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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Greenville County
Robin B. Stillwell, Trial Judge
Brooks P. Goldsmith, Initial Post-Conviction Relief Judge
Grace Gilchrist Knie, Second Post-Conviction Relief Judge

Appellate Case No. 2025-000415

TERRY LEMORE MCCARRELL, SCDC # 171323,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

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Did the initial post-conviction relief court properly reject Petitioner's claim that he was denied effective assistance of counsel for failing to move to sever his charges into separate trials where: (1) Petitioner could not establish any deficiency of counsel because trial counsel articulated a reasonable trial strategy based on a joint trial of all of Petitioner's pending charges, and (2) Petitioner could not establish any requisite prejudice because there is no reasonable probability the cases would have been severed into separate trials had such a motion been made based on the facts and circumstances of the case or that the result of separate trials would have been different?

STATEMENT OF THE CASE

Petitioner Terry L. McCarrell, an experienced felon with a prior record that spans decades[1], is currently incarcerated within the South Carolina Department of Corrections serving an aggregate sentence of twenty years of imprisonment. That sentence was imposed after he was convicted by jury of a variety of offenses stemming from his involvement with a thirteen-year-old child during 2011, including second-degree criminal sexual conduct with a minor and grand larceny. (App. 308-313).

The evidence presented during Petitioner's trial, including witness testimony corroborated by text messages, established that Petitioner (who was in his late forties at the time) engaged in a sexual relationship with the thirteen-year-old child that included vaginal and oral intercourse on a near daily basis for months beginning in May of 2011 until Petitioner was arrested later that year. During the course of his illegal sexual relationship with this child, Petitioner and the child stole rings from a neighbor when visiting the neighbor's home together. It was during the investigation into the stolen rings that text messages between Petitioner's daughter and the child brought Petitioner's sexual abuse of the child. As a result of these interconnected events, Petitioner was arrested by the Greenville County Sheriff's Office and was ultimately indicted by the Greenville County Grand Jury for second-degree criminal sexual conduct with a minor, lewd act upon a child, grand larceny, and contributing to the delinquency of a minor.

Alex Stalvey, Esquire, was appointed to represented Petitioner. On July 7, 2014, the State called Petitioner's case to trial before the Honorable Robin B. Stillwell, circuit court judge. Although Petitioner was initially present at the courthouse, he elected to leave prior to the start of

[1] Petitioner's prior record includes convictions for malicious injury to personal property, unlawful drugs, strong arm robbery, failure to return rental property, and federal counterfeiting. (App. 308-309).

his trial without informing the court or his attorney, and resultantly, he was tried in his absence. Following a two-day trial, the jury convicted Petitioner on all four charges as indicted. Judge Stilwell sentenced Petitioner and sealed the sentence. Petitioner was apprehended shortly thereafter, and on July 10, 2014, Judge Stilwell unsealed his sentence and sentenced Petitioner to concurrent terms of imprisonment of twenty years for second-degree criminal sexual conduct with a minor, fifteen years for lewd act upon a child, three years for contributing to the delinquency of a minor, and five years for grand larceny.

Petitioner, through counsel, filed a timely notice of appeal. Petitioner was represented by appellate counsel from the South Carolina Commission on Indigent Defense, who filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and moved to be relieved as counsel. The South Carolina Court of Appeals dismissed the appeal in an unpublished opinion and granted appellate counsel's motion to be relieved. The remittitur was issued on January 29, 2016.

While his direct appeal was still pending, Petitioner, through retained counsel William G. Yarborough, III, Esquire, filed a premature application for post-conviction relief on July 6, 2015, alleging various claims of ineffective assistance of counsel. Respondent filed a return and moved to summarily dismiss the application without prejudice as Petitioner's direct appeal was still pending pursuant to Rule 71.1(b), SCRCP. On August 13, 2015, the court dismissed the application without prejudice based on Petitioner's pending appeal.

Petitioner, again through retained counsel Yarborough, filed a timely application for post-conviction relief[2] on February 22, 2016, raising identical claims as to the ones raised in the previous application, including that trial counsel was ineffective for not moving to sever the trial.

[2] Respondent refers to this post-conviction relief action as his "initial" application and/or action as it was the first to be decided on the merits.

Respondent filed a return to the application and requested the court convene an evidentiary hearing. On February 23, 2017, the parties appeared before the Honorable Brooks P. Goldsmith, circuit court judge, for an evidentiary hearing. Petitioner was present alongside counsel Yarborough and presented testimony from himself, his daughter, and trial counsel. At the conclusion of the hearing, Judge Goldsmith denied the application in full and requested Respondent prepare a proposed order of dismissal for the court's consideration. On April 20, 2017, Judge Goldsmith issued an order denying the application and dismissing it with prejudice.

Petitioner, through counsel Yarborough, filed a timely notice of appeal but improperly filed the notice with the Court of Appeals. Thereafter, the Court of Appeals transferred the appeal to the South Carolina Supreme Court pursuant to Rule 243, SCACR. On February 9, 2018, Petitioner filed a motion for leave to file the petition and appendix out of time along with a petition for a writ of certiorari arguing that Judge Goldsmith erred in finding that trial counsel was not constitutionally ineffective for not moving to sever the charges. The Supreme Court granted Petitioner's motion and accepted the petition for a writ of certiorari and appendix as filed and served. After Respondent filed a return to the petition, the Supreme Court transferred the appeal to the Court of Appeals, which subsequently granted certiorari and requesting briefing. Despite numerous notices from the Court of Appeals, Petitioner's counsel failed to file a brief, and the appeal was dismissed. McCarrell v. State, Ct. App. Order filed August 7, 2019. The remittitur was issued on August 23, 2019.

Petitioner then filed a *pro se* application on May 27, 2021, arguing he was denied appellate review of the denial of his prior post-conviction relief action based on his prior post-conviction relief counsels' actions and seeking belated appellate review of Judge Goldsmith's order. On September 21, 2023, an evidentiary hearing was held before the Honorable Grace Gilchrist Knie,

circuit court judge, to resolve this sole issue. Following testimony from Petitioner and prior counsel Yarbrough, Judge Knie granted the application pursuant to Austin v. State, 305 S.C. 348, 409 S.E.2d 395 (1991). Petitioner then initiated this underlying appeal challenging Judge Goldsmith's denial of his earlier post-conviction relief action, raising the sole claim that trial counsel was ineffective for failing to move to sever his charges into two separate trials. This return follows.[3]

[3] Pursuant to the procedure outlined in King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992), Petitioner filed a petition for writ of certiorari raising the propriety of Judge Knie's grant of belated appellate review of the denial of Petitioner's initial post-conviction relief action as well as a separate petition for writ of certiorari pursuant to Austin v. State. Respondent does not challenge the grant of Austin review, and, accordingly, is not filing a return to the petition.

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, 180-81, 810 S.E.2d 836, 839-840 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (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. Smalls, 422 S.C. 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 initial post-conviction relief court properly rejected Petitioner's claim that he was denied effective assistance of counsel for failing to move to sever his charges into separate trials because Petitioner could not establish any deficiency of counsel where trial counsel articulated a reasonable trial strategy based on a joint trial of all of Petitioner's pending charges and Petitioner could not establish any requisite prejudice where there is no reasonable probability the cases would have been severed into separate trials had such a motion been made based on the facts and circumstances of the case or that the result of separate trials would have been different.

On appeal, Petitioner argues the initial post-conviction relief court wrongly denied him relief based on his claim that trial counsel was constitutionally ineffective for failing to move to sever his charges into two separate trials. Specifically, Petitioner asserts that his two charges related to his sexual abuse of his minor victim should have been tried separately from his two charges related to the theft of jewelry involving the same child, and that trial counsel was constitutionally deficient for failing to make such a motion. Petitioner further avers that had such a motion been made, it would have been granted and there is a reasonable probability that he would not have been convicted of the grand larceny without "the jury hear[ing] shocking evidence regarding sexual relationship between an adult and a minor, which unduly prejudiced [him]." (PWC Pursuant to Austin p. 7). However, the initial post-conviction relief court properly rejected this claim and denied relief because trial counsel articulated a reasonable trial strategy based on a joint trial of all of Petitioner's pending charges to attack the credibility of the child, which was crucial to the guilt or innocence of Petitioner on all four pending charges, thereby eliminating any deficiency. Moreover, Petitioner could not establish any resulting prejudice where there is no reasonable probability the cases would have been severed into separate trials had such a motion been made based on the facts and circumstances of the case, or that the result of separate trials would have been different. The initial post-conviction relief court properly determined Petitioner

failed to meet his burden of establishing constitutionally ineffective assistance of counsel and denied relief. This Court should similarly deny certiorari to review this claim.

APPLICABLE LAW

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, effective assistance of counsel does *not* mean perfect representation. See 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 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.

Petitioner, like all other post-conviction relief applicants, had the burden of proving the allegations in his post-conviction relief action, and when alleging counsel was constitutionally ineffective, he needed 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 evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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. 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.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. The function of the post-conviction relief court is to

determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance required of a criminal defense attorney." Id. at 690. Although courts may not indulge "post hoc rationalization" for counsel's decision-making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a "strong presumption" counsel's attention to certain issues to the exclusion of others reflects tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003).

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993).

The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86. "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

Like in the instant case, cases where an applicant asserts that trial counsel was ineffective for failing to move to sever his charges into separate trials, the same two-pronged standard as set forth in Strickland and its progeny applies. See Tyler v. State, 437 S.C. 17, 876 S. E.2d 132 (Ct. App. 2022) (employing the two-pronged Strickland standard requiring the applicant to establish both deficiency of counsel and prejudice when asserting a claim of ineffective assistance of counsel for failing to move to sever charges into separate trials).

Here, Petitioner failed to meet his burden of establishing his trial counsel's performance fell below the prevailing standard of professional norms. Likewise, Petitioner failed to establish he suffered any actual prejudice based on his trial counsel's performance that would have entitled him to a grant of post-conviction relief. Therefore, as the post-conviction relief judge determined, Petitioner did not—and could not—meet his burden of establishing his trial counsel was constitutionally ineffective, and the post-conviction relief application was properly denied.

RELEVANT EVIDENCE FROM PETITIONER'S TRIAL

Petitioner was charged with second-degree criminal sexual conduct with a minor, lewd act upon a child, grand larceny, and contributing to the delinquency of a minor. All four of these charges arose from Petitioner's relationship with the same thirteen-year-old child, who lived down the street from Petitioner. App. 150-151. In the spring of 2011, Petitioner, a forty-eight-year-old man, met the child at a gas station and struck up a relationship with her and her mother. App. 150-152, 201-202. Soon, Petitioner was visiting the child's home nearly every day, often when her mother was at work despite explicit instructions from the child's mother not to come to her home when she was not present. App. 153-154, 202-206, 218-220. After approximately two weeks, Petitioner exposed his penis to the child and attempted to engage in sexual intercourse with her, but the child was able to thwart Petitioner's advances. App. 154-158. Days later, Petitioner again attempted to engage in sexual intercourse with the child and this time, he was successful and vaginally penetrated her after using "aggressive and forceful" tactics. App. 159-162, 165. A few days after, Petitioner again had sexual intercourse with the child. App. 163. Petitioner began to have sexual intercourse with the child so regularly that "eventually it got to be an everyday thing." App. 163-166. Although Petitioner was a forty-eight-year-old grandfather, he told the child he was thirty years old and that his grandchildren were his children. App. 166-68. Beyond sexual

intercourse, Petitioner also performed oral sex on the child and instructed the child to perform oral sex on him. App. 168-69. Petitioner and the child exchanged text messages daily where they routinely told each other they loved each other, and other messages indicated an intimate relationship existed between the forty-eight-year-old Petitioner and the thirteen-year-old-child. App. 170-171.

Petitioner continued his sexual relationship with the child until he was arrested for the theft of rings from the child's next-door neighbors. App. 169. Regarding that theft, on November 14, 2011, Petitioner and the child went to the child's next-door neighbor Jesse Woodard's house. App.85-88, 94, 171. Conflicting reports were given for the purpose of the social visit (either to look at photographs of tattoos or for the child to get a neck tattoo), but while there, Petitioner entered the kitchen and took two rings valued at approximately $2,500.00 belonging to Woodard's wife. App. 70-71, 81-90, 93-94, 114, 172-173.

When Woodard's wife returned home from work, she noticed the rings were missing and inquired as to their whereabouts from her husband, who then connected the theft to Petitioner and the child. App. 73-76, 88-90. Woodard spoke to Petitioner and the child and asked for the rings to be returned without success and ultimately called law enforcement to report the theft. App. 75-76, 90-92, 103-106, 174-175. After being questioned by law enforcement, Petitioner advised the child to flush the rings down the toilet. App. 92, 106-107, 175. The child was able to successfully flush one of the two rings but ultimately hid the remaining ring under her bathtub in an attempt to protect Petitioner. App. 175.

Petitioner was ultimately arrested for the theft of the rings. App.131, 176-177. After Petitioner's arrest, the child and Petitioner's adult daughter began exchanging text messages and met to exchange the remaining ring in the hope of mitigating trouble for Petitioner. App. 131-136,

176-178. During these text message exchanges, the child advised Petitioner's daughter that she was pregnant with Petitioner's baby in an attempt to avoid any trouble herself. App. 177.

In an attempt to show that Petitioner had not taken the rings and that the child was the perpetrator, Petitioner's daughter went to law enforcement and shared her text messages. App. 117-118, 133-136. She consented to an extraction of her phone, including all text messages. App. 118-120, 133-134. These records revealed the extensive, intimate communications between Petitioner and the child. App. 118-125, 136-139, 178-180. After initially lying to law enforcement about the nature of their relationship, Petitioner eventually disclosed the sexual relationship between her and Petitioner, as well as her involvement with the theft of the rings App. 125-128, 178-182. However, at trial, the child testified that it was Petitioner who stole the rings, and she only assisted with the disposal of the rings afterwards "[t]o save [Petitioner]." App. 173-175.

During the trial, extensive testimony was provided about the child's troubled background, including the child's pregnancy at age twelve, her use of drugs, her direct disobedience to her mother, her disrespect towards law enforcement, her lack of candor and truthfulness to law enforcement, her involvement in selling illegal drugs, and her untruthfulness to avoid punishment. App. 90-92, 105-107, 126-128, 177-184, 206-208, 211-218, 239-240. The child and her mother also testified that the child had pled guilty to the theft of the rings in juvenile court. App. 180-182, 214-215. The child also admitted to lying to "everybody" about the theft of the rings and about being pregnant with Petitioner's baby so she would not get in trouble for the theft of the rings. App. 177-178.

During cross examination, trial counsel highlighted to the jury that the child repeatedly lied about everything from her involvement with the theft of the rings to her relationship with Petitioner. App. 214-220, 238. Trial counsel also highlighted to the jury through his cross-

examination of law enforcement witnesses how crucial credibility of the complainant was in criminal sexual conduct cases. App. 230-232, 238, 255-256. Trial counsel focused on these themes and the inherent lack of credibility of the child in his closing argument to the jury. App. 283-292.

RELEVANT TESTIMONY FROM PETITIONER'S POST-CONVICTION RELIEF PROCEEDING

Following an unsuccessful appeal, Petitioner sought post-conviction relief on numerous grounds, including a claim that his trial counsel was ineffective for failing to sever his charges into two distinct trials—one for the criminal sexual acts involving the child and a separate trial for the theft of the rings. App. 315-

At the post-conviction relief evidentiary hearing, trial counsel testified his trial strategy was to show that the child stole the rings and then fabricated a sexual relationship with Petitioner to avoid punishment for the larceny. Trial counsel elaborated that as part of that trial strategy, he made an intentional choice not to move for severance in furtherance of that trial strategy:

> Q: Okay. Why? Why didn't you move to sever?
>
> A: Well, my thinking was with the grand larceny, with that still being in the case, and the victim being involved in the grand larceny, it really—I mean, that was part of my defense was that the only reason that the victim made up these allegations was the try to save herself or give herself some excuse to get out of the grand larceny charge. You know, she was – her whole story, if I remember correctly was, that she was with Mr. McCarrell, Mr. McCarrell influenced her in some way to steal these items from the neighbor. And that's why she stole the items.
>
> When they caught her, you know, they basically caught her red handed. And that's when the whole relationship with Mr. McCarrell came out. So, I basically figured, you know, the grand larceny was her way of – she was charged with grand larceny and in order to get out of it, she had to accuse Mr. McCarrell of these acts. So, she looked like the victim. It was not actually the Defendant in a grand larceny case.
>
> Q: Right. But I mean, didn't that, at trial, didn't that tend to tie Mr. McCarrell to something that he said he wasn't involved in?

A: It did. But I thought that was – that was less significant than what he was accused of, which was a lewd act.

App. 381, line 11 – 382, line 11. Trial counsel testified that while he could not recall speaking to Petitioner about his decision not to sever the charges, it was a strategic decision for him to make as the attorney:

> I felt like I was well prepared [for this case]. I did not feel like I needed more time to do anything. I mean, the decision not to sever the cases was certainly a decision that I made. And I didn't – and I'll tell you right now, even if I would have talked to Mr. McCarrell, he would have said, No, I want you to sever them, I probably still would have gone forward with not severing them. Because that would have been a trial strategy that was my decision and not his.

App. 383, line 16-24.

Trial counsel further elaborated:

A: Mr. Yarborough, I felt like I had a good enough trial strategy, I didn't need to ask anybody else.

Q: Well, what was that trial strategy, do you remember?

A: Well, I mean, the not severing the cases would have been one.

Q: Right.

A: But -- and I can't remember exactly what it was. Challenging the credibility of the victim certainly was one.

Q: Sure.

A: I mean, I think she had lied about the stolen jewelry items. And she had a reason to try to throw Mr. McCarrell under the bus, for lack of a better term. So, she had a motive to lie. She had lied in the past. I think I had got some of that out on cross-examination, I didn't ask her about the juvenile record but I did ask her about some prior credibility issues. So, I had enough, I thought, that would establish reasonable doubt with a couple of the jurors. Based on the victim's prior credibility issues. And based on the fact that the victim had a motive to lie and to implicate Mr. Mccarrell in this case.

Q: Okay. Do you recall what that motive to lie was?

A: Well, that she, you know, she got caught stealing this jewelry from the neighbor.

Q: Right.

A: And she was with Mr. Mccarrell, so she says, you know, he made me do it. Which was completely untrue. She did it, you know, she did it under her own freewill. I remember that clearly. You know, it was just a young teenager that knew exactly what she was doing, got caught and was blaming it on somebody else to get out of trouble. Which she had done all her life.

App. 344-346.

ANALYSIS/DISCUSSION

In denying relief, the post-conviction relief court determined that Petitioner had failed to establish both deficiency of counsel and prejudice and concluded the claim was "meritless." App. 491-492. The post-conviction relief court specifically noted:

> Trial counsel testified that he has a very specific trial strategy in choosing not to sever these charges. He stated that he wanted to attack the credibility of the minor Victim, and he would not have been able to do that for any charge without trying all of them together. Trial Counsel's strategy was to suggest to the jury that the minor Victim fabricated her story about the criminal sexual conduct in order to escape punishment for stealing the rings, which were the subject of the grand larceny.

App. 491-492. The court concluded that because "[t]rial counsel articulated a valid trial strategy in choosing not to sever the trials . . . his choice was not deficient." App. 492. The court further found that Petitioner failed to establish any prejudice from trial counsel's decision not to move to sever the trials. App. 492.

The record clearly supports the post-conviction relief court's determination that Petitioner failed to meet his burden of establishing that counsel was ineffective. Initially, Petitioner cannot establish that trial counsel's performance during trial fell below the prevailing standard of professional norms, as the record firmly establishes that trial counsel articulated a reasoned,

strategic decision not to move for severance of Petitioner's charges into separate trials.

In interpreting the Strickland standard discussed above, this Court has repeatedly held "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004). "The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made. Accordingly, we must be wary of second-guessing trial counsel's tactics." Edwards v. State, 392 S.C. 449, 456–57, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 689). "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). Strickland established the rule that, in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland at 689.

As shown above, the record is replete with evidence of trial counsel's articulated and well-reasoned trial strategy. The post-conviction relief court correctly recognized this and denied relief.

Despite the abundance of evidentiary support, Petitioner now on appeal asserts that trial counsel's strategy could not possibly have been reasonable because he did not actually cross-examine the child at trial, and therefore he could not have attacked her credibility in a way that he could not have done if the charges had been severed. This argument lacks merit and is not supported by the record.

At trial, trial counsel questioned the child's mother about her daughter's behavior and criminal record. App. 214-221. He challenged her contention that the child was a good mother to her newborn baby by pointing out that just two months after the child was born, the child was stealing other people's property. App. 214. He had her admit that the child had pled guilty to stealing property and served ninety days in juvenile jail. App. 214-215. He asked in detail about the child's illegal tattoo, her disrespect and lies to the police during their investigation of the stolen rings, and her illegal possession and use of cigarettes. App. 214-221.

Trial counsel crossed-examined Investigator Robert Perry at trial about the child lying that she that she was pregnant with Petitioner's child and that she provided false information to law enforcement when they were initially investigating the stolen rings. App. 230-240. Trial counsel questioned Investigator Perry about his awareness of the child's numerous prior encounters with law enforcement prior to this incident and the fact that she was on juvenile probation at the time. App. 230-240.

In his closing argument to the jury, trial counsel pointed out that months after her baby was born, the child was "talking about selling drugs, selling marijuana to a neighbor to get Terry McCarrell out of jail," and that the child had a history of lying to the police. App. 284. He criticized the State's investigation of the case and called out inconsistencies in the child's testimony that would contradict her accusation of a sexual relationship with Petitioner just months after her baby

was born. He reminded the jury that the child's neck tattoo was illegal because she was only thirteen years old. App. 283-292. He asked the jury to scrutinize the veracity of the child's testimony:

> She said when she had her baby that her life changed. All right, well, let's see what she did after she had her baby. Her baby was born in September. In November, the rings were stolen. The rings were stolen when she went over there to get her neck tattooed by her own admission. Two months after her baby is born, two months after her baby is born, the police come and talk to her about it. She's changed her life, right? That's what she wants you to believe, she's changed her life. What did she tell the police about these rings? She lies. She says she didn't have anything to do with it. A month later, three months after her baby is born and her life has changed, the police come back. They say, We want to talk to you some more about these rings. By her own admission, her own testimony, she said, I lied again and I kept lying until they showed me the text messages. Then I told the truth because I knew I was caught.

App. 390-391.

These examples from the record clearly support trial counsel's articulated trial strategy. It is clear that trial counsel's defense was to show the jury that the child was not a credible witness and that she was lying in order to save herself, and that trial counsel's strategy of keeping all four charges together in order to use the stolen rings to show the child's motive for lying about a sexual relationship was crucial to this defense. Based on the facts and circumstances of this case, trial counsel's strategic decision to keep all charges together in one trial rather than pushing for two separate trials is logical, well-reasoned, and within the professional standards required of a criminal defense attorney. The post-conviction relief court correctly determined that Petitioner did not establish deficiency and denied relief, and this Court should deny certiorari to review this proper denial of relief.

Moreover, the post-conviction relief court also correctly recognized that although trial counsel employed a reasonable trial strategy thereby negating any deficiency, Petitioner also could not establish any prejudice because it is highly unlikely that this case would have been severed

had counsel moved for severance, as the record is clear that these four charges were all based on the continuous course of conduct and were provable by the same evidence, and as such, were part of the same *res gestae* making a single trial proper.

"Charges can be joined in the same indictment and tried together where they (1) arise out of a single chain of circumstances, (2) are proved by the same evidence, (3) are of the same general nature, and (4) no real right of the defendant has been prejudiced." State v. Beekman, 415 S.C. 632, 636, 785 S.E.2d 202, 204 (2016). Even where charges may not rise out of a single, isolated incident, the Supreme Court has "allowed joinder when the crimes involved connected transactions closely related in kind, place, and character." Id., 415 S.C. at 637, 785 S.E.2d at 205 (quoting State v. Cutro, 365 S.C. 366, 374, 618 S.E.2d 890, 894 (2005)); see also State v. Rice, 368 S.C. 610, 614, 629 S.E.2d 393, 395 (Ct. App. 2006) ("Offenses are considered to be of the same general nature where they are interconnected."). Courts should avoid the "inflexible application" of the rule that charges must arise out of the same set of circumstances to warrant joinder; if "it does not appear that any real right of the defendant has been jeopardized, [then] it would be a refinement not demanded by the law or by justice to require in all instances a separate trial[.]" City of Greenville v. Chapman, 210 S.C. 157, 161-62, 41 S.E.2d 865, 867 (1947).

That joinder of related offenses may result in the introduction of evidence that is relevant to one or more, but not all, of the charges, is not in and of itself an adequate basis for severance of charges into multiple trials. Beekman, 415 S.C. at 638-39, 785 S.E.2d at 205-06 (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)).

Here, the Court of Appeals' treatment of severance in State v. Rice is instructive. In Rice, the defendant was separately indicted for trafficking in cocaine and murder—crimes that would seem unrelated at first glance if one was only looking at the elements of the offenses. 368 S.C. at

615, 629 S.E.2d at 396. "The cocaine trafficking charge arose out of a traffic stop the police set up because they suspected Rice of Johnson's murder. The police found the gun believed to be the murder weapon in the same search that produced the cocaine that forms the basis of the cocaine trafficking charge." Id. The Court of Appeals further observed the motive for the murder related to the victim's theft of drugs and money from Rice, and that their relationship was mostly based on selling drugs. Id. Consequently, the Court of Appeals held that "[t]he information regarding the cocaine trafficking was relevant to show the complete, whole, unfragmented story[,]" and found Rice was not prejudiced by the joinder of the charges. Id., 368 S.C. at 616, 629 S.E.2d at 396 (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)).

Here, as with Rice case, the four charges for which Petitioner was indicted would also seem unrelated at first glance if one was only looking at the elements of the offenses, as Petitioner urges this Court to do. However, as in Rice, this Court must also look at the facts and circumstances surrounding the charges and the evidence to be introduced.

All four charges against Petitioner arose out of the same circumstances—Petitioner's inappropriate and criminal involvement with a thirteen-year-old child during 2011, during which he repeatedly groomed the child to lie to authority figures and adults to conceal their activities. The same evidence proved each case—the same testimony provides for how law enforcement was led to investigate Petitioner and reveal his various illegal actions taken for the purpose of his own sexual gratification with a child. The evidence presented during Petitioner's trial, including witness testimony supported by digital evidence by way of text messages, established that Petitioner (who was in his late forties at the time) engaged in a sexual relationship with a thirteen-year-old child that included vaginal and oral intercourse on a near daily basis for months beginning in May of 2011 until Petitioner was arrested. While engaging in this illegal sexual relationship with this child,

Petitioner and the child stole rings from a neighbor when visiting the neighbor's home together. It was during the investigation into the stolen rings that text messages between Petitioner's daughter and the child brought to light the criminal sexual conduct Petitioner was engaging in with the child. That a sexual relationship between Petitioner and the child was discovered on Petitioner's daughter's phone as part of the investigation into his theft of rings with the child forms a part of the *res gestae*, of the immediate context through which each of these crimes was inextricably entwined. Accordingly, Petitioner's charges were properly tried together and any motion for severance would not have been granted, thereby negating any possible prejudice.

Finally, there is no reasonable probability that Petitioner would not have been convicted of his charges had his trials been separated into two separate trials. Regarding the two charges related to Petitioner's sexual conduct with the child, it is simply implausible to think that the jury, which heard "shocking evidence regarding a sexual relationship between an adult and a minor" based on Petitioner's own characterization, only convicted Petitioner of the sex crimes because they also heard evidence of his involvement in the theft of two rings with that same child.[4] Similarly, the evidence overwhelming establishes that Petitioner was the one who stole the rings, and, accordingly, it is not likely that he would have been acquitted of the two charges related to that theft, especially when the victim of the theft, Jesse Woodard, testified that Petitioner was the only

[4] While Respondent believes the record firmly establishes that Petitioner cannot establish prejudice as to any of his four convictions, Petitioner's appellate arguments appear to be limited to the prejudice he suffered as to his grand larceny and contributing to the delinquency of a minor charges stemming from the ring theft, as Petitioner argues in his brief that it was the "shocking evidence regarding a sexual relationship between an adult and minor" that led to his prejudice. (PWC 7). Accordingly, if this Court finds that such evidence was improperly prejudice and severance should have been granted, that relief should only apply to the affected charges: the grand larceny and contributing to the delinquency of a minor. Cf. Tyler v. State, 437 S.C. 17, 876 S. E.2d 132 (Ct. App. 2022) (wherein the appellate court narrowly tailored relief to grant a new trial only as to the convictions where Petitioner was prejudiced by counsel's failure to move for severance by keeping the remaining conviction intact).

one who entered the kitchen were the rings were located. App. 87-88. There is no reasonable probability the result would have been different had Petitioner been tried separately for the theft of the rings and the sex crimes. Petitioner failed to establish that he suffered any actual prejudice based on his trial counsel's performance that would have entitled him to a grant of post-conviction relief. Therefore, just as the post-conviction relief judge determined, Petitioner did not—and could not—meet his burden of establishing his trial counsel was constitutionally ineffective, and Petitioner's post-conviction relief application was properly denied.

CONCLUSION

Because the post-conviction relief court properly determined Petitioner failed to establish any constitutional depravations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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