STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
J. Mark Hayes, Circuit Court Judge

Appellate Case No. 2021-000754

RECEIVED
May 25 2022
S.C. SUPREME COURT

Carrol Tremayne Washington,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE 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?

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. The PCR court correctly found Trial Counsel was not ineffective during his cross-examination of the complaining minor's mother because he was not representing conflicting interests at that time and his prior representation of the witness did not negatively affect his representation of Petitioner.

2. The PCR court properly found Trial Counsel was not ineffective for failing to object to the solicitor's closing argument because the solicitor neither made personal assurances of the victim's credibility nor asked the jurors to put themselves in the victim's shoes.

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections. Petitioner was indicted at the May 2017 term of the Newberry County Grand Jury for first degree criminal sexual conduct with a minor (2015-GS-36-0546). Charles Verner, Esquire ("Trial Counsel"), represented Petitioner. Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel, of the Eighth Circuit Solicitor's Office, prosecuted the case. On February 29, 2016, Petitioner proceeded to trial before the Honorable Donald B. Hocker and a jury. The jury found Petitioner guilty as indicted on March 2, 2016. Judge Hocker sentenced Petitioner to twenty-five years' imprisonment.

Petitioner filed a timely notice of appeal. Lara M. Caudy, Esquire, of the South Carolina Commission on Indigent Defense – Office of Appellate Defense, submitted a brief and motion to be relieved pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal on June 13, 2018. The remittitur was issued on July 2, 2018.

Petitioner filed his application for post-conviction relief on September 10, 2018 (2018-CP-36-00414). He alleged the following grounds for relief in his application:

A. Ineffective assistance of Trial Counsel during the guilt phase of the trial
    1. Trial Counsel was ineffective for failing to object to the amendment of the indictment from criminal sexual conduct with an adult to first degree criminal sexual conduct with a minor, which increased the maximum sentence
    2. Trial Counsel failed to adequately investigate improper conduct by law enforcement in order to properly challenge the officers' credibility
    3. Ineffective assistance of Trial Counsel for failure to object to leading questions by the prosecutor
    4. Ineffective assistance of Trial Counsel for failure to object to impermissible victim impact evidence in the solicitor's closing argument
    5. Ineffective assistance of Trial Counsel for failure to object to the solicitor's argument that Petitioner had lied under oath

6. Ineffective assistance of Trial Counsel for failure to object to impermissible vouching for the credibility of the State's witnesses during the solicitor's closing argument
7. Ineffective assistance of Trial Counsel for failing to object to the solicitor's improper remarks that the jury could act as the conscience of Newberry County
8. Ineffective assistance of Trial Counsel for failing to object to the solicitor's use of improper epithets intended to appeal to the jurors' prejudices and emotions
9. The totality of Trial counsel's failures throughout the entire trial created a reasonable probability that, but for the cumulative effect of Trial Counsel's unprofessional errors, the result of the proceeding would have been different

B. Ineffective assistance of Trial Counsel during the sentencing phase of the trial
   1. Trial Counsel failed to investigate, develop, and present all available relevant and admissible mitigating evidence
   2. Trial Counsel failed to object to inflammatory and irrelevant evidence presented by the prosecution
   3. Trial Counsel failed to object to the trial court's improper jury charge that the victim's testimony need not be corroborated

C. Ineffective assistance of Trial Counsel during the guilt phase of the trial
   1. Trial Counsel's cross-examination of a key witness for the State was impeded by Trial Counsel's conflict of interest

On January 18, 2021, Petitioner filed an amended application for post-conviction relief by and through counsel Ashley A. McMahan, Esquire, raising the following allegations:

1. Ineffective assistance of Trial Counsel
   a. Conflict of interest and failure to move for a mistrial once the victim's mother indicated Trial Counsel had represented her in the past
   b. Failure to object to multiple Golden Rule and vouching statements made during the solicitor's closing argument
   c. Allowing a juror to be seated that had worked with Petitioner and that Petitioner had asked repeatedly not to have on the jury

Respondent filed its return on December 17, 2018, and a virtual evidentiary hearing into the matter was convened on January 29, 2021, before the Honorable J. Mark Hayes, II. Petitioner was present at the hearing and represented by Ashley McMahan, Esquire. Assistant Attorney General Brianna L. Schill, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner went forward on the allegations raised or restated in his

amended application. By written order dated June 21, 2021, and filed July 1, 2021, Judge Hayes denied and dismissed the application.

Petitioner thereafter filed a timely notice of appeal. By and through counsel Victor R. Seeger, Esquire, Petitioner filed a petition for writ of certiorari on February 22, 2022. This Return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "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." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe,* 372 S.C. 318, 331, 642

S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Strickland*, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. *Id.* Accordingly, courts must be wary of second-guessing counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.*

ARGUMENT

I. The PCR court correctly found Trial Counsel was not ineffective during his cross-examination of the complaining minor's mother because he was not representing conflicting interests at that time and his prior representation of the witness did not adversely affect his representation of Petitioner.

The PCR court's finding that Trial Counsel was not ineffective due to a conflict of interest when cross-examining the victim's mother, notwithstanding the fact Trial Counsel had represented the witness in a divorce proceeding many years earlier, was correct because Trial Counsel was not representing competing interests at the time of Petitioner's trial and Petitioner failed to show that his representation was adversely affected by Trial Counsel's prior representation.

Petitioner was accused of molesting a minor ("Victim") on multiple occasions when she would come over to play at his apartment. At trial, the State called Nicole Simms, Victim's mother, who testified Victim began behaving strangely in 2014 and did not want to visit the apartment complex where Petitioner lived anymore. (App.pp.114–22). On cross-examination, Trial Counsel asked Simms if her children ever hid in the closet to avoid visitation with Simms' ex-husband, Christopher Thompson, and Simms acknowledged they did. (App.p.126, line 23–p.127, line 4). Trial Counsel then asked if Simms told investigators that one of her children was being molested by someone in Thompson's family. (App.p.127, lines 5–7). Simms denied making that statement, claimed her oldest daughter told a counselor about "something" happening to Victim, and then stated, "You ought to know, because you was my divorce lawyer and you bringing up something in my divorce." (App.p.127, lines 12–16). Trial Counsel and Simms began talking over one another, with Trial Counsel attempting to ask questions and

Simms insisting Trial Counsel was the lawyer who represented her in her divorce from Christopher Thompson. (App.p.127, line 17–p.128, line 2). After the trial court admonished Simms to wait for Trial Counsel to finish his question before answering, Trial Counsel asked again whether Simms ever told investigators that her oldest daughter had been abused by a family member. (App.p.128, lines 3–11). Simms again denied making such a statement, but she acknowledged stating her oldest daughter "did make an exaggeration about something happening to her little sister" at their father's house. (App.p.128, lines 12–14). Trial Counsel did not ask Simms any more questions.

At the evidentiary hearing before the PCR court, Trial Counsel testified he learned after the trial that he had represented Nicole Simms in an uncontested divorce action in 2006 or 2007, when she was known as Nicole Thompson. (App.p.467, lines 2–9). Trial Counsel stated he did not recognize Simms during the trial because so much time had passed since the divorce proceeding and Simms had changed her name. (App.p.467, lines 10–18). Trial Counsel testified that Simms was not involved with Petitioner at the time of her divorce from Christopher Thompson and that no disputes as to custody or property arose during the representation. (App.p.467, line 18–p.468, line 15). Trial Counsel remembered being caught off guard when Simms told him he had been her divorce lawyer. (App.p.469, lines 4–13). Although he acknowledged Simms was the victim's mother, Trial Counsel thought Simms' testimony was not important to the outcome of Petitioner's case. (App.p.481, lines 8–17).

An attorney who represents conflicting interests breaches the basic duty of loyalty; in such cases, a PCR applicant is not required to show prejudice in the traditional *Strickland* sense of "a reasonable probability the result of the proceeding would have been different." *Gonzales v. State*, 419 S.C. 2, 9–10, 795 S.E.2d 835, 839 (2017), *abrogated on other grounds by Smalls v.*

State, 422 S.C. 174, 810 S.E.2d 836 (2018). Rather, prejudice is presumed if the applicant proves that counsel actively represented conflicting interests and that this actual conflict of interest adversely affected counsel's performance. *Id.* at 10, 795 S.E.2d at 839. An "actual conflict of interest" occurs where a defense attorney owes duties to a party whose interests are adverse to those of the defendant, i.e., if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. *Id.* (citing *Jordan v. State*, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013)). The PCR applicant bears the burden of proving an actual conflict of interest existed and that it necessitates relief. *Id.* The mere possibility of a conflict is insufficient to impugn a criminal conviction. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008), *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836.

In this case, Simms was no longer a client of Trial Counsel; Trial Counsel stopped representing Simms in early 2007, many years before Petitioner's arrest. Trial Counsel's representation of Simms concerned a simple uncontested divorce, which did not involve any custody issues and which consequently had nothing to do with Victim, with Petitioner, or with any matter relevant to the State's case against Petitioner. Based on these facts, the PCR court correctly found Trial Counsel did not "actively represent conflicting interests" because Trial Counsel owed no duty to Simms that could have negatively affected his representation of Petitioner. *See Gonzales*, 419 S.C. at 10, 795 S.E.2d at 839. Because the PCR court's finding was based on evidence of probative value, it must be upheld pursuant to this Court's deferential standard of review for PCR cases. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527.

Petitioner argues Trial Counsel still had a duty of confidentiality toward Simms, which adversely affected his performance by preventing him from adequately cross-examining her.

Petitioner claims his main defense at trial was that Victim mistakenly accused him of sexual abuse that was actually committed by Christopher Thompson. He argues Trial Counsel could not pursue that defense because his ongoing duty of confidentiality made him cut short his questioning of Simms after he realized Simms was his former client. This argument is conclusively refuted by the trial transcript. Even after Simms told Trial Counsel that he had represented her in her divorce from Christopher Thompson, Trial Counsel continued asking Simms whether she had ever accused Thompson of molesting her children, and Simms clearly replied she had not. (App.p.127, line 5–p.128, line 14). Evidently, Trial Counsel did *not* believe his questioning of Simms on this point violated the duty of confidentiality. This fact accords with Trial Counsel's testimony at the PCR hearing that his earlier representation of Simms did not concern any issues related to Thompson's custody of Simms' children. Even assuming, *arguendo*, that Trial Counsel did have an ongoing duty of confidentiality toward Simms, such a duty clearly did not prevent him from trying to advance Petitioner's defense theory. Therefore, the PCR court correctly found Petitioner failed to show that an actual conflict of interest adversely affected Trial Counsel's performance. *See Gonzales*, 419 S.C. at 10, 795 S.E.2d at 839. Consequently, the presumption of prejudice articulated in *Gonzales* does not apply.[1]

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[1] In addition, cases like *Gonzales*, *Lomax*, and *State v. Gregory*, 364 S.C. 150, 612 S.E.2d 449 (2005), in which the South Carolina Supreme Court held prejudice must be presumed due to a conflict of interest, concerned "multiple concurrent representation," i.e., the simultaneous representation of multiple clients during the same proceeding. Petitioner's case, by contrast, concerns "successive representation," i.e., representation of a client at a proceeding involving a previous client. The Supreme Court of the United States has recognized this distinction and has never extended the presumption of prejudice to cases of successive representation. *See Mickens v. Taylor*, 535 U.S. 162, 175–76 (2002) (declining to address whether the presumption of prejudice for cases involving multiple concurrent representation, where prejudice is highly probable and difficult to prove, should extend to cases involving successive representation, which do not present comparable difficulties). Therefore, even if Petitioner's case involved an

In the absence of a presumption of prejudice, Petitioner must show, by a preponderance of the evidence, that the results of his trial would likely have been different but for Trial Counsel's alleged deficiencies. *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. Petitioner introduced no evidence to support his contention that, had Trial Counsel more thoroughly cross-examined Simms, Simms would have changed her testimony and accused Thompson of molesting Victim. *See Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 280 (2019) (holding mere speculation as to what a witness's testimony would have been cannot satisfy a PCR applicant's burden of showing prejudice). Therefore, because no actual conflict of interest justified a presumption of prejudice in this case, the PCR court correctly found Petitioner failed to meet his burden. This Court, therefore, should deny Petitioner's petition for a writ of certiorari as to this issue.

II. The PCR court properly found Trial Counsel was not ineffective for failing to object to the solicitor's closing argument because the solicitor neither made personal assurances of the victim's credibility nor asked the jurors to put themselves in the victim's shoes.

The PCR court's finding that Trial Counsel was not ineffective for failing to object to the solicitor's closing argument was correct because the solicitor never vouched for the credibility of Victim and never asked the jurors to put themselves in Victim's shoes.

The assessment of witness credibility is within the exclusive province of the jury. *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016). A solicitor may argue the credibility of the State's witnesses if the argument is based on the record or its reasonable

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actual conflict of interest adversely affecting Trial Counsel's performance, it is not clear that Petitioner should be excused from making the traditional *Strickland* showing of prejudice.

inferences; however, a solicitor may not vouch for the credibility of a 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). Improper comments do not automatically require reversal; an applicant must prove 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).

At Petitioner's trial, the solicitor began his closing argument with the following language:

> Sometimes, if you listen carefully, the softest voices speak the loudest. Sometimes the words of the smallest carry the greatest weight. There are times that a voice like this cries out from the dark begging to be heard, asking to be believed. And this is what a child in this case looks like. . . . Will you believe the soft voice of the meek whose message rings the loudest, or are you going to believe the voice of the taker?

(App.p.343, line 25–p.344, line 13). He later noted the consistency between Victim's statements at the forensic interview and the testimony she gave in court, and he asked the jurors whether they truly believed "an eight, nine, 10-year-old is capable of concocting something like this." (App.p.346, lines 19–23; p.349, lines 3–8). He also pointed out most children of Victim's age wouldn't know enough about sex to be able to fabricate as detailed an account of sexual abuse as the one Victim gave. (App.p.349, line 17–p.350, line 4). He also stated that it took courage for Victim to testify in court, stating, "I can't imagine being in her shoes." (App.p.347, lines 2–9). He emphasized that neither Victim nor her family had any motive to frame Petitioner for sexual abuse. (App.p.347, lines 10–17; p.348, line 15–p.349, line 3; p.351, lines 1–8). He also noted Victim did not change her story despite the pressure of cross-examination, stating "a child will fold under a cross-examination because they're not capable of lying to that degree and to that extent." (App.p.354, lines 18–23).

The solicitor noted that the question of who was credible was up to the jury. (App.p.353, lines 23–24). He asked again whether the jury thought "the average nine, 10-year-old is capable of . . . coming in here and swearing on the Bible [and] telling that story like that in front of you all." (App.p.354, lines 11–13). He then stated, "I submit to you she 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.p.354, lines 14–18).

Trial Counsel did not object to any portion of the solicitor's closing argument. At the PCR hearing, Trial Counsel testified he reviewed the solicitor's argument and did not see anything that he thought clearly crossed a line. (App.p.473, line 21–p.474, line 17).

Petitioner argues the solicitor's comments regarding Victim's credibility constituted improper vouching because the solicitor explicitly assured the jury that Victim was "wholly credible" and claimed she was incapable of lying; therefore, Petitioner contends Trial Counsel was ineffective for failing to object to them. However, the solicitor never suggested the jury should believe Victim because the solicitor personally knew she was credible based on information outside the record, which is the definition of vouching. *See Matthews*, 350 S.C. at 276, 565 S.E.2d at 768. Rather, all of the solicitor's arguments concerning Victim's credibility were based on reasonable inferences from the record. The solicitor made several arguments for Victim's credibility: that Victim's testimony was consistent with her forensic interview, that Victim's account was too detailed to have been concocted by a child without any sexual experience, that Victim had no motive to falsely accuse Petitioner, and that Victim would have "cracked" under the pressure of cross-examination if she had not been telling the truth. All of these arguments are reasonable inferences from the testimony presented at trial. When the solicitor said, "I submit to you she was wholly credible," it was in the context of these evidence-

based arguments; nothing about that statement would have suggested to the jury that the solicitor had some personal knowledge of Victim's credibility based on information outside the record. Therefore, the solicitor's comments did not constitute improper vouching, and Trial Counsel was not deficient for failing to object to them. *See id.*

Petitioner also argues, in a footnote, that the solicitor made a "Golden Rule" argument. *See Brown v. State*, 383 S.C. 506, 515–16, 680 S.E.2d 909, 914 (2009) (holding a "Golden Rule" argument is one that asks the jurors to place themselves in the victim's shoes; such arguments are improper because they tend to completely destroy the jury's impartiality). While Petitioner admits the solicitor never expressly asked the jurors to place themselves in Victim's shoes, he argues the solicitor "implicitly invite[d] them to do so" when he stated, during closing argument, "I can't imagine being in her shoes." (App.p.347, lines 8–9). However, in context, that statement was made to emphasize how trying it must have been for Victim to testify in court, which was part of the solicitor's argument that Victim had no motive to make up a false accusation. (App.p.347, lines 2–13). Therefore, the statement was intended to complement the solicitor's evidence-based argument, not to replace evidence with bias and personal interest, as "Golden Rule" arguments do. *See Brown*, 383 S.C. at 516, 680 S.E.2d at 915 (citing *State v. Reese*, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct. App. 2004). The mere mention of "shoes" does not convert an otherwise proper argument into an improper "Golden Rule" statement.

The PCR court correctly ruled the solicitor's arguments constituted neither improper vouching nor "Golden Rule" arguments. Therefore, the PCR court properly found Petitioner failed to prove his allegation that Trial Counsel was ineffective for failing to object to them. Because substantial probative evidence supports that finding, this Court should not disturb the

PCR court's ruling denying relief to Petitioner. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527. Accordingly, this Court should deny Petitioner's petition for a writ of certiorari as to this issue.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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