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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas  
Post-Conviction Relief

Kristi F. Curtis, Circuit Court Judge

Appellate Case No.: 2020-001398

Carnail Graham, ..... Petitioner,

vs.

State of South Carolina, ..... Respondent.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

- I. Trial counsel failed to provide effective assistance when he did not elicit the testimony of Conswella Smith in support of Petitioner's defense.
- II. Trial counsel failed to provide effective assistance when he did not object to vouching by the solicitor during closing arguments.

## ARGUMENT

- I. Trial counsel failed to provide effective assistance when he did not elicit the testimony of Conswella Smith in support of Petitioner's defense.

As in the post-conviction relief hearing, the State continues to argue that Ms. Smith's testimony was cumulative or would have ultimately been unhelpful to Petitioner's case. To support this proposition, the State cites Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) for the proposition that "counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial." (Return, p.17) Other than the point about cumulative evidence, this is markedly different from the proposition cited in the order of dismissal of the post-conviction relief court, which was that "where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." (App. p.1172) There is no allegation that Ms. Smith's testimony vacillated or that she provided different versions of events during interviews prior to trial.

Though part of Ms. Smith's testimony may have been cumulative, the State also admits that she could have provided exculpatory evidence "in establishing that there were four perpetrators, not three, and that Petitioner was not of the four." (Return, p.18) Both of these items would have greatly impacted the jury in Petitioner's favor. How much of an impact cannot be known, but is certainly within the scope of potential prejudice. The testimony was significant and favorable enough that the results of the proceeding may have been different because of the testimony. *See Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove trial

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." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

The State also argues in its Return that failing to call Ms. Smith was a reasonably articulable trial strategy. In making this argument, the State propounds false equivalencies, alleging that it was necessary for Petitioner to present evidence showing the deficiency of this as a trial strategy, and that no such evidence was presented. Rather, the entire hearing was evidence that the trial strategy was not reasonable because otherwise, Petitioner would not have been convicted and bringing forward the allegations of ineffective assistance of counsel. The State admits that the post-conviction relief court found Ms. Smith's testimony at the hearing credible, though attempts to diminish its value by stating it was essentially of no value for impeachment. While it may have been of no value for impeachment, it was of value for and not cumulative in informing the jury of the number of participants in the crime and, most importantly, that Petitioner was not involved. For these reasons, certiorari should be granted on this ground.

II. Trial counsel failed to provide effective assistance when he did not object to vouching by the solicitor during closing arguments.

The State, in its reply, argues that the statements made in closing at trial were "fair inferences" and made with "earnestness and vigor" rather than "appeal[ing] to personal bias[es] or arouse[ing] the jury's passions or prejudice." (Return, p.20) Petitioner does not disagree with the statement of case law as quoted, in such that a solicitor can state their version of the case law and so long as they do not assure the jury of a witness' credibility or bring in outside material. However, this solicitor quite clearly vouched for credibility. To say, "He's here telling on these people

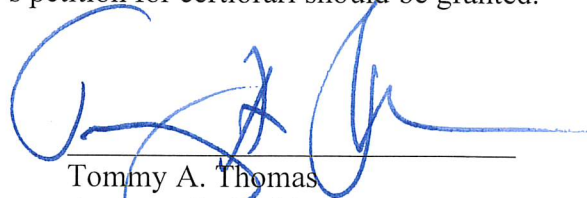
because it's the truth" and "He came up here and told you the truth" are the definition of vouching for veracity. This is not a reasonable inference from the record, even if the witness were the most credible witness to ever testify. A solicitor simply may not throw the weight of their office behind the integrity of any witness in this manner, as held in the cases cited in Petitioner's Petition and in the State's Return.

Regarding whether this constitutes deficiency, it absolutely does. Counsel's failure to object is outside of the scope of deference afforded during closing argument. While it may have been counsel's politesse that prevented him from objecting, this ultimately caused harm to his client, Petitioner. He eventually was so fed up with the solicitor's closing that he did object. (App. p. 1024) During the post-conviction relief hearing, trial counsel testified that he believed the solicitor's closing argument "was an appeal to emotion rather than to the evidence." App. 1127. He further asserted that Bootsie, to whom all of this referred, was a noted liar, most likely committed the murder, and to argue that he did not have a reason to lie was "simply farcical." (App. 1129) Though he admitted it in hindsight, trial counsel stated that these comments were objectionable, particularly given the testimony given at trial.

Again, we look to the prejudice prong of Strickland for the proposition that, but for this conduct, the outcome of the trial may have been different. This closing argument was the last thing the jury heard before deliberating. Though these portions are the ones Petitioner has highlighted, it is riddled with instances where the solicitor vouched for one witness or another, thus improperly emphasizing the State's case to the detriment of the defendants. Trial counsel's failure to object to these statements when it improperly impacted his client was not only deficient but also resulted in prejudice to Petitioner. For these reasons, certiorari should be granted on this ground.

**CONCLUSION**

For the above-stated reasons, Petitioner's petition for certiorari should be granted.



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