STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Post-Conviction Relief Judge
The Honorable L. Casey Manning, Trial Judge

Appellate Case No. 2019-000549

Victor D. Smith, #348112,

Petitioner,

v.

State of South Carolina,

Respondent,

BRIEF OF RESPONDENT

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The PCR judge erred in finding that counsel was not ineffective for failing to object to the lead investigator, Travis Holdorf's, opinion that he believed that one of Petitioner's co-defendants was being truthful when he implicated Petitioner in the murder because this was improper opinion testimony from a law enforcement officer.

Respondent's Counterstatement of Issue Presented

The PCR court correctly found Counsel was not constitutionally ineffective for failing to object to Investigator Travis Holdorf's testimony he did not believe Petitioner's co-defendant, Jeremiah Jones, was "faking it" when Jones implicated himself and Petitioner in the murder because the Counsel placed Jones's credibility at issue from the beginning of the trial as part of his defense strategy, which the State was entitled to respond to, and even if Holdorf's testimony improperly bolstered Jones's, it was not reasonably likely to have affected the outcome at trial where a second co-defendant also testified to Petitioner as the shooter and Petitioner's girlfriend also testified he admitted shooting the victim, and the jury was properly instructed on their role in determining the credibility of witnesses.

STATEMENT OF THE CASE

Victor D. Smith (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted during the February 2010th term of the Richland County Grand Jury for one count of murder (2010-GS-40-12999). Petitioner was represented by Christopher R. Hart, Esquire (Trial Counsel). Assistant Solicitors Daniel Goldberg and Carter Potts prosecuted the case. Petitioner proceeded to trial on September 19 – 23, 2011, before the Honorable L. Casey Manning. The jury convicted Petitioner as indicted. On October 6, 2011, Judge Manning sentenced Petitioner to confinement for life without the possibility of parole.

A timely Notice of Appeal was filed on Petitioner's behalf, and an appeal was perfected by Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense – Appellate Defense Division. Following the submission of an Anders[1] brief, the South Carolina Court of Appeals dismissed the appeal. State v. Smith, No. 2013-UP-423 (filed November 20, 2013). The Remittitur was returned on December 6, 2013.

Petitioner then filed an application for post-conviction relief on July 9, 2014. Respondent made its Return on July 23, 2015. An evidentiary hearing into the matter convened on December 11, 2015, at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. Jonathan D. Waller, Esquire, represented Petitioner. J. Clayton Mitchell, Esquire, then of the South Carolina Attorney General's Office, represented Respondent. Trial Counsel testified and Petitioner testified on his own behalf. By written order filed on February 18, 2016, the PCR court denied relief and dismissed the application with prejudice. Petitioner then filed a motion to alter

[1] Anders v. California, 386 U.S. 738 (1967).

or amend the judgment pursuant to Rule 59(e), SCRCP, which was denied by written order filed on March 29, 2019.

This Brief of Petitioner follows.

STATEMENT OF THE FACTS

Ernest "E.J." Melvin Robinson (Victim) was last seen alive on September 27, 2008. Victim's mother filed a missing person report on December 10, 2008, stating she had last seen her son on the night of Saturday, September 27, 2008. (App. at 161-62). Investigator Dottie Cronise (Cronise) was assigned to Victim's case on December 29, 2008. (App. at 1578-60). Cronise first contacted Victim's employer, a Beef O'Brady's restaurant, and determined he had last been seen at work on September 27, 2008, but he did not return as scheduled the next day. (App. at 162). He had also never returned to pick up the last paycheck owed to him. (App. at 162). However, when Victim's mother made the initial report, she told Cronise it was not unusual for him to go missing for several months at a time. (App. at 171).

Marvin Shipman, a friend of Victim's from high school, testified he picked Victim up from the apartment complex on September 27th, along with another friend of Victim's named Allen.[2] (App. at 203-04). Shipman drove Victim and Allen to buy a bag of weed, and then all three went to another friend's house to smoke and hang out. (App. at 204-05). Sometime that evening, around 5:00 or 6:00 p.m., Shipman dropped Victim off for his shift at Beef O'Brady's. (App. at 205). According to Shipman, Victim gave the bag of weed to Allen and told Allen he would meet up with him after work to smoke the rest of it. (App. at 206). Shipman then dropped Allen off at the apartment complex. (App. at 206). Shipman never saw Victim again, but he ran into Allen sometime later at a Verizon store. (App. at 206). According to Shipman, when Allen recognized him, the color drained from Allen's face, and Allen appeared to be scared. (App. at 206-07).

[2] Cronise spoke with a witness named Melissa Rowe (Rowe), a fellow Beef O'Brady's employee who was friends with Victim. (App. at 168). Rowe and her husband, Michael, reported they had seen Victim with Marvin Shipman on September 27, 2008, along with another African American male whose name they did not know. (App. at 168).

Shipman approached Allen and demanded to know where Victim was. (App. at 207). Shipman testified he and Victim spoke regularly for over ten years – at least once a month – even when Victim was out of town, but he had not seen or heard from Victim since the night they were together with Allen. (App. at 207-08).

Mark Wickham, the owner of the Beef O'Brady's restaurant, testified Victim had worked for him as a line cook for approximately two years until September 2008, when Wickham last saw him. (App. at 177). Wickham testified Victim was a good employee, and the only time he was ever absent from work without notice was September 28, 2008. (App. at 177). Wickham testified he had worked with Victim the night before until Wickham left the restaurant around 10:00 p.m. (App. at 177-78). Wendy Clifton, a manager at Beef O'Brady's, testified she closed the restaurant with Victim between 11:00 p.m. and 11:30 p.m. on the night of Saturday, September 27. (App. at 183-84). According to Clifton, she and Victim left the restaurant together, and she saw him walk away towards the Elders Pond apartments.[3] (App. at 186, 188).

However, Wickham testified that Victim did not show up for his shift the next morning. (App. at 178). Wickham testified Petitioner had also been scheduled to work the morning of Sunday, September 28, 2008, but he showed up late and stayed only about an hour before simply walking off the job. (App. at 178-79). Wickham testified he saw Petitioner again briefly the next Friday when Petitioner picked up his final paycheck. (App. at 179). Victim never picked up his last paycheck, which Wickham testified was very unusual. (App. at 179-80).

Then, on July 20, 2009, Nolan Martin (Martin) was working on a land surveying job in the Elders Pond area off Hardscrabble Road in Richland County. (App. at 119-20). While surveying the retention pond area of the Northstone apartments, Martin discovered what he believed to be a

[3] Cronise obtained Petitioner's address, which was on Elders Pond Road. (App. at 163).

body wrapped in plastic and tied up with a belt. (App. at 120-24). Martin testified he confirmed his suspicions with his coworker and his supervisor, then they called 911 to report the body. (App. at 122-23).

Captain James "Stan" Smith (Smith) of the Richland County Sheriff's Department testified he reviewed the missing person report on Victim taken by Investigator Cronise and found "everything seemed to match up... logistically" between that report of a missing person and the unidentified body. (App. at 286-87). Specifically, Smith noted the body was discovered at the apartment complex that Victim was known to frequent around the time of his disappearance, and in fact, the apartment, which was in close proximity to the location of the remains, was the last place Victim had been seen alive. (App. at 287-88).

Smith testified Petitioner and his girlfriend, Jazmine Bright (Bright), had been living in the apartment when Victim disappeared, and Bright still lived there when the body was found. (App. at 288). Smith participated in the execution of a search warrant on Bright's apartment. (App. at 289). According to Smith, while officers were searching the apartment, a man named Dietrich Williams (Williams) showed up because Bright had asked him to check on the home while she was away. (App. at 290). Williams provided information that led investigators to identify "Allen" – the man Marvin Shipman picked up along with Victim on the night before Victim went missing – as Allen Fulten (Fulten). (App. at 290).

Smith interviewed Fulten, who ultimately gave a statement identifying Petitioner; Petitioner's brother, Darius Smith (Darius); and a person nicknamed "Man," who police later identified as Jeremiah Jones (Jones), as being involved in Victim's disappearance. (App. at 291). Smith testified Jones also gave a statement implicating himself, Fulten, Darius, and Petitioner in

Victim's murder. (App. at 292). As a result of Jones's statement, Fulten and Darius were also arrested and charged with murder. (App. at 292-93). Jones and Fulten both testified at trial.[4]

Jones testified he knew Victim as a friend of Petitioner and confirmed Petitioner lived in the apartment on Elders Pond Road with Bright. (App. at 438-39). Jones explained that he was at the apartment along with Petitioner's brother when Petitioner returned and realized someone had taken his rent money from his room. (App. at 439-440). Petitioner confronted Jones, but Jones denied taking it. (App. at 440). Jones then told Petitioner both Fulten and Victim had also been at the apartment, and when Fulten returned, Petitioner confronted Fulten, but Fulten also denied taking the money. (App. at 440). According to Jones, Fulten claimed Victim had taken the money, and Petitioner said he would kill Victim for it. (App. at 441-42).

Jones stated he and Darius had gone to the store when Petitioner called and told them to return to the apartment because Victim was on his way over. (App. at 443). Jones testified Victim came straight from his job at the restaurant and brought some food to eat. (App. at 444). When Victim arrived at the apartment, Petitioner was in the front bedroom along with Fulten, Jones, and Darius. (App. at 444). Jones testified the men were smoking and drinking when Victim and Fulten started "getting into it," and each threatened to beat up the other. (App. at 445). Petitioner then gave Fulten a "mean look" and asked if Fulten "was going to do him." (App. at 445). Fulten punched Victim in the face, and the other three men also jumped on him. (App. at 446).

Jones testified Petitioner then ordered Jones to hit Victim with a brick, which was part of a snake cage that was in the bedroom. (App. at 444-45; 447). Jones admitted he hit Victim twice in the head until the brick broke. (App. at 448). At that point, Victim stumbled and tried to get

[4] Darius did not testify at trial because he invoked his Fifth Amendment right against self-incrimination. (App. at 654-55).

out of the room, but Petitioner pulled him back so forcefully that Jones heard a pop. (App. at 448). Jones stated Petitioner then picked up a forty-pound weight and dropped it on Victim's back, even though Victim had already stopped moving. (App. at 448-49). According to Jones, Fulten also picked up the weight and struck Victim with it. (App. at 449). Petitioner then shot Victim in the head.[5] (App. at 449).

Jones testified Petitioner then ordered him to wrap Victim up, so Jones took the shower curtain and sheet and wrapped the body. (App. at 450). Jones testified he also used his black belt to tie Victim's body, and then he took Victim out back and dumped him over the fence at Petitioner's direction. (App. at 450). Jones stated he and Fulten then took the body and put it in the woods, and left it there. (App. at 451-52). Jones testified Petitioner then ordered them to clean up the blood and brought them some cleaner from his job. (App. at 452). Jones stated they cleaned the carpet and painted the walls and ceiling. (App. at 452). According to Jones, Bright was asleep in the other bedroom when the murder occurred.[6]

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[5] Jones admitted on both direct and cross-examination that he first gave a statement saying Fulten fired the shot because he and Petitioner were "like brothers," and he did not want to get Petitioner in trouble. (App. at 442; 464-65).

[6] Bright also testified at trial. (App. at 617-50; 658-83). She explained sometime in the late summer of 2008, she discovered some of her and Petitioner's rent money was missing. (App. at 624-25). Bright stated she overhead Petitioner having a conversation about it with Allen and Jones, and he told her they would "handle it." (App. at 626). Bright further testified on the night of October 21, 2008, law enforcement searched their apartment on suspicion of marijuana dealing. (App. at 627-28). Bright testified that the night before the search, Petitioner had become emotional and confessed to Bright that he had killed "E.J." because he took the rent money. (App. at 628-32). Bright testified Petitioner told her he shot Victim. (App. at 635). After the police searched the apartment the next day, Petitioner never returned to the apartment. (App. at 635). Bright also stated she remembered hearing a gunshot in the night around the time the money went missing, but she was asleep, and she thought it came from the next apartment. (App. at 636). She testified Petitioner asked her the next day if she had heard anything, and she said she had, but she thought it was next door; Petitioner stated he heard it too, and they did not discuss it further. (App. at 636). Finally, Bright testified she recalled seeing Petitioner and his friends cleaning the front bedroom. (App. at 638). Petitioner told her they were "tak[ing] some initiative" because she always complained that his friends did not clean up after themselves. (App. at 638).

Fulten testified he hung out with both Victim and Petitioner back in September 2008. (App. at 476). He confirmed Marvin Shipman's testimony that Shipman drove him and Victim to purchase a bag of weed for the three of them to smoke earlier in the day. (App. at 476-77). Fulten stated Shipman dropped him off at Petitioner's apartment, then took Victim to work at Beef O'Brady's. (App. at 477-78). According to Fulten, Victim planned to meet up with him at Petitioner's apartment after work to finish smoking the weed. (App. at 478).

Fulten testified when he got back to Petitioner's apartment, Petitioner questioned him about the missing rent money. (App. at 479). Fulten explained that Petitioner started drinking and eventually concluded Victim had taken the money. (App. at 480-81). According to Fulten, Petitioner said he planned to confront Victim, beat him up, and make him pay. (App. at 481-82). Fulten testified Petitioner wanted Fulten to hit Victim first to start the fight. (App. at 482). When Victim got there, he walked into the bedroom with Petitioner, Fulten, Jones, and Darius and sat down to eat, then, the men began smoking weed and drinking. (App. at 483).

Fulten testified the plan was for Petitioner to signal him, and Fulten would hit Victim. (App. at 484). According to Fulten, when Petitioner gave the signal, Fulten hit Victim in the nose, and when Victim got up to fight back, the rest of the men "rushed" him. (App. at 484). Fulten testified Petitioner then ordered Jones to hit Victim with a brick, and Jones hit Victim twice until the brick broke in half. (App. at 485-86). Fulten stated Petitioner then got on Victim's back and did "like a wrestling move," then ordered Darius to hit Victim with a forty-five-pound dumbbell. (App. at 486-87). After Darius hit Victim, Petitioner retrieved a gun from under a couch and shot Victim in the side of the head. (App. at 487-88).

Fulten testified after Petitioner shot Victim, it was "bedlam" in the room until Petitioner pointed the gun at him and Jones and ordered them to help. (App. at 488-89). Fulten stated the

men stripped Victim, then wrapped his body in a shower curtain and sheet. (App. at 489-90). After the men disposed of the body, Fulten testified he and Jones spent all night and into the next day cleaning and painting the bedroom. (App. at 490-92).

Because of the condition of the remains, investigators were not able to obtain any physical evidence, such as DNA or fingerprints, to conclusively identify the body as Victim or to link Petitioner to the body directly. (App. at 312; 325-30; 397-99). However, Deputy Coroner Bill Stevens, who conducted the autopsy, testified as an expert in forensic anthropology. (App. at 534). Stevens testified the body showed both a gunshot wound and a blunt force trauma to the head, consistent with being hit with a brick. (App. at 532; 539-40). Stevens also testified the skeleton was that of an African American male in his twenties who was approximately 5 feet, 10 inches tall, and the body appeared to have been in that location "under a year, but close to a year." (App. at 538-39; 541-42; 550).

Stevens explained it was not unusual for bodies to decompose in a residential area and still not be found for some time. (App. at 551). Stevens stated, in this case, the shower curtain would have helped contain the odor. (App. at 551). He also testified he reviewed some literature on air currents and discovered ponds and low-lying areas can produce "eddies" and "swirling wind currents," which may have prevented the odor from being carried back up the slope toward the apartments at certain times. [7] (App. at 551).

[7] Dr. Clay Nichols (Nichols), who assisted with the autopsy, testified as an expert in forensic pathology. (App. at 277). Nichols also stated a body can decompose and emit odors for up to a year, but if a body were wrapped in a sheet or plastic, that would concentrate the odor underneath the wrapping, so the odor would not dissipate into the surrounding environment as much. (App. at 284). Nichols also stated that if a body is outdoors, any odor will be carried in whichever direction the wind is blowing. (App. at 284).

Stevens testified the skeleton was consistent with Victim's biological profile. (App. at 547). Stevens further testified, in his expert opinion, the remains were Victim's, and he was "convinced it was him based on circumstances and description." (App. at 548; 554). The State entered into evidence, without objection, a death certificate for Victim listing his date of death as September 27, 2008. (App. at 532).

The State's final witness was Travis Holdorf (Holdorf), the lead homicide investigator on the case. (App. at 684-85). Holdorf recounted the discovery of the body and stated investigators concluded the body had been placed in that location. (App. at 685). Holdorf testified one of the first things he did was search missing person reports for the area and familiarize himself with Investigator Cronise's investigation. (App. at 685-86). Holdorf interviewed many of the same witnesses as Cronise, learned about Victim's paycheck being left at Beef O'Brady's and the argument with Petitioner over the rent money, and concluded: "all indicators pointed towards [Petitioner.]" (App. at 685-87).

Investigators eventually spoke with Bright, who told them Petitioner had confessed to killing Victim and indicated Jones was also involved. (App. at 690). Holdorf testified he located Jones, who voluntarily accompanied officers to the station to give a statement. (App. at 690-91). Holdorf stated Jones initially claimed Fulten shot Victim in the woods where the body was found, but Holdorf knew that was not true because that scenario did not match up with the known facts. (App. at 691). When Holdorf confronted Jones about the lie, Jones then admitted Petitioner shot Victim, and additionally admitted to his own involvement in the murder. (App. at 691). In discussing Jones' two statements, Holdorf testified:

> And after refuting or confronting him that [the first statement] just doesn't match up with the facts, he admitted that he lied. He did not want to implicate [Petitioner], that [Petitioner] was like a brother to him. He was emotional. I think it was very real what he was saying,

> because again, he was emotional. There are just some things you get a feeling they're not faking. He didn't want to tell, but he didn't have a choice. He even implicates himself in the murder. When he started doing that, that was actually very surprising to us. I had no – I didn't believe he was, at the time. So when he starts giving his statement where he admits hitting [Victim] with the brick twice. And he's giving us details we wouldn't know.

(App. at 692-93).

Holdorf stated after speaking with Jones and interviewing Fulten twice, investigators charged Jones, Fulten, Darius, and Petitioner with Victim's murder. (App. at 694). In order to speak with Petitioner, Holdorf testified, he and another investigator traveled to Mississippi, where Petitioner was in the Department of Corrections. (App. at 694-95). Petitioner gave two statements, both denying any involvement in the murder. (App. at 699-701; 705-08).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court correctly found Trial Counsel was not constitutionally ineffective for failing to object to Investigator Travis Holdorf's testimony he did not believe Petitioner's co-defendant, Jeremiah Jones, was "faking it" when Jones implicated himself and Petitioner in the murder because Trial Counsel placed Jones's credibility at issue from the beginning of the trial as part of his defense strategy, to which the State was entitled to respond, and even if Holdorf's testimony improperly bolstered Jones', it was not reasonably likely to have affected the outcome at trial where a second co-defendant also testified to Petitioner as the shooter and Petitioner's girlfriend also testified he admitted shooting the victim, and the jury was properly instructed on their role in determining the credibility of witnesses.

The PCR court correctly found Trial Counsel was not constitutionally ineffective for failing to object to Investigator Travis Holdorf's testimony he did not believe Petitioner's co-defendant, Jeremiah Jones, was "faking it" when Jones implicated himself and Petitioner in the murder. (App. at 956). Petitioner argues this was an error because, according to Petitioner, this was "improper opinion testimony," which vouched for the credibility of the co-defendant, and Trial Counsel failed to offer a reasonable strategy for his failure to object. (PWC at 6-7). However, Petitioner placed Jones's credibility in issue, so the State was entitled to respond to the defense's assertions Jones was not believable, and in any event, this testimony was not reasonably likely to have changed the outcome at trial where a second co-defendant also identified Petitioner as the person who pulled the trigger and killed Victim, and Petitioner's former girlfriend testified he confessed to the murder. Thus, even if Trial Counsel was deficient in failing to object, Petitioner cannot meet his burden as to prejudice.

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; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); 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 "counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "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). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Id. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. 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. 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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Ultimately, the "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v.

Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir.1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (internal quotation marks omitted); cf. Sallie v. State of N.C., 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed to was not "intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness"). Accordingly, when counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel).

In this case, part of Petitioner's defense was to question the credibility of the two testifying co-defendants, Jones and Fulten. As Trial Counsel explained, he "knew none of those witnesses told the truth up front," and he recalled arguing in his opening statement that the jury could not believe anything they said. (App. at 903). Contrary to Petitioner's assertion that Trial Counsel had no trial strategy for failing to object to the testimony, Trial Counsel actually testified he simply could not remember if he had a strategic reason for not objecting. (App. at 903). Regardless, because Petitioner called Jones's credibility into question from the beginning of the trial, the State was entitled to respond to that assertion. See, e.g., Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d

72, 75 ("Conduct that would otherwise be improper may be excused under the 'invited reply' doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense.").

Petitioner cites Briggs v. State[8] for his assertion that Holdorf's testimony was improper bolstering, and yet Briggs acknowledges there are circumstances in which trial counsel can reasonably decide not to object to arguably bolstering testimony when such testimony is offered to respond to a disputed issue created by the defense. Id. at 327, 806 S.E.2d at 719 ("[T]he State has a good argument that it offered the opinion to respond to [trial counsel's] statement in opening that made coaching an issue, not for the purpose of bolstering. Under these circumstances, we do not believe...testimony that the child had not been coached was improper bolstering, and we decline to hold that [trial counsel's] failure to object to it was deficient performance.").

Similarly, here, Trial Counsel readily acknowledged that challenging the co-defendants' credibility was part of his trial strategy, and he attacked their credibility from the start in his opening statement, saying the jury "won't be able to believe one word that comes out of their mouths" because "when the police first talked to them they didn't tell the truth." (App. at 117). Based on this strategy, the record clearly reflects why Trial Counsel did not object to Holdorf's testimony – because he had opened the door.

Further, Holdorf testified Jones' second statement, in which Jones admitted Petitioner shot Victim, was the catalyst for issuing an arrest warrant for Petitioner. (App. at 292-93). Holdorf explained he knew Jones had lied in his first statement because it did not match up to the evidence, but he felt Jones' second statement "was very real," and Jones was "not faking" when Jones finally confessed Petitioner had been the shooter and admitted his own participation in the murder and

[8] 421 S.C. 316, 806 S.E.2d 713 (2017)

disposal of the body. (App. at 691-93). Given this context, Holdorf's testimony was appropriate to respond to the defense's contention Jones could not be believed because he lied to the police in his first interview.

Notably, Petitioner's bolstering argument is based exclusively on criminal sexual conduct with minor cases, and those cases are not applicable to the case *sub judice*.[9] It is axiomatic that criminal sexual conduct with minor cases are unique and delicate cases. Often times in these cases, there are partial disclosures, delayed disclosures, and no physical evidence, and the case turns solely on the credibility of the child-victim. The present case is immediately distinguishable from the cases Petitioner relies on for his bolstering argument. Here, Holdorf's testimony Petitioner avers should have been objected to does not bolster or provide any opinion as to whether a child victim is telling the truth.

In any event, even if this Court finds counsel was deficient for not objecting to Holdorf's testimony, Petitioner cannot overcome the prejudice prong of Strickland. Also, even if Holdorf's testimony improperly bolstered Jones', it is not reasonably likely to have affected the outcome of the trial because Jones' testimony was cumulative to that of the other co-defendant, Fulten, and Petitioner's former girlfriend, Bright. Fulten gave a statement to police and testified at trial that Petitioner was the shooter. (App. at 291; 487-88). Additionally, Bright testified Petitioner admitted to her that he shot and killed Victim. (App. at 628-32; 635).

Moreover, the trial court properly instructed the jury as to the primacy of their role in determining the credibility of witnesses. The trial court's instructions read:

> You are also the judges, the sole judges, of credibility, the believability of the witnesses who have testified, and passing upon

[9] Even if the cases were applicable to the case at bar, the majority of the cases Petitioner relies on were decided *after* Petitioner's trial date. Strickland is clear—counsel cannot be required to be clairvoyant, and the touchstone in Strickland is reasonableness at the time of trial.

> their credibility, you may take into consideration many things, such as number one, the demeanor or manner of testifying. Two, whether the witness has a reason to be biased or prejudiced. Three, whether a witnesses (sic) testimony was contradicted on the one hand or supported and corroborated on the other hand. You certainty to (sic) not determine the credibility or believability by counting the number of witnesses for either side. You may believe a small part of a witnesses (sic) testimony and disregard the larger or vice versa. You may believe one witness against many or many against one.

(App. at 786).

The jury, therefore, had other credible evidence Petitioner was the principal perpetrator responsible for Victim's murder, and the outcome at trial is not reasonably likely to have been different had Trial Counsel objected to Holdorf's testimony.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the PCR court's denial of Petitioner's application for post-conviction relief.

Respectfully submitted,

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December 2, 2022

From: Russ Barlow
To: Robert Michael Dudek
Subject: Emailing: SMITH Victor D. - BOR (03167079xD2C78).PDF
Date: Friday, December 2, 2022 10:44:00 AM
Attachments: SMITH Victor D. - BOR (03167079xD2C78).pdf
image001.png

Mr. Dudek –

Please find attached the BOR in appellate case no. 2019-000549, to be filed shortly.

Respectfully,

Russ Barlow
Assistant Attorney General
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