstered Minor’s testimony.5

ARGUMENT III

Trial counsel’s failure to object to the solicitor’s improper closing argument in which she vouched for the credibility of the state’s star witness and placed the imprimatur of the government on the witness violated Petitioner’s right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments.....6

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ARGUMENT IN REPLY

I. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the testimony of a forensic interviewer regarding the process she used for the forensic interview, which included an indirect comment on Minor’s veracity, and by failing to object to the forensic interview itself, which contained multiple comments by the forensic interviewer that she believed Minor. In the alternative, to the extent trial counsel’s objection preserved this issue for direct appeal, appellate counsel violated Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of appellate counsel by failing to raise this issue on appeal.

In its return, Respondent restated the issues presented with substantial alterations. Petitioner’s first issue challenged trial counsel’s (1) failure to object to the testimony of a forensic interviewer regarding the process she used for the forensic interview *and* (2) failure to object to the forensic interview itself.¹ For his second issue, Petitioner challenged trial counsel’s failure to object to the testimony of the forensic interviewer that improperly bolstered Minor’s testimony. In the return, Respondent contended the PCR court “properly determined Petitioner failed to establish counsel was ineffective for failing to object to Dr. Rahter’s testimony concerning the forensic interview process and the believability” of Minor. Ret. at 12. As is readily apparent, Respondent’s issue statement did *not* address trial counsel’s failure to object to the forensic interview itself. Although Respondent’s “Statement of Facts” detailed the offending portions of the forensic interview, neither Respondent’s issue statement nor the discussion of the issue addressed trial counsel’s failure to object to the actual forensic interview. Thus, one

¹ As an alternative ground for relief, Petitioner challenged appellate counsel’s failure to raise these issues on appeal. Respondent recapitulated the claim regarding appellate counsel as a separate issue.

conclusion to draw from Respondent's deliberate decision not to oppose Petitioner's request for relief on this ground is Respondent simply concedes that Petitioner is entitled to relief from his conviction due to trial counsel's failure to object to the admissibility of the forensic interview in its entirety in light of the forensic interviewer's indirect comments on Minor's veracity during the interview.

Similarly, Respondent discussed *only* whether Petitioner showed he was *prejudiced* by trial counsel's failure to object to Dr. Rahter's testimony concerning the forensic interview process or Dr. Rahter's testimony improperly bolstering Minor's credibility. Based upon Respondent's utter failure to discuss trial counsel's deficient performance, one conclusion to draw is Respondent concedes trial counsel acted deficiently.

Respondent alleged Petitioner suffered no prejudice because the state's case rested on more than Minor's testimony. Ret. at 13. Specifically, Respondent argued Gause's testimony that she discovered the abuse because Gause's daughter and Minor were touching each other's genitalia shows Minor had age-inappropriate sexual knowledge. Ret. at 14. Gause's testimony was disputed. In fact, Minor contradicted Gause. Minor told the jurors that she and Gause's daughter pulled their pants down, but she insisted no one caught them as Gause claimed. App. 187, l. 22 – App. 188, l. 11. Furthermore, in her forensic interview Minor indicated that Gause's daughter was the one with age-inappropriate sexual knowledge. It was Gause's daughter who told Minor to get on her hands and feet. App. 277, ll. 8-9. It was Gause's daughter who undid Minor's pants. App. 277, ll. 9-10. And, it was Gause's daughter who put her finger in it. App. 277, ll. 9-10. Respondent's bold claim that Gause's testimony showed Minor had age-inappropriate sexual knowledge as a result of elicited contact with Petitioner that somehow supported the conviction cannot stand in light of Minor's testimony to the contrary.

Additionally, Respondent argued Petitioner was not prejudiced by trial counsel's failure to object to the forensic interviewer's testimony regarding the forensic interviewing process because of the "great lengths" to which Minor's grandmother went in order to obtain retraction statements from Minor. Ret. at 14. According to Respondent, "[t]hese steps," which were taken by someone other than Respondent, "indicat[ed] Petitioner's guilt because they likely would not have been taken by the grandmother if the allegations were patently false or otherwise untrue or unbelievable." Certainly, there was evidence in the record that Minor's grandmother took a video of Minor recanting her allegation of sex abuse. Minor's mother also submitted multiple affidavits to the solicitor indicating Minor had recanted. At trial, Minor's mother claimed this information was not true and was completed at the instigation of grandmother. However, Minor's mother also indicated that she had met with the solicitor prior to trial and she was scared of losing her children during this meeting. At the solicitor's insistence, Minor's mother entered a safety plan with DSS. It was during this meeting when Mother feared losing custody of her children and was forced to enter a safety plan with DSS that Minor's mother claimed the video and affidavits were false. Therefore, Respondent's reliance upon the actions of the grandmother to support an inference of guilt when the actions were taken by someone other than Petitioner and the veracity of the allegations were disputed is misplaced.

Where credibility was the critical matter for the jury to resolve, counsel's failure to object to the forensic interviewer testifying about the forensic interview process, which included an indirect comment on Minor's veracity, and counsel's failure to object to the forensic interview itself, which included indirect and direct comments on Minor's veracity, prejudiced Petitioner. The evidence against Petitioner was far from overwhelming, and Minor's alleged age-inappropriate sexual knowledge and the conduct of Minor's grandmother simply could not

sanitize the influence of the forensic interviewer's unapologetic and improper bolstering of Minor on the jury.

II. In violation of Petitioner’s right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments, trial counsel failed to object to the testimony of a forensic interviewer, who was qualified as an expert in child sexual assault examinations, that improperly bolstered Minor’s testimony.

In light of Respondent’s decision to combine part of Petitioner’s first issue with Petitioner’s second issue, Petitioner relies upon his response to Respondent’s first issue as his response to the matters discussed within his second issue as well. Briefly, Respondent’s failure to address whether trial counsel acted deficiently by failing to object to the testimony of the forensic interviewer when that testimony improperly bolstered Minor permits the conclusion that Respondent concedes trial counsel acted deficiently. Regarding prejudice, the outcome of the trial turned on whether the jury believed Minor or Petitioner. The state relied solely on Minor’s testimony to support the charges, which the solicitor admitted in her closing when she informed the jury she was “dealing with not having evidence.” App. 346, ll. 5-19. Therefore, the forensic interviewer’s testimony that improperly bolstered Minor’s credibility prejudiced Petitioner. See Chappell v. State, 429 S.C. 68, 80, 837 S.E.2d 496, 502 (Ct. App. 2019) (explaining “[t]he determination whether a bolstering error [prejudiced the outcome of a trial] depends on whether the case turn[ed] on the credibility of the victim”).

III. Trial counsel's failure to object to the solicitor's improper closing argument in which she vouched for the credibility of the state's star witness and placed the imprimatur of the government on the witness violated Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments.

Once again, Respondent argued only that Petitioner was not prejudiced by trial counsel's deficient performance in failing to object to the solicitor's improper closing argument. Thus, one conclusion to draw from the return is that Respondent concedes counsel performed deficiently in this regard. Further, Respondent faulted Petitioner for not providing "any reasoning for why he was prejudiced by [trial counsel's deficient performance in failing to object to the solicitor's improper closing argument] in his brief [*sic*]." To the contrary, Petitioner argued that trial counsel's failure to object to the solicitor's improper closing argument prejudiced him and cited authority to support his argument. Nevertheless, to the extent there is any question that Petitioner contends trial counsel's failure to object was prejudicial, let the question be resolved now – when trial counsel allowed the solicitor to improperly vouch for the credibility of Minor and place the imprimatur of the government on the witness, trial counsel performed deficiently, *and* there is a reasonable probability that the outcome of the trial would have been different had trial counsel not performed deficiently.

Recently, this Court addressed a solicitor's use of the first-person pronoun "we" when questioning a child witness in a criminal sexual conduct case about telling the truth. State v. Reyes, 432 S.C. 394, 403-404, 853 S.E.2d 334, 339 (2020). Specifically, the solicitor phrased two of her questions in the first person. Id. at 404, 853 S.E.2d at 339. This Court held the questions were improper because the questioning suggested the solicitor believed the witness. Id. Nevertheless, this Court held the error was harmless because it was cured by the judge's

instruction to the jury to assess the credibility of a child witness through a more suspect lens. Id. at 408, 853 S.E.2d at 342. Here, the trial judge instructed the jury similarly. App. 367, l. 16 – App. 368, l. 8. Yet, the instruction cannot save this improper closing argument as it rescued the solicitor’s improper questioning in Reyes. While Reyes involved only two questions using the first-person pronoun “we,” the offensive portion of the solicitor’s argument in this case occurred over almost ten pages of the transcript and was the last thing the jury heard prior to the judge’s instructions. In her closing, the solicitor repeatedly informed the jury of her view of the evidence using the first-person pronoun “I” so there could be no doubt as to whose opinion she was delivering. The solicitor implicitly assured the jurors that if she did not believe Minor was telling the truth, then she would not be trying the case when she attested that she had dismissed cases in the past when alleged victims recanted. Other prosecutors may have dismissed this case in light of Minor’s recantations, but this solicitor did not because she “got to the bottom” of it. This solicitor only wanted to know “what the truth is.” This solicitor went so far as to say that Minor’s mother “did not protect her child in the beginning” and “didn’t get it right until we sat down and talked about it and she knows that.” This solicitor’s closing argument was much more egregious than the solicitor’s two questions in the form of first-person pronouns in Reyes. The jury instruction that was “perilously close to a charge on the facts” cannot cleanse the blatantly improper argument by this solicitor. See Reyes, 432 S.C. at 412, 853 S.E.2d at 343 (Hearn, J., dissenting).

Finally, the weakness of other evidence allegedly supporting guilt to which Respondent clings for its overwhelming evidence of guilt argument to defeat prejudice is made apparent by this Court’s examination of the other evidence of guilt in Reyes. Despite both Reyes and the alleged victim testing positive for herpes simplex virus type 1, this Court concluded there was

not overwhelming evidence of Reyes' guilt. Id. at 407, 853 S.E.2d at 341. The state's expert witness in child abuse pediatrics provided conflicting explanations for how the alleged victim might have contracted the disease in her genital area and there was an absence of other physical evidence of abuse. Id. Here, Minor had no virus or other disease in her genital area that could be connected to Petitioner. There was no physical evidence at all to support the state's allegations of abuse. The solicitor's closing argument in which she repeatedly and emphatically vouched for Minor's credibility prejudiced Petitioner where the entire case depended upon the jury believing Minor, who had recanted on videotape.

CONCLUSION

Petitioner respectfully requests this Court grant certiorari on the issues presented and allow full briefing.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 3rd day of May, 2021.