RECEIVED
Jul 19 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Berkeley County
Jennifer B. McCoy, Circuit Court Judge
Appellate Case No. 2023-000213

Gary Fraley, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED

I. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to call Petitioner's daughter as a witness.

II. The PCR Court did not reversibly err in finding trial counsel was not ineffective for altering his strategy related to the basis of Petitioner's attempt to obtain an insanity defense.

III. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to object to testimony of the State's expert explaining information relied on to reach her diagnosis.

IV. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to object to prior bad act testimony.

V. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to object to testimony beyond time or place.

VI. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to object to the State's closing argument.

VII. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to provide mitigation testimony during sentencing. (Petitioner's Questions VII and VIII).

VIII. The procedure utilized by the PCR Court in having the State draft the order denying relief, as well as the PCR Court's discretion in the timing of the order do not violate any state or federal rights and have been specifically authorized by the South Carolina Supreme Court. (Petitioner's Questions IX, X, and XI).

IX. The cumulative effect of any errors in the case do not demand reversal.

STATEMENT OF THE CASE

A thorough procedural and factual history can be found in the Order of Dismissal.

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter *de novo* and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STANDARD APPLICABLE TO INEFFECTIVE ASSISTANCE OF COUNSEL

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does not mean perfect or mistake-free representation. See Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1910 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective only when "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." Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) ("Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (citation and internal quotations omitted)).

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); see United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a "high mountain a defendant must climb"); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing "the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment" and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 137 S. Ct. at 1912 (explaining "the rules governing ineffective-assistance claims must be applied with scrupulous care" (citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Richter, 562 U.S. at 110 (instructing the proper analysis "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided

adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Accordingly, "[j]udicial 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 an 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.

Furthermore, the reviewing court will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105.

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the

proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687.

In order for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112; see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

ARGUMENT

I. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to call Petitioner's daughter as a witness.

The PCR Court correctly found trial counsel was not ineffective for failing to call Petitioner's daughter as a witness at trial. Initially, counsel was not deficient for failing to call and interview Petitioner's daughter in light of Petitioner's expressed desire not to burden her and his failure to inform counsel of the significance of her testimony. Additionally, the testimony presented by Petitioner's daughter at the PCR hearing would not have produced a reasonable probability that the result of the proceeding would have been different.

"A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). The South Carolina Supreme Court has stated previously "criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). However, counsel need only interview potential witnesses "when it is reasonable to do so." Id. at 457, 710 S.E.2d at 65. As the United States Supreme Court explained:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all

> the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690–91.

In this particular case, Petitioner's trial counsel indicated from discussion with Petitioner that he and his ex-wife—the mother of his daughter—were not on good terms. She indicated calling the daughter was not something on her mind because of that relationship and the fact it would not likely be helpful. (App. 1354). Counsel testified she never knew of the text messages which were the center point focus of the daughter's PCR testimony, even though Petitioner was the one that sent the messages and could have informed her of the messages. In addition to the above, counsel testified she did not call the daughter because she was young, and no one told her the daughter had helpful information. Significantly, counsel explained her recollection was that Petitioner "didn't want to burden his 13 year old daughter with what was going on. And [counsel's] opinion was that it was not something that I was supposed to go dig into to try to get information from her." (App.1355).

As a result of what counsel was told, the fact she was given the impression by Petitioner not to involve his daughter, and the fact she was never told the daughter had helpful information, she was not deficient in failing to interview and call the daughter as a witness.

Additionally, even if counsel had called the daughter, there would not have been a reasonable probability of a different result in the proceeding. The daughter's testimony, focused primarily on text messages from Petitioner, may have established a strange sense of humor or even irrational thoughts, but it did not establish that Petitioner did not understand right from wrong. Further, testimony indicated on the day of his arrest, there was no indication in any of Petitioner's medical records that he was psychotic. (App. 690). At trial, Petitioner testified he did not remember whether at the time he committed the acts he knew right from wrong. (App.

554-555). The trial court, in denying the request for an insanity defense, specifically found there was no testimony presented Petitioner did not know that the alleged crime was morally or legally wrong. (App. 704). The daughter's testimony would not have convinced the judge to provide an insanity instruction because it did not rebut the expert finding that Petitioner knew right from wrong, did not contradict the medical records that he was not psychotic at the time of his arrest, nor did it provide any evidence that he did not know moral or legal right from wrong at the time he was raping his eleven-year-old victim.

Accordingly, this Court should deny the Petition for Writ of Certiorari as to this issue because Petitioner has not established the PCR Court erred in finding trial counsel was not ineffective in failing to interview and call the daughter as a witness.

II. The PCR Court did not reversibly err in finding trial counsel was not ineffective for altering his strategy related to the basis of Petitioner's attempt to obtain an insanity defense.

The PCR Court properly did not rule on Petitioner's claim that trial counsel was ineffective for abandoning the defense of insanity related to Vivitrol as opposed to basing his insanity on his malnourishment and other medical reasons. The issue was abandoned at the hearing and the only evidence presented related to the issue was in the form of inadmissible hearsay which the PCR Court is assumed to have given no weight. Further, trial counsel explained her reasoning in switching from Vivitrol to Petitioner's medical issues as the basis of his insanity and her strategic decision was reasonable.

At the PCR hearing, Vivitrol was only an issue as it related to whether counsel was ineffective for failing to object to the testimony of Dr. Gomez when discussing the basis for her opinion that Petitioner was not insane at the time of the crimes. The issue raised on appeal related to abandoning the defense of insanity or involuntary intoxication by Vivitrol was never addressed to any witness or even raised in closing argument by counsel during the PCR. As a result, it was not pursued at the PCR hearing and the PCR Court properly did not address the claim.

Further, the only evidence Petitioner points to in support of his claim are deposition transcripts from an entirely unrelated hearing which are not admissible and likely not considered by the PCR Court. See State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011) (explaining a judge in a bench trial is "presumed" to disregard inadmissible evidence). Petitioner points to the fact section 17-27-80 of the South Carolina Code allows a PCR Court to "receive proof by affidavits, depositions, oral testimony or other evidence" but this presupposes the deposition is in the case before the Court and not a totally unrelated matter.

Finally, trial counsel explained why she focused on Petitioner's physical state instead of the Vivitrol injection as the basis for his insanity charge request. In discussing her overall strategy of the case, she explained that Petitioner "presented as a person who said that he had taken some medicine and it cause him to go off the deep end." (App. 1341) She explained she tried to find someone to substantiate that claim. As a result, she contacted Dr. Bennett to testify. She indicated even with Dr. Bennett testifying she "could never really get a good connection to that drugs effect in [Petitioner]." (App. 1343) Instead she was able to provide a connection to his physical state—malnourishment and other issues—to his psychosis and so that was the path she decided to follow.

Her discussion at the PCR hearing tracts what took place at trial. She initially began pursuing an insanity defense on the basis of Vivitrol. However, by the time all evidence had been presented, as she explained to the trial court, she believed the best course of action was to blame his psychosis on his medical conditions. When directly asked which basis she was pursuing, trial counsel conferred with her client, and explained she was basing her decision to pursue insanity from the medical conditions after reviewing the facts and testimony of the various experts. (App. 705-706).

In light of the evidence presented at trial[1], and the information from her own expert, it was not an unreasonable trial strategy to focus of Petitioner's overall medical condition and "overall system failure" as the basis for his psychosis as opposed to the side effects of Vivitrol. See Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) ("[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Accordingly, this Court should deny the Petition on this Question.

[1] In particular, Dr. Magro's testimony that he has used Vivitrol hundreds of times and specifically indicated Vivitrol does not cause psychosis. (App. 692).

III. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to object to testimony of the State's expert explaining information relied on to reach her diagnosis.

The PCR Court properly found trial counsel was not ineffective for failing to object to testimony of the State's expert explaining information relied on to reach her diagnosis. First, trial counsel objected on the basis of hearsay at the first possible opportunity and the trial court overruled the objection. Second, the testimony was properly admitted to explain why Dr. Gomez discounted Petitioner's claims of Vivitrol impacting his ability to know right from wrong. Finally, even if it should have been objected to further by trial counsel, any error was not prejudicial especially in light of the testimony of Dr. Magro.

In order to preserve an issue for appeal, there are four requirements. "The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). All four are met in this case.

Additionally, this case is remarkably similar to the case of State v. Simmons, 423 S.C. 552, 561, 816 S.E.2d 566, 571 (2018) in which a hearsay object was made at the beginning of expert testimony and was allowed to proceed only subject to specific exceptions under Rule 803, SCRE. The South Carolina Supreme Court specifically said the issue was preserved even though the defendant did not continue to raise the objection throughout the testimony. Trial counsel raised a hearsay objection as soon as Dr. Gomez began to testify regarding the information she received from the pharmacist. (App. 135). As a result, trial counsel was not deficient.

Further, the testimony was not hearsay. It was properly admitted for the purpose of explaining to the jury why Dr. Gomez did not credit Petitioner's argument that the Vivitrol made him lack the ability to know right from wrong. As the Court of Appeals explained:

> [T]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. It is received only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute a true hearsay exception.

Jones v. Doe, 372 S.C. 53, 63, 640 S.E.2d 514, 519 (Ct. App. 2006) (citing 2 Kenneth S. Broun, et al., McCormick on Evidence § 324, at 418 (2006)). Here the testimony was not admitted for the truth of the matter asserted but to explain why Dr. Gomez, even when confronted with the claim that the Vivitrol caused Petitioner to not know right from wrong, found he knew the difference at the time of the crimes.

Finally, even if counsel was deficient for failing to object to inadmissible hearsay, it did not prejudice Petitioner because the testimony that the Vivitrol was in his system a certain period of time and did not cause any psychiatric side effects was merely cumulative to other properly admitted testimony. Dr. Magro testified the Vivitrol lasts about a month. He testified he has never seen in research or in his hundreds of times using Vivitrol where the drug made someone have "dreamlike sequences and everything is white and foggy and they have memory lapses where they remember a great deal of some things and don't remember details of others." Finally, he specifically testified Vivitrol does not cause psychosis. (App.692) As a result, even if trial counsel had continued to object to Dr. Gomez's testimony it would not have reasonably altered the outcome of the proceedings. Accordingly, this Court should deny the Petition as to this Question.

IV. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to object to prior bad act testimony.

The PCR Court properly found trial counsel was not ineffective for failing to object to prior bad act testimony. The testimony was properly admitted even under the current standard articulated by State v. Perry, 430 S.C. 24, 42, 842 S.E.2d 654, 664 (2020) and discussed in State v. Durant, 430 S.C. 98, 844 S.E.2d 49 (2020). Finally, the failure to object, even if deficient, did not prejudice Petitioner in light of the fact he never contested the fact he committed the acts for which he was charged and only challenged his intent based on his mental state and inability to know right from wrong.

As the South Carolina Supreme Court explained:

> Rule 404(b) of our Rules of Evidence provides, "Evidence of other crimes, wrongs, or acts ... may . . . be admissible to show . . . the existence of a common scheme or plan . . . ." The trial court's standard for making this determination is the Lyle "logical connection" test.

Perry, 430 S.C. at 44, 842 S.E.2d at 664–65. As discussed in Perry, the particularly unique circumstances by which a person commits the bad acts is sufficient to establish the logical connection. Perry discussed State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) ("It would be difficult to conceive of a common scheme or plan more within the plain meaning of the exception than that presented by this evidence."), in which the defendant "developed a particularized plan for sexually assaulting his children through which he invoked the Bible, placed a duty on the children to 'honor' him, and placed himself in the role of 'teaching' them to submit to sexual violence." Perry, 430 S.C. at 42, 842 S.E.2d at 663.

In the instant case, Petitioner also had a particularly unique method of attempting to isolate a young girl. With both the victim and the prior bad act testimony, Petitioner attempted

to gain access to a young girl by inviting her to a surprise birthday party for his daughter even though it did not occur at the time of his daughter's birthday. This particularly unique method of seeking access to a young girl is the quintessential common scheme or plan as discussed in McClellan and Durant. As a result, even if counsel had continued her objection to the testimony, it would have been affirmed on appeal.[2]

Additionally, Petitioner never contested that he was the person who committed the acts against the minor victim. Instead, he only challenged his criminal intent and whether he knew right from wrong at the time of the actions. As a result, even if the testimony of the prior attempt to obtain access to a girl by faking a surprise birthday party was not properly admitted its exclusion would not have reasonably altered the outcome of the hearing. There was ample evidence indicating Petitioner was intoxicated and not insane at the time of the sexual assault and other crimes being committed. Accordingly, Petitioner cannot establish prejudice to the defense he was actually asserting. As a result, this Court should deny the Petition as to this Question.[3]

[2] It is also important to note that at the time of the appeal, the prior bad act testimony would have been analyzed under the then existing State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), standard which looked merely to similarities versus dissimilarities and it certainly would have been upheld.

[3] Additionally, it should be noted the allegation of error would only impact the charges related to the sexual assault and possibly the kidnapping of the minor victim. Any ineffectiveness would not have had any impact on the outcome of the charges related to the attempted murder or kidnapping of Tsafos for which Petitioner was sentenced 60 years.

V. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to object to testimony beyond time or place.

The PCR Court properly found trial counsel was not ineffective for failing to object to hearsay testimony by the victim's parents which went beyond time and place. Even if deficient for not objecting, Petitioner cannot establish prejudice because the testimony did not attack his criminal intent or attempted insanity defense and he never contested identity or that he committed the underlying acts.

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland v. Washington, 466 U.S. 668, 700 (1984). To establish prejudice, an applicant must show that "but for counsel's error, there is a reasonable probability the result of the proceedings would have been different." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 102 (2013) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

In the instant case, Petitioner's counsel conceded he committed the underlying acts in her opening statement. He never contested the fact the acts were done, and he never contested the fact he committed the acts. He solely contested his criminal liability for the actions. The testimony by the parents, while beyond the "time or place" exception of Rule 801(d)(1)(D), SCRE, did not impact any determination regarding his intent. Instead, it merely corroborated what he had already admitted—that the girl was raped. As a result, he has not established any prejudice sufficient to undermine confidence in the outcome of the trial.[4]

[4] Additionally, it should be noted the allegation of error would only impact the charges related to the sexual assault and possibly the kidnapping of the minor victim. Any ineffectiveness would not have had any impact on the outcome of the charges related to the attempted murder or kidnapping of Tsafos for which Petitioner was sentenced 60 years.

VI. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to object to the State's closing argument.

The PCR Court properly found trial counsel was not ineffective for failing to object to commentary during the State's closing argument regarding the victim's parents. The testimony was not impermissible vouching based on information outside the record. Further, the innocuous commentary, even if impermissible, did not prejudice Petitioner such that it undermined confidence in the outcome of the trial.

Petitioner maintains counsel should have objected to the commentary by the State during closing argument: "When you think about Ruth Vick and Chad Vick what kind of people are these? These are people who are respectful, they have good jobs, they take care of their family." (App 745). He asserts: "There is no basis in the record for the State's statements regarding the Vicks in closing." However, the statements are characterizations of the testimony presented by the Vicks. Ruth Vick testified she was a respiratory therapist and Chad Vick indicated he was a registered nurse. (App. 222).

A solicitor is allowed to make reasonable inferences from the testimony in the record and provide characterizations based on the evidence in the record. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996) ("A solicitor's closing argument . . . should stay within the record and reasonable inferences to it."). To be sure, solicitors have "substantial latitude to present their case as they see fit" and "[t]hat latitude is not to be casually abridged." Bennett v. Stirling, 842 F.3d 319, 323 (4th Cir. 2016). In fact, the Supreme Court warns "[t]he line separating acceptable from improper advocacy is not easily drawn." Id. (quoting United States v. Young, 470 U.S. 1, 7 (1985)).

As the United States Supreme Court has concluded: "it 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' . . . The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986). In the instant case, the commentary by the solicitor was derived from the testimony and record before the jury. It also was not remotely of the nature of "universally condemned" statements.

Finally, even if the commentary should have not been spoken, it did not prejudice Petitioner. As noted before, Petitioner never challenged whether he was the perpetrator of the acts or whether any or all of the acts occurred. He merely challenged his criminal liability based on a lack of intent and the inability to determine moral or legal right from wrong. As a result, he undoubtedly fails the second prong of the Strickland test. Accordingly, this Court should deny the Petition for Writ of Certiorari as to this Question.[5]

[5] Additionally, it should be noted the allegation of error would only impact the charges related to the sexual assault and kidnapping of the minor victim. Any ineffectiveness based on commentary related to the minor victim's parents would not have had any impact on the outcome of the charges related to the attempted murder or kidnapping of Tsafos for which Petitioner was sentenced 60 years.

VII. The PCR Court did not reversibly err in finding trial counsel was not ineffective for failing to provide mitigation testimony during sentencing. (Petitioner's Questions VII and VIII).

The PCR Court properly found trial counsel was not ineffective for failing to provide mitigation testimony. Petitioner relies on the information underlying Questions I and II, most of which was already known by the Court prior to sentencing.

As discussed in Question I, trial counsel was not ineffective for failing to interview and call Petitioner's daughter as a witness. In mitigation, Petitioner contends his daughter would have testified that he never touched her or was otherwise inappropriate to his daughter. This argument was never presented to the PCR Court during the hearing and should be deemed abandoned. Even if not abandoned, trial counsel had no reason to know Petitioner's daughter would have provided any benefit in mitigation. While the minimal testimony that Petitioner had never done anything inappropriate to her would have provided a sweet sentiment from his daughter, it does nothing to mitigate the scheme Petitioner used to kidnap the minor victim and how he completely ruined her life by raping her orally, anally, and vaginally.

Additionally, Petitioner argues that the Vivitrol effects should have been presented in mitigation. However, this argument was never presented to the PCR Court and should be deemed abandoned. Additionally, the trial court was well aware of the discussion related to Vivitrol and the claimed effects on Petitioner. The court was also well aware of his claims regarding a lack of criminal intent and not knowing right from wrong. As a result, any additional information would have been at most cumulative and would not have had a reasonable probability to causing a different result at the proceeding.

VIII. The procedure utilized by the PCR Court in having the State draft the order denying relief, as well as the PCR Court's discretion in the timing of the order do not violate any state or federal rights and have been specifically authorized by the South Carolina Supreme Court. (Petitioner's Questions IX, X, and XI).

The PCR Court's procedure did not violate any right of Petitioner and was specifically authorized by the South Carolina Supreme Court. The Order signed by Judge McCoy, whether drafted in full or in part by a party, is her Order upon placement of her signature. There are no timeframes provided by statute, rule or otherwise for completion of the underlying order regardless of drafting party. Finally, the procedure and timing did not violate Due Process or the State Speedy Trial Provision.

Our Supreme Court understands that parties in civil cases—which includes Post-Conviction Relief cases—frequently are asked to draft orders for consideration by the ruling judge. The Court recently noted:

> The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency."). When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019). This is the procedure utilized by the PCR Court in this case. The State, at the direct request of Judge McCoy, drafted a proposed Order of Dismissal denying Petitioner relief. (App.1126;1114). Specifically, on August 31, 2022, the State included an editable Word format version of the proposed order to the judge and copied opposing counsel. In the email, the State asks the PCR Court if the Court wanted any changes or if the State could provide anything additional. (App. 1114). Judge McCoy signed the forty-nine-page Order on October 14, 2022 and it was filed October 19, 2022. (App.1038). Tellingly, during the month and a half Judge McCoy had the proposed order, Petitioner never alerted either counsel or the PCR Court of any deficiencies in the proposed order or asked for any additions or amendments to the proposed order as the Supreme Court expected in setting forth the procedure in Fishburne. Counsel did take the next available step in the Fishburne process and filed a Motion pursuant to Rule 59, SCRCP, which was ultimately denied.

Counsel may not agree with the Order, its findings and its conclusions. To insinuate the PCR Court did not act as an independent judiciary when it signed the Order after having it under review for over a month and a half is disingenuous at best. No executive branch personnel signed the Order. No party signed the Order. The Order was signed by Judge McCoy sitting as the PCR Court and in her role on behalf of the judicial branch.[6]

Further, nothing in the process utilized in this case or the timing violated Petitioner's Due Process Rights or violated tenants of fundamental fairness. Petitioner points to the delays and other issues counsel for the State had during the time it was asked by the PCR Court to draft an order and insinuated they imply "an intent to delay resolution of this matter." (Pet. 37). At any

[6] It is also interesting to note that while Petitioner now contends it was unconstitutional and improper for Judge McCoy to delegate writing the proposed order to the State, his counsel was more than happy to prepare an Order for Judge McCoy's signature should she change her mind on the outcome of the PCR hearing. (App. 1118).

time during this process, the PCR Court was free to relieve the State of its responsibility of drafting the proposed order. Instead, the PCR Court accepted the State's explanations and allowed the State time to complete the Order. There is absolutely zero evidence of misconduct on the part of counsel for the State and zero evidence Petitioner was denied fundamental fairness by the process or timing of the proposed order.

Petitioner contends the overall process, including the time involved in drafting the order, violates his right to a speedy resolution under S.C. Const. Art. I Sec. 9 ("All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained."). He notes issues with filing with the Clerk of Court, continuances of hearings, the delay in the drafting of the proposed order, and the need to file a Rule 59 motion as the "primary" reasons why the PCR filed on July 24, 2018, was finally decided on January 12, 2022. What he fails to note is that three of the hearings scheduled November 22, 2019, January 24, 2020, and September 10, 2021[7] were all continued at Petitioner's request due to reasons provided by his counsel. Additionally, it is significant that counsel filed an Amended Post Conviction Relief Application raising claims on March 12, 2021. As a result, a significant portion of the delay from July 2018 until the hearing in December 2021. At that point, the hearing he was entitled to was complete, the judge ruled, and, as discussed above, the process the South Carolina Supreme Court laid out in Fishburne was followed. Petitioner is not entitled to any relief.

Accordingly, this Court should deny the Petition as to these Questions.

[7] Petitioner acknowledges the 2019 and 2020 continuances are related to his counsel. The September 2021 continuance was because Petitioner's counsel Mr. Falk was unable to attend due to a conflicting general sessions matter.

IX. The cumulative effect of any errors in the case do not demand reversal.

The cumulative effect of any errors in the case do not demand reversal. As discussed above, counsel was only deficient in failing to object to a hearsay which had no impact on the underlying case. The vast majority of Petitioner's claims even if the Court found deficiency would not be prejudicial because Petitioner did not contest identity or the fact the actions occurred. He only challenged his criminal intent and whether he knew moral and legal right from wrong. As a result, even if the majority of the errors occurred as claimed by Petitioner, it would not have resulted in a different outcome at trial because they did not inure to the defense he actually asserted. As noted in Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002): "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." The facts and circumstances of this case as discussed throughout are not such that the Court should need to entertain and address the question.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.[8]

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 19, 2023

[8] Should the Court grant Certiorari as to any question, the State asks for the opportunity to provide further briefing.