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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

Honorable J. Mark Hayes, Circuit Court Judge

CARROL T. WASHINGTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-000754

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether trial counsel provided ineffective assistance of counsel for failing to diligently investigate into the complaining witness' mother for the existence of a conflict of interest and for failing to move for a mistrial at trial after he discovered that a conflict of interest existed because trial counsel represented the complaining minor witness' mother in her divorce?

2. Whether trial counsel provided ineffective assistance of counsel when he failed to object to the solicitor's closing argument because the solicitor improperly bolstered the complaining minor witness where the case was a credibility battle and where the trial court's jury instruction failed to inform the jury they were the sole arbiters of credibility and arguments of counsel were not evidence?

STATEMENT

During the October 2015 term, the Newberry County Grand Jury indicted Petitioner for first degree criminal sexual conduct with a minor. App. 526 – 528.

On February 29, 2016, Petitioner proceeded to trial before the Honorable Donald B. Hocker, and a jury. App. 1. Charles Verner represented Petitioner. Id. Dale Scott and Taylor Daniel represented the state. Id. Petitioner was found guilty as indicted. App. 370, l. 19 – 371, l. 2. Judge Hocker sentenced Petitioner to twenty-five years' imprisonment. App. 378, ll. 7 – 22.

On March 17, 2017, a direct appeal was filed pursuant to Anders v. California, 87 S.Ct. 2094 (1967), for Petitioner. App. 381 – 398. On December 14, 2018, the state filed its Return. App. 423 – 430. In an unpublished opinion, the Court of Appeals dismissed Petitioner's direct appeal on June 13, 2018. App. 399 – 400; State v. Washington, No. 2016-000792 (S.C. Ct. App. June 13, 2018).

On September 5, 2018, Petitioner filed an application for post-conviction relief (PCR). App. 401 – 422. On January 8, 2021, Petitioner filed an amended PCR application. App. 431 – 434. Among other allegations, Petitioner alleged trial counsel provided ineffective assistance of counsel for failing to move for a mistrial when he discovered a conflict of interest existed because he represented the minor complaining witness' mother in her divorce, and that trial counsel was ineffective for failing to object to the solicitor's egregious bolstering of the complaining minor witness. Id.

On January 27, 2021, Petitioner's PCR hearing was held before the Honorable Mark Hayes. App. 435. Ashley A. Mahan represented Petitioner. Id. Brianna L. Schill represented the state. Id.

In an order of dismissal filed on June 21, 2021, the PCR court denied Petitioner relief. App. 505 – 525. The PCR court found that his allegations were without merit and he was not able to show how he was prejudiced from trial counsel's alleged errors. App. 516 – 518; App. 518 – 521.

This petition follows.

ARGUMENT

1. Trial counsel provided ineffective assistance of counsel for failing to diligently investigate into the complaining witness' mother for the existence of a conflict of interest and for failing to move for a mistrial at trial after he discovered that a conflict of interest existed because trial counsel represented the complaining minor witness' mother in her divorce.

Relevant Facts

Petitioner was in a live-in relationship with Tonya Dawkins, a relative of the complaining minor witness ("Minor"). App. 101, l. 2 – 102, l. 14; App. 103, ll. 13 – 19; App. 252, ll. 4 – 6; App. 269, ll. 5 – 18. Nicole Simms, Minor's mother, would bring Minor to her grandmother's home, Ethyl Simms, in Whitmire, South Carolina which was "within five minutes" of Dawkins and Petitioner's home. App. 100, ll. 11 – 24.

On March 25, 2015, Minor alleged that Petitioner penetrated her anus with his finger at Dawkins' home while she was on a visit to her grandmother's house. App. 131, l. 23 – 134, l. 18; App. 203, l. 1 – 206, l. 10; App. 221, ll. 17 – 21. Minor said the suspect went by the name of "Man." App. 131, l. 23 – 134, l. 18; App. 203, l. 1 – 206, l. 10. Minor's mother, Nicole Simms, brought Minor to police, informed Investigator Brad Epps of the allegation, and that Petitioner, known as "Man," was the suspect. App. 131, l. 23 – 134, l. 18. Minor picked Petitioner out of a photo-identification lineup and underwent a forensic interview where she reiterated her claims against Petitioner. App. 136, l. 20 – 138, l. 5; App. 179, l. 15 – 181, l. 3; App. 185, l. 22 – 187, l. 24.

There was no physical evidence or eye-witness accounts to the alleged assault. The entirety of the evidence was Minor's allegation and identification of Petitioner. Accordingly, the case was

a "he said, she said" credibility battle. App. 89, ll. 11 – 13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3.

On June 4, 2015, Petitioner was interviewed by Epps. App. 139, l. 25 – 142, l. 18. Petitioner denied improperly touching Minor and explained that he did not know why Minor would make that allegation. Id. He also insinuated that Minor had a reputation for being promiscuous. Id. Petitioner confirmed that his nickname is "Man." App. 143, ll. 4 – 14. On June 10, 2015, Epps arrested Petitioner. App. 143, l. 25 – 144, l. 6.

During Simms' testimony at Petitioner's trial, trial counsel "realized" he represented Simms in an earlier matter for her divorce with Minor's biological father. App. 125, l. 23 – 128, l. 16. In his questioning of Simms, trial counsel attempted to elucidate Petitioner's defense theory that a different man committed the sexual misconduct and that Minor mistakenly identified Petitioner. App. 126, l. 23 – 128, l. 16. The main suspect trial counsel tried to point to as the true perpetrator was Minor's biological father. Id.

Trial counsel asked Simms about her children's reluctance to visit their biological father and about a prior allegation of abuse involving the biological father. Id. Simms was noticeably taken aback. App. 126, l. 23 – 127, l. 8. Moreover, after the shock of that line of questioning subsided, she angrily retorted "you should know" about the child abuse allegation with her ex-husband, Minor's biological father, because trial counsel learned about it when he represented her in her divorce. App. 127, ll. 9 – 24. Simms went on to testify that trial counsel had all this information in his file from her divorce. App. 127, ll. 22 – 24. Simms' response put trial counsel on notice that he learned of Christopher Thompson's abuse during his representation of Simms such that bringing it up now constituted a breach of the confidentiality of their prior attorney-client relationship.

It was in that moment that Petitioner needed an uncompromised advocate to forcefully question Simms because his main defense was that he was mistakenly identified as the perpetrator and the true perpetrator was Minor's biological father. App. 126, l. 23 – 128, l. 16; App. 501, l. 24 – 502, l. 22. Trial counsel could not pursue that line of questioning ardently because of his duty to not violate confidentiality with his prior client Simms. Id. Trial counsel cut short his cross-examination of Simms, the trial proceeded, and Petitioner was found guilty. App. 370, l. 19 – 371, l. 2.

At his PCR hearing, Petitioner testified trial counsel never mentioned that he had been Simms' divorce attorney. App. 448, l. 17 – 449, l. 3. The revelation that trial counsel used to be Simms' attorney during trial was a "shock" to Petitioner. Id. Petitioner recalled an incident prior to trial where trial counsel admitted to Petitioner that he remembered Simms but did not inform Petitioner he knew Simms from a prior representation. Id. While that conversation was taking place, Dale Scott, trial counsel's assistant, interrupted and tried to get Petitioner to accept a plea offer from the state. App. 449, ll. 4 – 17.

Trial counsel testified at the PCR hearing as well. App. 459, l. 21. Trial counsel minimized his attorney-client relationship with Nicole Simms. App. 466, l. 22 – 469, l. 19. He stated that her divorce was "uncontested" and the biological father was not an issue in the divorce proceedings. Id. However, that claim was contradicted by Simms' trial testimony where Simms stated trial counsel had "everything on file" and "should know" about the allegation of abuse her children made on Christopher Thompson from the divorce proceedings. App. 127, ll. 5 – 24.

Petitioner also put trial counsel on notice of Christopher Thompson prior to trial. Petitioner wrote trial counsel a detailed letter explaining the incident and allegation. App. 500, l. 19 – 501, l. 5. In that letter, Petitioner made sure to include that Thompson was Minor's biological father. Id.

Petitioner also specifically raised the defense theory that Christopher Thompson "might have been involved in some kind of sexual misconduct" with Minor. App. 502, ll. 11 – 22.

Trial counsel confessed that "at some point" prior to trial, he learned that Minor's father was Christopher Thompson. App. 494, l. 10 – 496, l. 9. Minor's last name was Thompson. App. 497, ll. 2 – 13. When trial counsel represented Simms, her last name was Thompson. Id. Given those connections, a competent attorney would have at the very least investigated to see if Nicole Simms was the Nicole Thompson he represented in her divorce from Christopher Thompson.

Despite the abundance of evidence that should have made trial counsel aware Simms was his prior client, he incredulously asserted he conducted an adequate conflict check that was thwarted because Simms no longer went by the last name Thompson. App. 495, l. 11 – 496, l. 2. Tellingly, when trial counsel explained his conflict checking process, the entirety of the conflict check consisted of asking the question "do I recognize the name [of the client]?" Id.

Trial counsel categorized Simms as an adversarial, material witness. App. 493, ll. 9 – 14. He agreed with PCR counsel that his duties to her as her former attorney continued after the representation was over. App. 493, l. 15 – 494, l. 4. As Simms was an adversarial, material witness trial counsel knew Simms would testify for the state "from day one." App. 494, ll. 5 – 9; App. 496, ll. 10 – 20. Trial counsel further admitted that if he had "any concerns about it this case it would be" the conflict of interest with Simms. App. 494, l. 18 – 495, l. 11.

During Simms' divorce, trial counsel learned about Simms' relationship with Christopher Thompson and the state's PCR counsel recognized that even during questioning at the PCR hearing there were topics she could not ask about because of the attorney-client privilege between trial counsel and Simms. App. 467, l. 22 – 468, l. 15. Simms testified at Petitioner's trial that trial counsel's file contained the information about the abuse allegation against Christopher Thompson.

App. 126, l. 23 – 128, l. 2. Thus, trial counsel learned of the abuse allegations while he was in an attorney-client relationship with Simms such that he was bound by his duty of confidentiality not to disclose that information. That duty of confidentiality still existed during Petitioner's trial. Accordingly, Petitioner was prejudiced by trial counsel's conflict of interest because trial counsel's duty of confidentiality to Simms hamstrung his cross-examination of her regarding the crux of his defense.

Discussion

In this case Petitioner was deprived of his constitutional right to be represented by a conflict-free attorney. Trial counsel provided ineffective assistance by failing to move for a mistrial when it was revealed that he represented Minor's mother in an earlier matter, where she was the state's "adversarial, material witness" against Petitioner. That undisclosed conflict of interest violated Petitioner's Sixth Amendment right to effective assistance of counsel because "an attorney who has previously represented one of the state's witnesses has a continuing obligation to that former client not to reveal confidential information received during the course of the prior representation" and that inability to question his prior client regarding that information "dampen[ed] the ardor of [trial counsel's] defense" of Petitioner. Nix v. Whiteside, 106 S.Ct. 988, 1005 n.7 (1986) (Stevens, J., concurring); State v. Gregory, 364 S.C. 150, 153 – 54, 612 S.E.2d 449, 450 – 51 (2005).

A defendant's claim that counsel's ineffective assistance required reversal of a conviction has two components. Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced

the defense." Id. Prejudice means that defense counsel's errors deprived the defendant of a fair trial whose result was reliable. Id.

To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance. Thomas v. State, 346 S.C. 140, 143–44, 551 S.E.2d 254, 256 (2001) See Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998) (citing Cuyler v. Sullivan, 100 S.Ct. 1708, (1980); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984)). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Jackson v. State, supra (citing Duncan v. State, supra).

In South Carolina an attorney owes a duty of confidentiality to clients, both past and present. Rule 1.6(a) of the South Carolina Rules of Professional Conduct states "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Rule 1.6(a), RPC, Rule 407 SCACR.

That duty extends to prior clients under Rule 1.9(c) of the South Carolina Rules of Professional Conduct, which states in part, "A lawyer who has formerly represented a client in a matter... shall not thereafter: use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or reveal information relating to the representation except as these Rules would permit or require with respect to a client." Rule 1.9(c), RPC, Rule 407 SCACR. In this case trial counsel owed Simms a duty of confidentiality to not reveal information he learned while he represented her, including the allegation of abuse from Simms' children on

their father, Christopher Thompson. That duty hindered trial counsel's ability to defend Petitioner in this case because he could not adequately cross-examine Simms at trial.

A conflict of interest can arise when an attorney represents a current client, but also previously represented a past client who then becomes a witness for the state against the current client, even when the matters are not substantially related. See Mickens v. Taylor, 122, S.Ct. 1237 (2002). In Mickens, a Virginia jury convicted Mickens of the murder of Timothy Hall. Mickens, at 1239. One of Mickens' three appointed attorneys, Saunders, represented Hall on assault and concealed weapons charges at the time of the murder. Id., at 1240. The juvenile court judge who dismissed the charges against Hall, because he was now deceased, also appointed Saunders to represent Mickens. Id. Accordingly, the juvenile court should have known that there was a potential conflict of interest in Saunders' representation of Mickens; however, the juvenile court failed to inquire into that potential conflict of interest. Id. Mickens' trial continued, and he was found guilty of murder. Id., at 1239.

Mickens argued in a federal habeas corpus appeal that the juvenile court judge's failure to inquire into the potential conflict either mandated automatic reversal of his conviction or relieved him of the burden of showing that the conflict of interest adversely affected his counsel's performance. Id., at 1240. In a five-to-four decision, the United States Supreme Court held that while the representation of a prior client with adverse interests to a current client did present a conflict of interest, the lower court's failure to inquire into the potential conflict of interest did not eliminate Mickens obligation to show that the conflict adversely affected his counsel's performance. Mickens, at 1244 – 46. Moreover, since the Court of Appeals determined that the conflict of interest did not adversely affect trial counsel Saunders' performance, an actual conflict did not exist in Mickens' case. Id., at 1245.

In South Carolina, the issue of whether an actual conflict of interest existed for an attorney who previously represented a client with adverse interests to their current client arose in Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001) and our Supreme Court's decision illustrated that a knowing waiver of conflict-free representation was necessary to eliminate the conflict of interest. In Fuller, the defendant was indicted and tried jointly with two codefendants, McClain and Meadows. Fuller, at 632, 557 S.E.2d at 665. All three defendants were represented by James O. Thomasson and all claimed an alibi defense. Id. Critically, Thomasson advised all the defendants of "the potential for conflicts of interests" and each defendant agreed to continue with Thomasson's representation. Id.

McClain subsequently changed his story and Thomasson moved to be relieved from representing him. Id., at 632 – 33, 557 S.E.2d at 665. Both Meadows and Fuller were advised by the trial judge of the potential conflicts of interest that could arise if Thomasson continued to represent them. Id., at 633, 557 S.E.2d at 665. Both agreed to continue to be represented by Thomasson because they had the same alibi defense and witnesses. Id.

Meadows and Fuller both testified at trial, but McClain did not. Id. The testimony from the witnesses for were conflicted, one witness placed Fuller and Meadows at the scene and three other witnesses placed Fuller but not Meadows at the scene. Id. The jury convicted McClain and Fuller, but Meadows was acquitted. Id.

Fuller proceeded to a post-conviction relief hearing on the grounds that Thomasson provided ineffective assistance of counsel because but for Thomasson's prior representation of McClain, counsel could have called McClain to testify and then impeach him with his earlier statement to police that neither he, Fuller, or Meadows was present at the crime scene. Id., at 634, 557 S.E.2d at 666. Thomasson testified at the PCR hearing that he did not call McClain to testify

because he "knew what [McClain] was going to say as far as putting [Fuller] at the scene." Id., at 633, 557 S.E.2d at 665.

In Mickens, "The PCR court found the appearance of a conflict based on the fact that Fuller was convicted while Meadows was acquitted, and that counsel [was] unable to cross-examine McClain about statements he made" due to Thomasson's prior representation of McClain warranted reversal of Fuller's conviction. Id., at 634, 557 S.E.2d at 665 – 66. Accordingly, Fuller was successful at PCR and the state appealed. Id.

This Court reversed the PCR court's decision, holding that Fuller failed to demonstrate there was an actual conflict of interest. Id., at 634, 557 S.E.2d at 666. As for the joint representation, the Court determined no conflict existed because Fuller and Meadows' defenses were consistent and because "both had been advised of the potential for conflicts and agreed to continued joint representation" thereby waiving their right to conflict-free representation. Id.

For Thomasson's prior representation of McClain, Fuller alleged that but for Thomasson's prior representation of McClain, counsel could have called McClain to testify and then impeach him with his earlier statement. Id. However, at Fuller's PCR hearing, Thomasson testified that he had no intention of calling McClain as a witness because they knew he was going to testify that Fuller was present at the crime scene. Id.

This Court "[found] there was neither an actual conflict, nor the appearance of a conflict of interest in [Fuller's] case" because Fuller waived any potential conflict regarding Thomasson's previous representation of McClain at the hearing where Thomasson was relieved as McClain's attorney. Fuller, at 635 n.5, 557 S.E.2d at 666 n.5. Moreover, "the appendix demonstrate[d] that both Meadows and Fuller were questioned by the trial judge and indicated they understood the possibility of a conflict, and that they nonetheless wished to proceed." Id. The Court further held

there was neither "any deficiency, nor any conflict, in counsel's failure to call a witness who, by all indications, would have inculpated Fuller in the crime." Fuller, at 634–35, 557 S.E.2d at 666. Accordingly, Thomasson's choice to not call McClain to testify was a strategic decision rather than a limitation due to being McClain's former attorney.

In this case, the conflict of interest was neither disclosed nor waived prior to trial. Undersigned counsel is unaware of any South Carolina cases that analyze whether a conflict of interest existed when an attorney previously represented a client who goes on to become a witness for the state in the trial against his current client where the attorney failed to disclose the prior representation and where the current client never waived his right to a conflict-free attorney.

The Minnesota Supreme Court did encounter such a circumstance in State v. Patterson, 812 N.W.2d 106 (2012). In that case, Patterson was on trial for the murder of Rashante Artison because of an intra-gang conflict. Patterson, at 108 – 110. Patterson hired attorney Newmark to defend him at trial. Id., at 108. The state moved to dismiss Newmark because Newmark represented three of the state's potential witnesses. Id. Over Patterson's waiver of his right to conflict-free counsel, the trial court granted the state's motion on the basis of the potential conflicts with two of the state's prospective witnesses. Id. Patterson continued with a different attorney and was found guilty of second-degree murder. Id.

On appeal, Patterson argued the trial court violated his right to counsel of choice by disqualifying Newmark over his objection. Id., at 109; See State v. Patterson, 796 N.W.2d 516 (Minn. Ct. App. 2011). The Minnesota Court of Appeals held "the district court thoroughly analyzed Newmark's purported conflicts of interest," and "any prejudice to Patterson was outweighed by the state's interest in the finality of any judgment of conviction, the court's interest in preserving the ethical standards of the legal profession, and the public's interest in having a

criminal justice system that is perceived as fair." Patterson, at 109. The Supreme Court of Minnesota reviewed the disqualification of Patterson's counsel of choice for an abuse of discretion and examined the trial court record to determine if an actual conflict between Newmark and the two state's witnesses existed. Id., at 109 – 10.

At Patterson's trial, the state planned to call witness Wilson. Id. Newmark previously represented Wilson on "approximately four felony drug cases." Id., at 110. While Newmark represented Wilson, they reviewed police reports together and had privileged communications about the facts underlying Wilson's arrest. Id. Wilson was later indicted on federal drug charges and was appointed a different attorney for his federal case. Id. Wilson's new attorney negotiated a plea agreement with the federal government in which Wilson agreed to cooperate in the prosecution of Patterson, and Patterson's codefendant, for Artison's murder. Id. At Patterson's trial, Wilson objected to being cross-examined by Newmark. Id.

Based on those circumstances, the state argued that Newmark's previous representation of Wilson created a potential conflict of interest because Newmark would have to discredit his former client during cross-examination which might jeopardize both Wilson's and Patterson's interests. Id. The state further argued that Patterson's waiver of conflict-free counsel was not sufficient to eliminate the potential conflict because Patterson could not waive Newmark's ethical obligations to Wilson. Id. Patterson argued that, because the state failed to demonstrate that Wilson's interests were adverse to Patterson's, no actual conflict or serious potential for conflict would arise from Newmark's representation of Patterson. Id. After considering those arguments, the trial court disqualified Newmark as Patterson's attorney. Id.

The Minnesota Supreme Court held the trial court's disqualification of Newmark based on his previous representation of Wilson was proper. Patterson, at 111. A potential conflict of interest

existed due to Newmark's past representation of Wilson because Newmark learned confidential information about Wilson during that representation that would be relevant to his cross-examination of Wilson on Patterson's behalf. Id. The need for Newmark to cross-examine Wilson, with information that Newmark obtained during his past representation of Wilson, "created a substantial risk that confidential information would materially advance Patterson's defense." Id.

Despite Wilson not being on trial for the same charges, like a codefendant would be, the Minnesota Supreme Court still determined that Wilson and Patterson had "materially adverse" interests. Id. Furthermore, the Minnesota Supreme Court held the impact on Patterson's defense caused by the prior representation would have been severe because the limitation on Newmark's ability to effectively cross-examine Wilson would have materially harmed his representation of Patterson. Id. "Newmark's past representation of Wilson would have made it difficult for Newmark to effectively cross-examine Wilson on Patterson's behalf," as Newmark could not use information he learned while representing Wilson on cross-examination because it was subject to attorney-client confidentiality "thereby calling into question the fairness of Patterson's trial." Id., at 112.

The resulting prejudice from trial counsel's conflict of interest in this case was evident from the record. Trial counsel proceeded to trial without notifying Petitioner, Simms, or the trial court that he represented Simms in the past, despite evidence that trial counsel was aware he knew Simms prior to trial. App. 448, l. 17 – 449, l. 15. As a result, *Petitioner was not given a chance to waive his right to conflict-free representation.*

In fact, trial counsel never revealed his conflict of interest, it was Simms who revealed the prior representation to the trial court and Petitioner during cross-examination. App. 126, l. 23 – 127, l. 24. Simms simultaneously revealed that trial counsel knew of the abuse allegation against

Minor's father from his representation of Simms during her divorce because as Simms testified trial counsel "should know [about the abuse]" and that trial counsel had "everything on file." Id.

Petitioner's main defense was that he was mistakenly identified by Minor. App. 483, ll. 6 – 21. The key suspect that Petitioner pointed to as the true culprit was Christopher Thompson. App. 502, ll. 7 – 22. Petitioner needed to question Simms about her children's prior allegations of abuse against Thompson to effectively present the crux of his defense.

Due to trial counsel's prior representation of Simms, trial counsel was under a duty of confidentiality to not expose the information about the allegation of abuse regarding Minor's father that he learned while he represented her. App. 492, l. 15 – 494, l. 4. Trial counsel began questioning her about the allegation of abuse, but once it was revealed that he was using information he gained from the prior representation trial counsel prematurely ended that line of questioning, lest he be caught breaching that duty of confidentiality. App. 127, l. 9 – 128, l. 16.

Since Petitioner's entire defense relied on the line of questioning that pointed to Minor's father being the true culprit, trial counsel's conflict of interest adversely affected his performance and prejudiced Petitioner because his trial attorney "dampen[ed] the ardor of his defense in order to placate" Simms regarding crucial, material evidence. Gregory, supra.

2. Trial counsel provided ineffective assistance of counsel when he failed to object to the solicitor's closing argument because the solicitor improperly bolstered the complaining minor witness where the case was a credibility battle and where the trial court's jury instruction failed to inform the jury they were the sole arbiters of credibility and arguments of counsel were not evidence.

Relevant Facts

Petitioner's case was a "he said, she said" credibility battle. App. 89, ll. 11 – 13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. There was no physical evidence of abuse, no confession of guilt, and no eye-witness testimony alleging to have seen Petitioner abuse Minor. App. 478, l. 12 – 479, l. 1. Accordingly, the credibility of the witnesses was paramount.

In an effort to tip the scales in the state's favor, the solicitor made comments in his closing argument regarding the truthfulness of Minor and his personal belief that Minor was telling the truth. Those comments could only be reasonably interpreted as improper vouching of Minor's testimony.

The solicitor's closing statement excessively leaned on Minor's testimony. App. 343, l. 25 – 344, l. 15; App. 346, ll. 21 – 23; App. 347, ll. 8 – 9; App. 349, ll. 8 – 13; App. 354, ll. 14 – 354, l. 23; App. 356, ll. 2 – 7. The solicitor began his closing by imploring the jury to be a champion for Minor who was a "voice that crie[d] out from the dark begging to be heard, to be believed." App. 343, l. 25 – 344, l. 4. He continued, "Will you believe the soft voice of the meek whose message rings out the loudest, or are you going to believe the voice of the taker? The taker who has taken away so much from [Minor]?" App. 344, ll. 11 – 14.

That colorful language was just the setup, unfortunately, for the egregious vouching statements that came next. The solicitor repeatedly insinuated that Minor, like all "eight, nine, 10-year-old[s]," was *physically incapable of lying*. App. 346, ll. 21 – 23; App. 349, ll. 8 – 13. Then he went so far as to explicitly tell the jury he believed Minor's testimony. The solicitor declared, "*I* submit to you [Minor] *was wholly credible.* That *she's only capable of telling the truth. She's not capable of carrying on a lie* to that degree for that long. *A child just isn't capable of doing that.*" App. 354, ll. 14 – 18. (emphasis added) He then reiterated "A child will fold under a cross-examination because *they're not capable of lying to that degree.*" App. 354, ll. 21 – 23. (emphasis added). Trial counsel failed to object because he did not see any comments that "crossed the line." App. 473, l. 14 – 474, l. 17.

The trial court's jury instruction did not cure trial counsel's failure to object, nor did it cure the resulting prejudice because it failed to explicitly instruct the jury that they were the sole arbiters[1] of credibility. The closest the trial court came to informing the jury they were the sole arbiters of credibility was when it said, "as jurors it is your duty to determine the affect, value, weight and truth of the evidence presented during this trial." App. 358, l. 5 – 359, l. 16. The court reiterated that same sentiment when it said it was the jury's duty to analyze and evaluate evidence and determine which evidence convinces them of its truth. App. 362, ll. 4 – 19.

That instruction did not tell the jury to ignore the attorneys' opinions regarding the credibility of witnesses. The trial court also failed to explicitly inform the jury that arguments of counsel were not evidence. Therefore, even when the trial court informed the jury that it was their duty to judge the credibility of the witnesses and evidence, the solicitor's comments that Minor

[1] In contrast, the judge did specifically say the jury was the exclusive judge of the "facts." App. 358, l. 5 – 359, l. 16.

was literally incapable of lying had a reasonable likelihood of affecting the jury's credibility determinations; and thus, the outcome of Petitioner's trial. App. 346, ll. 21 – 23; App. 349, l. 8; App. 354, ll. 10 – 18. Accordingly, trial counsel's failure to object to the improper vouching by the solicitor was ineffective assistance of counsel that prejudiced Petitioner in this "he said, she said" case.

Discussion

Petitioner's case was a credibility battle between Minor and Petitioner. App. 89, ll. 11 – 13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. Accordingly, trial counsel's failure to object to the solicitor's improper vouching of Minor constituted deficient performance that prejudiced Petitioner because the solicitor's comments improperly bolstered the key witness' testimony where there was no physical evidence of abuse, no third-party witness testimony of guilty, and no instruction by the trial court that the jury was the sole arbiter of witness credibility. See State v. Reyes, 432 S.C. 394, 408 – 09, 853 S.E.2d 334, 342 (2020) (holding the trial court cured a solicitor's improper bolstering questions with instructions to the jury that it was the sole arbiter of witness credibility).

To establish ineffective assistance of counsel, a defendant must show trial counsel's performance fell below an objective standard of reasonableness and, trial counsel's ineffective assistance prejudiced the defendant's case. Strickland v. Washington, supra. Prejudice means that defense counsel's errors deprived the defendant of a fair trial whose result was reliable. Id.

Generally, "[t]he assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct.App.2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). 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 solicitor'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), our Supreme Court held Gilchrist's defense 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. The Court held that the solicitor's statement was a personal assurance of the witness' veracity, and trial counsel should have objected. Id. Further, the Court held defense counsel's error prejudiced

Gilchrist because the witness the solicitor vouched for 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).

In this case trial counsel provided deficient performance when he failed to object to the solicitor's numerous statements during closing argument that vouched for Minor's credibility and truthfulness. App. 343, l. 25 – 344, l. 15; App. 346, ll. 21 – 23; App. 347, ll. 8 – 9; App. 349, ll. 8 – 13; App. 354, ll. 14 – 354, l. 23; App. 356, ll. 2 – 7. Trial counsel stated that he did not object because, in trial counsel's mind, none of the solicitor's comments "crossed the line." App. 473, l.

14 – 475, l. 17. However, the record clearly showed that the solicitor violated the holdings of Matthews v. State, supra, and Gilchrist v. State, supra when he *explicitly assured the jury* that Minor was "wholly credible." App. 354, ll. 10 – 18. Even more egregious, the solicitor used first person pronouns when declaring Minor was "wholly credible" and claimed that Minor was literally incapable of lying. Id. Those comments were exactly the kind that South Carolina Courts have held to be improper. See Smith v. State. 375 S.C. 507, 523, 654 S.E.2d 523, 532 (2007), abrogated by Smalls v. State. 422 S.C. 174, 810 S.E.2d 836 (2018) (discouraging use of the pronoun "I" in closing argument).

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 in his opinion Minor was "wholly credible" he improperly expressed his personal opinion regarding the complaining witnesses' truthfulness. See 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 his judgment rather than its own view of the evidence. See Kelly, at 368, 540 S.E.2d at 860. The vouching in this case was particularly harmful because the solicitor knew the case would turn on whether or not the jury believed Minor's testimony and he improperly told the jury during closing that Minor was incapable of lying.

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. *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). As a result, the solicitor's improper comments 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 trial court's jury instruction did not cure the prejudice in this case because the jury was not informed that it was the "sole arbiter" of witness credibility. *Cf.* State v. Reyes, 432 S.C. 394, 408 – 09, 853 S.E.2d 334, 342 (holding that the solicitor's improper vouching was harmless because the trial court instructed the jury that it was the sole arbiter of witness credibility). Moreover, this was case distinguishable from Reyes in two more key aspects. The impropriety here was far more egregious[2]. App. 354, ll. 10 – 18; App. 349, l. 8; App. 354, ll. 21 – 23. The solicitor in this case explicitly assured the jury that Minor was "wholly credible" and incapable of lying, whereas in Reyes the solicitor simply asked the minor witness during direct examination if she knew to tell the truth while testifying. App. 354, ll. 10 – 18; Reyes, at 399 – 400, 853 S.E.2d at 337. In this case there was also no physical evidence of guilt, whereas in Reyes the *six-year-old minor* and Reyes tested positive for herpes simplex virus type one. Reyes, at 401, 853 S.E.2d at 337. Therefore, the jury instruction from the trial court given here did not cure the prejudice from the improper vouching as it did in the close call three-to-two decision in Reyes. Reyes, at 409, 853 S.E.2d at 342.

In State v. Tappeiner, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016), our Supreme Court held that trial counsel was ineffective for failing to object during the solicitor's closing argument where she improperly vouched for the credibility of the minor witness because her comments amounted to her telling the jury that she believed the minor's version of events. The Court determined that Tappeiner was prejudiced by his trial counsel's ineffective assistance because the dearth of direct

[2] The solicitor also arguably made a "golden rule argument" at closing. App. 347, ll. 8 – 9. While he did not explicitly tell the jury to put themselves in Minor's shoes, he did implicitly invite them to do so when he stated "I can't imagine being in [Minor's] shoes." Id.; See State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009).

or circumstantial evidence, outside of the minor's allegation, meant that the evidence of Tappenier's guilt was not overwhelming. Id. at 253, 785 S.E.2d at 478. Accordingly, there was a reasonable probability that but for the solicitor's improper vouching the outcome of Tappenier's trial would have been different. Id. at 250, 785 S.E.2d at 476.

Here, the solicitor invaded the province of the jury and usurped its fact-finding function when he asserted that the state's key witness was incapable of lying. App. 354, ll. 10 – 18. 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).

As in Tappenier, the evidence of Petitioner's guilt in this case was not overwhelming. Trial counsel admitted at the PCR hearing that the case was largely a "he said, she said" matter. App. 89, ll. 11 – 13; App. 464, l. 11 – 465, l. 12; App. 478, l. 12 – 479, l. 1; App. 488, l. 16 – 489, l. 3. Since there was no physical evidence of guilt nor third party witness testimony, the case came down to a credibility battle between the complaining witnesses and Petitioner. App. 478, l. 12 – 479, l. 1. Concordantly, trial counsel's ineffective assistance in failing to object to the solicitor's improper vouching of the state's key witnesses prejudiced Petitioner. App. 354, ll. 10 – 18.

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. App. 518 – 521. Trial counsel's ineffective assistance of counsel created "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

By reason of the foregoing arguments, Petitioner respectfully requests this Court grant certiorari to allow for full briefing of these issues.

Victor R Seeger
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of February, 2022.