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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge

Post-Conviction Relief Case No. 2016-CP-26-06592
Appellate Case No. 2024-001061

Ronald L. Legg, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the PCR court properly concluded Counsel was not ineffective due to "personal matters" he was experiencing during Legg's trial where those matters did not constitute circumstances whereby prejudice should be presumed under *Cronic*, and where Legg otherwise failed to carry his burden of proving deficiency or prejudice caused by Counsel's "personal matters" pursuant to *Strickland.*

2. Whether Legg's argument that Counsel was ineffective for failing to object to comments and testimony which allegedly bolstered the testimony of Victim and Counsel himself bolstering her testimony by eliciting otherwise inadmissible evidence, is unpreserved for review where it was neither raised to nor ruled upon by the PCR court. Furthermore, whether the PCR court properly concluded: (1) Counsel was not ineffective in how he strategically chose to approach his defense of Legg at trial, and (2) Legg was not prejudiced by Counsel's approach, overall performance, or how Counsel handled the instances of alleged bolstering.

3. Whether the PCR court properly concluded Counsel was not ineffective for failing to properly investigate Legg's case by (1) failing to investigate the minor Victim's background and (2) failing to request *Giglio* material on Detective Frebowitz where: in the first instance Counsel articulated a valid strategic reason and in the second instance the purported *Giglio* material was not available until after the trial.

4. Whether the PCR court properly declined to apply the cumulative error doctrine to Legg's case where: (1) it is unsettled whether South Carolina recognizes the doctrine and (2) even if recognized and applied, Legg failed to meet the basic threshold to even begin asking the cumulative prejudice question because the PCR court found no instances of error, let alone multiple errors.

STATEMENT OF THE CASE

Petitioner, Ronald L. Legg (Legg), was indicted at the October, 2011 term of the grand jury for Horry County for lewd act upon a minor. (2011-GS-26-03553). He was represented by William Isaac Diggs, Esquire (Counsel).[1] Respondent (the State) was represented by Assistant Solicitor Martin Spratlin of the Fifteenth Circuit Solicitor's Office. On March 10-12, 2014, Legg proceeded to trial before the Honorable Edward B. Cottingham and a jury, pursuant to which he was found guilty as indicted. Judge Cottingham sentenced Legg to twelve (12) years' imprisonment and ordered sex offender registry and mandatory GPS monitoring. (App.p.751-p.755). The following day, Legg appeared before Judge Cottingham for post-trial motions and those motions were denied. (App.p.755-p.761).

Legg filed a timely notice of intent to appeal and an appeal was perfected by Chief Appellate Defender Robert M. Dudek of the South Carolina Office of Appellate Defense. Legg raised two issues on appeal: (1) a challenge to the constitutionality of section 17-23-175 of the South Carolina Code and (2) a claim that the trial court erred in qualifying State's witness Dr. Rahter as an expert in medicine and child sexual abuse. (App.p.241). The State filed a brief in response. Upon motion by the State, by order dated May 29, 2015, the Supreme Court of South Carolina certified the appeal and held the matter in abeyance pending a decision in *State v. Anderson*, which similarly considered the constitutionality of section 17-23-175. (App.p.242). *Anderson* was decided a few months later. *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015). On February 9, 2016, the parties proceeded to oral argument before the Supreme Court.

[1] Legg was initially represented by William Thomas Floyd, Esquire; however, Legg filed suit against Floyd in federal court and Floyd was relieved of any further representation. Legg was then briefly represented by Johnny Gardner, Esquire, who removed himself due to a conflict of interest. Legg's third attorney was R. Scott Joye, Esquire, (Former Counsel), who met the same fate as Floyd—he was sued in federal court and relieved. Counsel represented Legg after Joye's departure. Legg also attempted to relieve Counsel, but upon learning of the trial court's firm stance that trial would proceed as scheduled, Legg relented and permitted Counsel to continue representation. (App.p.223).

Legg was represented by Mr. Dudek and the State was represented by Assistant Attorney General Jennifer Ellis Roberts of the South Carolina Attorney General's Office. In an opinion issued April 20, 2016, the Supreme Court affirmed Legg's conviction. *State v. Legg*, 416 S.C. 9, 785 S.E.2d 369 (2016). The remittitur was issued on May 6, 2016. (App.p.242).

Legg filed his first application for post-conviction relief (PCR) on December 17, 2014 (2014-CP-26-08376), while his direct appeal was still pending. As a result, the application was dismissed without prejudice by Order of the Honorable Steven H. John dated April 20, 2015, and filed May 6, 2015. (App.p.242). On October 13, 2016, Legg filed a second, approximately 220 page, handwritten, *pro se* application for post-conviction relief (PCR) alleging he was being held in custody unlawfully for a variety of reasons. (App.p.1-p.221). On October 16, 2017, the State filed a return, partial motion to dismiss, and motion for a more definite statement, asking in part that an evidentiary hearing be held. (App.p.222-p.229). Legg subsequently filed a more than 203-page *pro* se amendment on January 14, 2019, which alleged he was being held unlawfully on sixty-four different grounds. (App.p.242-p.243).

An evidentiary hearing into the matter was held on March 28, 2019, at the Horry County Courthouse before the Honorable Bentley Price. (App.p.316). The court had before it: (1) Legg's records from the South Carolina Department of Corrections, (2) a copy of the trial transcript, (3) the records of the Horry County Clerk of Court regarding the subject convictions, (4) Legg's direct appeal records, and (5) the pleadings in this matter. (App.p.240). Legg appeared at the evidentiary hearing *pro se*. The State was represented by Assistant Attorney General Johnny Ellis James, Jr., of the South Carolina Office of the Attorney General. (App.p.316). During the hearing, Legg presented testimony from three witnesses: (1) Former Counsel Joye; (2) Counsel Diggs; and (3) trial prosecutor Spratlin. (App.p.316-p.490). He did

not testify on his own behalf but made a closing argument to the PCR court. (App.p.490-p.492). The State did not call witnesses in reply, relying instead on cross-examination of Legg's witnesses and closing arguments from Mr. James. (App.p.486-p.495). At the conclusion of the evidentiary hearing the PCR court took the matter under advisement.

On July 31, 2019, Judge Price issued a thirty-page written order finding in part that: (1) the court had reviewed the testimony presented at the evidentiary hearing, observed the witnesses, passed upon their credibility, and weighed the testimony accordingly; (2) Legg failed to demonstrate any deficiency on the part of Counsel; and (3) Legg failed to demonstrate prejudice from the deficiencies alleged; and therefore, denied relief. (App.p.240-p.269). The PCR court found the volume, structure, and interconnected nature of Legg's allegations did not permit a traditional recitation of the grounds raised and therefore, in light of the evidence presented at the hearing, they would be more specifically addressed in the following four broad categories:

1. Ineffective Assistance of Pre-Trial Counsel R. Scott Joye;
2. Ineffective Assistance of Trial Counsel William I. Diggs;
3. "Overreaching" or Cumulative Error; and
4. Prosecutorial Misconduct of prosecutor Martin D. Spratlin.

(App.p.242-p.243). The PCR Court proceeded to address the grounds raised at the PCR hearing, making findings of fact and conclusions of law in each of the four broad categories before reaching the overall conclusions described above. (App.p.247-p.250; p.257-p.264; p.267-p.268).

On August 19, 2019, the State filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, seeking to remove language that Legg be remanded to the custody of SCDC because he had completed service of the sentence imposed. (App.p.272-p.274). That same day, the PCR

court issued an Order to Amend. (App.p.271). On August 27, 2019, Legg filed his own Rule 59(e) motion to amend, asking the PCR Court to "rule on every issue raised in his PCR application." (App.p.275-p.279). On April 15, 2024, the State filed a return. (App.p.280-p.292). In an order dated April 26, 2024, and filed May 1, 2024, Judge Price denied and dismissed Legg's motion to amend. (App.p.298-p.307). In a document dated June 17, 2024, and received by the Supreme Court June 25, 2024, Legg filed a notice of appeal, appealing the PCR court's denial of his application for PCR and denial of his Rule 59(e) motion. In an Order dated November 8, 2024, the Court dismissed the appeal due to Legg's failure to provide the petition for writ of certiorari and the appendix; however, after reviewing his November 16, 2024, request for reinstatement, the Supreme Court reinstated the appeal and allowed it to proceed by Order dated January 16, 2025. On May 30, 2025, a Petition for a Writ of Certiorari and the Appendix were filed on Legg's behalf by Alissa L. Wilson, Esquire. This Return on behalf of the State now follows.

STATEMENT OF FACTS

Between June 2010 and June 2011, when the minor victim (Victim) was between the ages of ten and eleven, Legg, on a number of different occasions, inappropriately touched Victim's body in various places, spread her legs, exposed himself to her, called her "sexy," stole her clothing while swimming, and showed her programming with explicit sexual content. (App.p.545-p.548; p.561-p.568). After an instance of verbal abuse by Legg, Victim disclosed the conduct to her mother, and she reported it to the police. (App.p.526-p.527; p. 555-p.556; p.567-p.568). Law enforcement arrested Legg a few days later and charged him with committing a lewd act on a minor. (App.p.650).

Standard of Review

In PCR proceedings, the burden of proof is on the applicant to prove the allegations in his or her application. *Speakes v. State*, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008). The appellate court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them. *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). Questions of law are reviewed *de novo*, and the appellate court will reverse the PCR court's decision when it is controlled by an error of law. *Id.*

ARGUMENT

I.

The PCR court properly concluded Counsel was not ineffective due to "personal matters" he was experiencing during Legg's trial because those matters did not constitute circumstances whereby prejudice should be presumed under *Cronic*,[2] and because Legg otherwise failed to carry his burden of proving deficiency or prejudice caused by Counsel's "personal matters" pursuant to *Strickland*.[3]

In his petition, Legg argues the PCR court erred in denying relief on grounds that he failed to carry his burden of proving ineffective assistance of counsel where Counsel "failed to effectively represent [Legg] due to personal matters which affected Trial Counsel's ability to advocate." He contends Counsel "was in the process of being disbarred" during the pendency of Legg's case, noting he was ultimately disbarred from both North Carolina and South Carolina in 2016. Legg further notes Counsel was "the sole provider for his bedridden wife and was homeless at times and living out of his car," and argues it is difficult to conceive how Counsel

[2] *United States v. Cronic*, 466 U.S. 648 (1984).

[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

could focus on anything else beyond his personal situation, which was quickly spinning out of control. He argues it is clear Legg's case did not get the attention it required, which led to Counsel making numerous mistakes causing his representation to be ineffective. (Petition, p.12-p.13). The State disagrees and submits the PCR court properly denied relief in regard to the alleged impact of Counsel's "personal matters" on his representation of Legg. Indeed, a trial attorney experiencing "personal matters" is not a circumstance which would exempt a showing of actual prejudice under *Cronic*. Additionally, neither the trial transcript nor the evidence presented at the PCR hearing demonstrated any particular instances where Counsel provided ineffective assistance as a result of the alleged "personal matters." Finally, to the extent this Court finds Counsel's performance was somehow rendered ineffective as a result of his "personal matters," the PCR court properly concluded Legg suffered no prejudice from Counsel's representation in the context of the trial as a whole.

Where the PCR application alleges ineffective assistance of counsel as a ground for relief, the applicant is required to prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. In order to prove counsel was ineffective, an applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. *Id.* at 687. Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." *Id.* The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). The applicant is prejudiced by the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. "The prejudice analysis

requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

While the United States Supreme Court has recognized that in certain circumstances "prejudice is presumed," *Cronic*, 466 U.S. at 658, those circumstances are incredibly narrow and only apply in those cases where counsel fails to "function in any meaningful sense as the Government's adversary." *Florida v. Nixon*, 543 U.S. 175, 190 (2004). By way of example, and in line with several other federal circuits, the Fourth Circuit Court of Appeals has held that a defendant's Sixth Amendment right to counsel is violated when that defendant's counsel is asleep during a substantial portion of the defendant's trial. *United States v. Ragin*, 820 F.3d 609, 619 (4th Cir. 2016). Similarly, the South Carolina Supreme Court has recognized a particularly egregious case which "represents one of the rare cases where counsel 'entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Nance v. Ozmint*, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006) (describing eight major errors committed by counsel and presuming prejudice where "counsel did not act as an adversary to the prosecution's case, but instead helped to bolster the case *against* his client"). Unlike *Nance*, this is not one of those rare cases. As noted by the PCR court, there is no precedent to support Legg's claim that disbarment [or other personal problems] should result in a presumption of prejudice. (App.p.258).

Instead, as recognized in somewhat similar circumstances, "personal matters" alone should *not* constitute a circumstance which would exempt a showing of actual prejudice per *Cronic*. Indeed, the principle of constructive denial of counsel means that "although defendant is represented by counsel, the circumstances of the representation are such that defendant, in effect, is lacking the assistance of counsel." 3 LaFave, Israel, King, & Kerr, CRIM. PROC. § 11.10(d) (4th

ed. 2016). This only happens in "extreme situations." *Id.* The U.S. Supreme Court has specifically warned against expansion of the *Cronic* constructive denial exception, *Bell v. Cone*, 535 U.S. 685, 696-98 (2002), and as demonstrated by the cases below, any such expansion has been extremely limited. While sleeping-counsel cases sometimes qualify for a presumption of prejudice, *e.g.*, *Ragin*, 820 F.3d at 619, the same cannot be said of ill-attorney cases. *See State v. Young*, 316 So.3d 843, 859 (La. App. 4 Cir. 2017) (rejecting the presumption of prejudice where counsel suffered from Parkinson's disease at the time of trial); *Dows v. Wood*, 211 F.3d 480, 485-86 (9th Cir. 2000) (rejecting the presumption of prejudice where counsel had Alzheimer's disease at the time of trial); *Smith v. Yist*, 826 F.2d 872, 876 (9th Cir. 1987) (rejecting a presumption of prejudice where counsel suffered from a mental illness at the time of trial). Legg's case should be subject to a similar analysis. It was simply not one of the rare cases where counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Rather, Counsel was present and awake and participated in all aspects of Legg's trial. Thus, *Cronic* does not apply and the PCR court properly rejected the application of presumed prejudice.

Additionally, neither the trial transcript nor the evidence presented at the PCR hearing demonstrated any particular instances where Counsel provided ineffective assistance as a result of the alleged "personal matters." Indeed, the record reflects that in all respects, Counsel's performance was objectively reasonable and did not fall outside the wide range of professionally competent assistance. The PCR court concluded Counsel "reasonably selected a trial strategy that was consistent with the evidence in the case and consistent with reasonably effective assistance of counsel." (App.p.258). It further concluded Counsel "correctly identified that the minor victim's credibility was the central issue of the case and correctly focused his attention on

a strategy founded on the idea that her imagination was catalyzed by the State to accuse [Legg]." (App.p.259). These findings had ample support in the record.

As highlighted by Legg in his petition, Counsel certainly acknowledged having personal problems with his finances and his wife's deteriorating health, all of which led to him misappropriating funds and ultimately getting disbarred. (App.p.352-p.353; p.355-p.358). However, Counsel also testified he had reviewed the trial transcript and repeatedly opined he did a credible job representing Legg despite these personal matters, and he failed to see how they negatively impacted his performance. (App.p.353; p.362; p.368-p.369; p.378; p.386; p.450). Given Counsel's investigation, his multiple meetings with Legg, his articulated theory of defense, and his articulated trial strategies, this is simply not a case in which it could fairly be said that Counsel's performance fell below professional norms. Thus, Counsel was not rendered ineffective as a result of his "personal matters." Furthermore, Legg failed to meet his burden of proving prejudice. The PCR court clearly contemplated the record as a whole in assessing whether Legg met his burden of proving prejudice and found he did not do so. That finding is supported by evidence in the record. For all of these reasons, the PCR court properly denied relief and certiorari should be denied.

II.

Legg's argument that Counsel was ineffective for failing to object to comments and testimony which allegedly bolstered the testimony of Victim and Counsel himself bolstering her testimony by eliciting otherwise inadmissible evidence, is not preserved for review because it was neither raised to nor ruled upon by the PCR court. In any event, the PCR court properly concluded: (1) Counsel was not ineffective in how he strategically chose to approach his defense of Legg at trial, and (2) Legg was not prejudiced by Counsel's approach, overall performance, or how Counsel handled the instances of alleged bolstering.

In his petition, Legg argues Counsel was ineffective for failing to object to "multiple occasions of bolstering the testimony of [Victim] and himself [bolstering her] testimony by eliciting otherwise inadmissible testimony." He contends that where the case turned solely on the credibility of Victim and there was no physical evidence to corroborate her allegations, Counsel's failure to object to bolstering testimony and his decision to elicit testimony about digital penetration cannot be considered harmless and therefore must be deemed prejudicial. (Pet.p.13-p.19). The State disagrees and submits this argument should be denied and dismissed for several reasons. First, it is not preserved for appellate review because a bolstering argument was neither raised to nor ruled upon by the PCR court. Furthermore, the PCR court properly concluded that Counsel was not deficient in how he strategically chose to approach his defense of Legg at trial, including how he responded to instances of alleged bolstering. Finally, the PCR Court properly concluded that even if Counsel was ineffective in some aspect of his representation, Legg was not prejudiced by Counsel's performance where the overwhelming evidence that was properly admitted at trial supported Legg's conviction irrespective of any evidence which arguably constituted bolstering.

Our courts have long recognized the application of basic error preservation rules in the context of PCR. *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019); *Mangal v. State*, 421

S.C. 85, 805 S.E.2d 568 (2017); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992); *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Thus, where an issue was neither raised at the PCR hearing, nor ruled upon by the PCR court, it is procedurally barred. *Plyler*, 309 S.C. at 409, 424 S.E.2d at 478. Although our supreme court has excused an applicant's failure to file a Rule 59(e) motion asking the PCR court to make a ruling on a claim that was actually raised by the applicant but not ruled upon by the court, *Fishburne*, 427 S.C. at 515-16, 832 S.E.2d at 589, it has *not* excused error preservation requirements as to issues that were not adequately raised by an applicant at all. *Mangal*, 421 S.C. at 92-96, 805 S.E.2d at 571-73. Here, as in *Mangal*, the written application makes no mention of a claim based on improper bolstering. Furthermore, Legg never questioned Counsel at the PCR hearing nor argued that there had been improper bolstering at trial. Finally, although Legg filed a general Rule 59(e) motion, he never specifically asked the PCR court to address any claim about improper bolstering—likely because no such claim was raised. Thus, this is not an appropriate case in which to excuse Legg from his procedural default. Certiorari should be denied on Issue 2 for this reason alone.

Whatever the case, Legg failed to carry his burden of proving Counsel was ineffective for failing to object to the alleged instances of bolstering, either because they were not actual bolstering or they were insignificant in the context of the trial and did not warrant an objection that would have done nothing more than draw the jury's attention to the comments or evidence. In regard to the solicitor, the trial judge, and some witnesses occasionally referring to the minor child as "the victim" during trial, (App.p.502-p.503; p.577; p.642; p.653-p.654), these references were innocuous where the jury was clearly being asked to make the ultimate determination about whether she was credible and in fact, a victim. In regard to the occasional testimony that reached beyond the time and place of the incident, (App.p.527; p.642; p.682), it likely was not

concerning to Counsel as possible bolstering because no witness vouched for Victim's credibility. In regard to Counsel eliciting testimony from Detective Frebowitz about his affidavit suggesting digital penetration, (App.p.671-p.672), this was clearly a calculated part of Counsel's strategy. First, it served to undermine Frebowitz's credibility and the State's case as a whole by showing he embellished his affidavit with a more egregious level of sexual contact than Victim described at the forensic interview or at trial. Second, it served to highlight questions about Victim's credibility, which Counsel explained was the cornerstone of Legg's defense. Finally, in regard to Counsel's comment in his closing argument that Victim would have everything available to her that the system had to offer, (App.p.724), Counsel disagreed that it was bolstering and explained it simply implied Victim needed help. (App.p.362). Thus, Counsel does not appear to have been ineffective in this regard, and the PCR court appropriately concluded he was not.

Furthermore, Legg failed to carry his burden of proving prejudice from the instances of alleged bolstering. Indeed, any references to Victim as "the victim" and any brief references to Legg or some details of the assault that went beyond time and place of the incident, paled in comparison to Victim's direct testimony (App.p.545-p.568) and the corroboration of Legg's improper behavior by State's witness Shannon Lattimore, which is described in more detail below. (App.p.632-p.635). Where the alleged bolstering had little to no impact at trial, the PCR court properly concluded there was no prejudice. For all of these reasons, the PCR court properly denied relief and certiorari should be denied.

III.

The PCR court properly concluded Counsel was not ineffective for failing to properly investigate Legg's case by (1) failing to investigate the minor Victim's background and (2) failing to request *Giglio*[4] material on Detective Frebowitz because: in the first instance Counsel articulated a valid strategic reason and in the second instance the purported *Giglio* material was not available until after the trial.

In his petition, Legg argues Counsel was ineffective for failing to properly investigate his case. Specifically, he contends Counsel was ineffective for: (1) failing to investigate the minor Victim's background and (2) failing to request *Giglio* material on Detective Frebowitz. Legg argues that where Counsel was required to conduct a reasonable amount of pretrial investigation, his failure to take these steps supported a finding of ineffective assistance of counsel because the information that could have been gathered could have changed the outcome of trial. (Pet.p.19-p.22). The State disagrees. The PCR court considered these issues in light of Counsel's testimony and properly concluded Counsel was not deficient in these areas of his representation of Legg at trial. Furthermore, the PCR Court properly concluded that even if Counsel was ineffective in some aspect of his representation on these two issues, Legg failed to prove he was prejudiced by Counsel's performance.

Trial counsel must be granted the flexibility to make strategic decisions that are both reasonable and necessary for effective advocacy. *Strickland*, 466 U.S. 690-91. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland* at 688-89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. For that reason, "[j]udicial scrutiny of counsel's performance must be highly deferential."

[4] *Giglio v. United States*, 405 U.S. 150 (1972).

Id. at 689. Under *Strickland*, to prove a claim of ineffective assistance of counsel, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*

If counsel provides a valid strategic reason for their actions or inactions, their performance should not be deemed ineffective. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Determining whether a stated reason for counsel's conduct is a valid strategic reason depends on the circumstances of each case; therefore, courts take a case-by-case approach to decide what constitutes a valid trial strategy. *Solomon v. State*, 347 S.C. 635, 639, 557 S.E.2d 666, 668 (2001) (finding failure to request not guilty option on verdict form presented to jury was not unreasonable for strategic reasons where counsel's strategy was to argue that defendant was guilty of only the lesser and not the greater offense).

In regard to the allegation relating to Counsel's failure to investigate Victim's background, the PCR court found: (1) Counsel articulated valid strategic reasoning not to challenge Victim's credibility in that particular way—doing so could potentially offend jurors; (2) Counsel was presented nothing, either from Legg or from the materials produced in discovery, to show any sufficiently extreme conduct to justify the risk of investigating and attacking Victim based on her social history; and (3) no evidence of Victim's social history was presented at the evidentiary hearing to support Legg's allegation. (App.p.261). Each of these findings was supported by the record, particularly the conclusion that Counsel had a valid

strategic reason to refrain from aggressively attacking Victim's character by trying to dredge up her background. Because Counsel provided a valid strategic reason for his actions or inactions, his performance was appropriately not deemed ineffective. *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313.

In regard to the allegations relating to Detective Frebowitz and possible *Giglio* material, the PCR court described the information related to Frebowitz's termination and found: (1) there is no indication or evidence of fabrication or falsification of evidence, or that investigatory information was improperly disclosed in any way as to taint a witness; (2) Frebowitz's termination subsequent to Legg's trial was immaterial to Legg's trial; (3) Counsel could not have impeached Frebowitz with his termination, or with any of the information leading to his termination, because the termination did not occur until after Legg was convicted; and (4) even if Counsel had somehow been able to impeach Frebowitz with his termination, such impeachment would have been of very little value in the context of Legg's case. (App.p.260-p.261). Each of these findings was supported by the record, particularly the conclusions that Counsel could not have impeached Frebowitz with his termination because it did not occur until after trial, and that even if Counsel had somehow been able to impeach Frebowitz with his termination, it would have been of very little value in the context of Legg's case. These findings support the conclusion that Counsel was not ineffective in failing to request Frebowitz's personnel files and that Legg was not prejudiced by Counsel's failure to do so. For all of these reasons, the PCR court properly denied relief and certiorari should be denied.

IV.

The PCR court properly declined to apply the cumulative error doctrine to Legg's case because: (1) it is unsettled whether South Carolina recognizes the doctrine and (2) even if recognized and applied, Legg failed to meet the basic threshold to even begin asking the cumulative prejudice question where the PCR court found no instances of error, let alone multiple errors.

In his petition, Legg argues the PCR court erred in refusing to find that the cumulative effect of counsel's deficient performance established prejudice requiring a new trial. He contends the State's case against him was "not strong" because it was "solely based upon the credibility of the minor child" with "no forensic evidence" and "no witnesses to the alleged sexual assault." (Pet.p.24). Initially, the State disagrees with this characterization of the evidence. At trial, in addition to Victim's extensive direct testimony about multiple instances of improper sexual contact (App.p.545-p.568), the State presented eyewitness testimony about two particular instances of Legg's inappropriate conduct towards Victim. Shannon Lattimore testified she had once been swimming with Legg and Victim when she saw Legg holding Victim's swimsuit bottom as he was trying to get close to her. Victim hid behind Lattimore until she could get the bottoms back for Victim. (App.p.634). Next, Lattimore said once while they were at Legg's house she saw Legg touch Victim's chest, in the breast area. (App.p.635). Both of these instances corroborated either the particular acts or general behaviors described in Victim's testimony. (App.p.556-p.557; p.564). Thus, even when considering "the strength of the State's case" in isolation and presuming some level of deficiency, the PCR court properly declined to grant relief on grounds of cumulative error.

In any event, the State submits the PCR court properly declined to apply the cumulative error doctrine to Legg's case because: (1) it is unsettled whether South Carolina recognizes the doctrine and (2) even if recognized and applied, Legg failed to meet the basic threshold to even

begin asking the cumulative prejudice question where the PCR court found no instances of error, let alone multiple errors. Thus, Legg's invitation for this Court to adopt the cumulative error doctrine is insufficient to warrant a grant of certiorari under the facts and circumstances of this case.

In line with the *Cronic* analysis in Issue 1, our courts have recognized that when counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice. *Green v. State,* 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). However, whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina. *Id.* at 197, 569 S.E.2d at 324-25; *see also Lorenzen v. State*, 376 S.C. 521, 535 n.3, 657 S.E.2d 771, 779 n.3 (2008) (recognizing the same and declining to answer the issue given the facts of the case). Notwithstanding the unsettled question, "the threshold to asking the cumulative prejudicial question is to first find multiple errors." *Green*, 351 S.C. at 197, 569 S.E.2d at 325; *see also Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701,710 (2006) (finding no need to attempt a cumulative error analysis where several errors are not present); *Walker v. State*, 397 S.C. 226, 239, 723 S.E.2d 610, 617 (Ct. App. 2012) (*reversed on other grounds* 407 S.C. 400, 756 S.E.2d 144 (2014)) (reversing a grant of relief based upon cumulative error where the lower court erred in finding three instances of deficiency on the part of counsel).

As to the application of the cumulative error doctrine itself, where non-prejudicial errors are somehow accumulated in an attempt to establish prejudice, it runs counter to the fundamental character of *Strickland.* A key point in the standards for measuring ineffective assistance of counsel is that the principles set forth in *Strickland*:

> . . . do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry

> must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696. Thus, when Legg advances "cumulative error" as a means of analyzing *Strickland* prejudice by totaling some ephemeral quanta of prejudice across the numerous allegations, his demand runs contrary to the anti-mechanical tilt of *Strickland*. The *Strickland* court explicitly advises against such calculus when it tells lower courts to approach the problem in whatever order is quickest:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland at 697. The cumulative summation of prejudice would require this Court, and indeed every court, to analyze both prongs in every case in a mechanical, burdensome fashion. It would also perversely incentivize applicants to raise not only their best grounds for relief (as is consistent with best practices for appellate advocacy), but also raise as many allegations as possible in every case in the hopes of landing enough glancing blows to knock out their conviction (a strategy arguably taken by Legg in this very case). A plethora of post-conviction relief and appellate allegations cannot accumulate to an applicant's benefit; to the contrary, the

multiplicity betrays the inadequacy of any single allegation. *See, e.g., Fifth Third Mortgage Co. v. Chicago Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2010) ("When a party comes to us with nine grounds for reversing the district court, that usually means there are none."); *Pierce v. Visteon Corp.*, 791 F.3d 782, 788 (7th Cir. 2015) (raising 13 issues on appeal violates principle that counsel must concentrate attention on best issues).

Cumulative error analysis is simply not appropriate in the form demanded by Legg. Furthermore, even if the Court were to apply a cumulative summation of prejudice analysis to this case, the sum would be "zero" because Applicant has failed to meet his burden of demonstrating any deficiencies of counsel, let alone more than one. *See Hunter v. Smith*, 856 F.Supp. 251, 258 (D. Md. 1994) ("The fact that many claims of counsel error are pressed does not alter the fundamental math—a string of zeros still adds up to zero."). There can be no prejudice at all without deficiency, and there should be no accumulated prejudice without specific instances of prejudice. Therefore, the PCR court properly denied relief and certiorari should be denied.

CONCLUSION

Based on the foregoing reasons, this Court should deny the petition for a writ of certiorari in its entirety and let stand the decision of the PCR court. If the Court grants the petition, the State hereby requests permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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