STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

MARK R. BOLTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-186252

BRIEF OF PETITIONER

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STATEMENT

Petitioner Mark R. Bolte was convicted of incest, lewd act upon a child under the age of sixteen and criminal sexual conduct with a minor in the second degree per jury trial held during the September 2004 term of the Abbeville County General Sessions Court before Judge Wyatt T. Saunders. Petitioner received an aggregate forty-five year prison sentence. App. 1-607. Petitioner was represented by Charles Grose at trial.

Petitioner appealed, but his convictions and sentences were affirmed. App. 609-321. See State v. Bolte, Opinion No. 2009-UP-3611 (Ct. App. 2009). App. 622-623. Petitioner was represented by Eleanor Duffy Cleary on appeal.

On December 23, 2009, petitioner filed a PCR application with the Abbeville County Office of the Clerk of Court. App. 624-641. The respondent filed a return dated April 16, 2010, requesting that a hearing be held in the case. App. 642-648. A PCR hearing was held on October 27, 2010 at the Abbeville County Courthouse before Judge Eugene C. Griffith. App. 649-753. Petitioner was represented by Jon Newlon. On January 20, 2011, Judge Griffith issued an order of dismissal in the case. App. 755-776.

Petitioner appealed Judge Griffith's order of dismissal and filed a petition for writ of certiorari with this Court on November 7, 2011. The respondent filed a return on January 27, 2012. On September 18, 2013, this Court granted the petition for writ of certiorari filed in the case. This Brief of Petitioner follows.

ARGUMENT I

Trial counsel erred in failing to object to the solicitor's closing remark highlighting petitioner's right to remain silent by referring to the state's case as "undisputed" because this invited the jury to draw adverse inferences from petitioner's failure to testify at trial.

The state's case consisted of four witnesses and the case for the defense consisted of two witnesses. Petitioner did not testify at trial.

The female prosecutrix testified that she was in the ninth grade when her family[1] moved to South Carolina and that from that year (1998) until she graduated from high school (2002) her father, who is petitioner, touched her private parts inappropriately (inserted his finger into her private parts), and made her touch and put her mouth on his private parts, and ultimately performed sexual intercourse upon her. App. 119, l. 1 – p. 190, l. 22. Therapist and counselor Cherry McTaggart testified about the reasons for children's delay in disclosing sexual abuse. App. 333, l.14 – p. 352, l. 5. Ruth Burton, who was the dorm director at Erskine College, where the prosecutrix attended college, testified that petitioner violated trespassing warnings by appearing on the college campus to talk to the prosecutrix during her freshman year. App.363, l. 1 – p. 373, l. 25. Also, victim service director testified that she received and turned over to police the tapes of recorded telephone messages of petitioner's calls to the prosecutrix. App. 378, l. 1 – p. 383, l. 20.

The two defense witnesses who testified on behalf of petitioner's case were Ester Lopez, who was petitioner's ex wife and the prosecutrix's mother, and Lopez's divorce attorney Velvet Moore. Ms. Lopez admitted that she and petitioner were going through a divorce during the time the prosecutrix claimed the sexual abuse occurred and that she received possession of the house and

[1] The family under one roof in South Carolina consisted of the prosecutrix, two siblings, and her father (petitioner) and mother.

cars during that process. App. 403, l. 1 – p.443, l. 3. Note that one of petitioner's arguments in his defense at trial was that the divorce battle spawned these allegations of sexual abuse as a strategy for the mother to gain an advantage in family court. Attorney Velvet Moore testified that she represented Lopez in her divorce proceeding. Moore explained that Lopez was opposed to petitioner's requests for reconciliation, joint custody, and visitation, but that ultimately, the divorce was granted and Lopez received full custody of the children. App. 480, l. 1 – p. 493, l. 11.

During her closing argument, the solicitor made the following impermissible remarks in question:

> And finally I would just like to address the issue of reasonable doubt. Reasonable doubt can be defined in a lot of ways and when I'm done speaking at the very close of this case the judge will charge you on exactly what reasonable doubt is, but I submit to you ladies and gentlemen that throughout this case, from the witnesses supplied by the State and the witnesses supplied by the defense, the facts of this case are undisputed. One thing stands like stone. He did it and there is no other reasonable explanation for why we're here.

App. 529, l. 18 – p. 30, l. 4.

In response to petitioner's PCR assertion that trial counsel erred in failing to object to the solicitor's argument that the evidence was "undisputed," trial counsel admitted that he "should have objected to the solicitor's "undisputed" remark. Counsel could not give a reason as to why he failed to object to this, and further stated that this would have been a good issue for appeal. App. 689, lines 5-23; App. 690, lines 6 – 19; App 693, lines 12 – 25; App. 717 lines 13 -25. The PCR judge held that the remark at issue this was not an improper comment on petitioner's right to remain silent, but rather an overall assessment of the case that "was based on [the solicitor's] version of the testimony presented by the state and the defense as opposed to a suggestion that [petitioner] was under any duty to testify at trial". App. 758-763.

The presumption of innocence and the state's burden of proving the accused guilty are principles embedded in our federal and state constitutions. The defendant has a right to put the state to its burden of proof in a criminal case. Doyle v. Ohio, 426 U.S. 610 (1976). Additionally, a defendant has a Fifth Amendment right to remain silent and not testify at trial; and as a result, the state cannot comment upon the defendant's exercise of his right to remain silent and the same cannot be used against him. State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (2004); Brown v. State, 375 S.C. 464, 652 S.E.2d 765 (2007). It is error for a solicitor to attempt to elicit an adverse inference from the defendant's failure to testify at trial. Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998). As a rule, the solicitor may never argue an adverse inference based on the defendant's failure to present any defense at all where he presents no evidence at all. State v. Posey, 269 S.C. 500, 238 S.E.2d 176 (1977); State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002).

Nonetheless, in cases where the defendant presents witnesses and where there are other witnesses who are available to him to present, the solicitor is allowed to comment on the same. Douglas v. State, supra; State v. Shackelford, 228 S.C. 9, 88 S.E.2d 778 (1955); State v. Bamberg, 270 S.C. 77, 240 S.E.2d 639 (1977). Here, petitioner did present two witnesses in his defense to show that the pending divorce led to these charges as a way to remove him from the home. However, although petitioner presented witnesses in his defense, the solicitor did not argue that certain witnesses were not produced as allowed via Douglas and its progeny; but rather, the solicitor ventured beyond the accepted boundaries and went directly to the issue of petitioner's personal silence with reference to the case. This was an attempt to highlight petitioner's personal failure to testify in the case and refute the prosecutrix's testimony. There can be no other interpretation of the solicitor's argument since there were no witnesses to the sexual acts that occurred, which in turn meant the case boiled down to the prosecutrix's verbal testimony versus petitioner's silence. In

other words, if the prosecutrix testified and petitioner did not testify, the resulting "undisputed" comment made by the solicitor could only mean that the remark at issue was intended for the jury to draw an adverse inference from petitioner's failure to testify at trial.

Moreover, trial counsel erred in failing to object to the solicitor's "undisputed" comment at closing. Note that trial counsel admitted that he erred in failing to object to the solicitor's "undisputed" comment. Note further that the instant error was not harmless. A harmless error analysis is applicable when a Doyle violation has occurred to the extent that in order to be harmless, the record must show a single reference to the exercise of the right to silence, and the reference must be tied to the defendant's defense, and the defense must be implausible, and the evidence of guilt must be overwhelming. See State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996). Here, there was no overwhelming evidence of guilt in the case and petitioner's defense that the charges emanated from impure motives connected to the divorce was a plausible defense, and the reference to petitioner's silence was tied to his defense to the extent that he failed to testify and refute the prosecutrix's story. Trial counsel erred and admitted his error in failing to object to the solicitor's comment on petitioner's right to remain silent when she referred to the state's case as "undisputed" when the case boiled down to the prosecutrix's story versus petitioner's silence at trial. This violated petitioner's Sixth Amendment right to effective assistance of counsel (see Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984)), such that but for the error, the outcome of petitioner's trial would have been different.

ARGUMENT II

Trial counsel erred in failing to object to the conscience of the community remarks made by the solicitor during her closing argument because of the inflammatory nature of such an argument.

At closing, the solicitor appealed to the jury's responsibility to be the conscience of the community by returning guilty verdicts in the case. The solicitor's remarks follow:

> You are the conscience of the community and I submit to you that this case has been proven beyond a reasonable doubt. The testimony of [Victim] alone is proof beyond a reasonable doubt of his guilt. Her testimony was corroborated by numerous people, by his own words on that tape. [Victim] has no motive to lie, nothing to gain and she's had everything to lose. You have before you the most noble of opportunities, the chance to strike back against injustice and deliver a verdict which speaks the truth. Ladies and gentlemen, that verdict is guilty of incest, and guilty of attempting or committing a lewd act upon a child.

App. 572, l. 22 – p. 573, l. 10.

During the PCR hearing, trial counsel did not admit that he erred in failing to object to the solicitor's conscience of the community argument. App 715, l. 14 – p. 716, l. 14. The PCR court ruled that this conscience of the community argument did not infect the trial with such unfairness as to make his convictions the result of a denial of due process. App. 764-765.

As a rule, a solicitor's closing argument must not appeal to the personal biases of the jurors. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). In State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999), the court held that the solicitor's closing argument urging the jury to protect the community by keeping drugs off the street via a conviction of the defendant on conspiracy to traffick in cocaine constituted reversible error because the argument was calculated to appeal to the "jury's passions and prejudices by playing on the jury's fear of the impact of drugs on our society." Here, the solicitor's plea for the jurors to "strike back against injustice" and her reminder to them

that they are the "conscience of the community" constituted an appeal to the conscience of the community, which was so prejudicial that the same infected the trial with sufficient unfairness, (especially when coupled with the failure to testify argument), to deprive petitioner of his right to a fair trial. See State v. Hawkins, 292 S.C. 418, 357 S.E.2d 10 (1987); Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

Counsel's error in failing to object to this conscience of the community argument constituted deficient representation that fell below the standard of competence demanded of criminal attorneys. Counsel's error in this regard violated petitioner's right to the receipt of effective assistance of counsel at trial. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). But for the error, a reasonable probability exists that the outcome of petitioner's trial would have been different.

ARGUMENT III

Trial counsel erred in failing to move to challenge venireperson Susan New (juror #106) for cause and in failing to strike her from the petit jury because it was clear that she had been victimized by criminal sexual abuse in some form or fashion and would not have been an impartial juror in petitioner's case.

During the jury voir dire, juror New answered in the affirmative when asked if she had been the victim of criminal sexual conduct or knew of any family member or friend who had experienced criminal sexual conduct. App. 53, l. 10 – p. 56, l. 5. Nonetheless, juror New was seated on the petit jury in the case. App. 64, lines 22 – p. 65, l. 3. At the PCR hearing, petitioner argued in effect that counsel failure to move to challenge juror New for cause and excuse her from the petit jury constituted error. App. 711, l. 1 – p. 713, l. 13. The PCR judge ruled that the record was void of

any evidence that the juror New was unable to serve fairly and impartially, and that petitioner did not meet his burden of proving prejudice as a result of counsel's failure to strike juror New from sitting on the petit jury in petitioner's case. App. 772 – p. 773.

Trial counsel testified at the PCR hearing that venireperson New confessed that she had experienced some sort of connection with sexual abuse and that he intended to strike her, but admitted that for "whatever reason" he did not strike her. App. 707, l. 8 – p. 710, l. 7.; App. 712, l. 17 – p. 714, l. 4. Additionally, trial counsel acknowledged that juror New stood during the jury voir dire in response to the trial judge's question as to whether a venireperson had experienced any criminal sexual conduct, but that he did not strike her from the jury panel. Also, counsel admitted that he did not ask for any clarification regarding juror New's experience in connection with sex abuse. App. 710 . 2-12. Furthermore, note that the trial judge also failed to inquire of juror New about the nature of her criminal sexual encounter. App. 711, l. 6 – p. 712, l. 16. Relevant portions of the colloquy surrounding this issue follow:

> THE COURT: Has any member of the venire or any member of your family or any close friend ever been the victim, as far as you know, of criminal sexual conduct, criminal sexual conduct with a minor, committing or attempting a lewd act upon a minor child, incest, criminal domestic violence, child abuse, criminal assault, murder, assault and battery with intent to kill, assault and battery of a high and aggravated nature, robbery, burglary, kidnapping or any such crime? If so, please stand. This is if this question applies, regardless of whether any charges were brought or not. Your name and number, sir, on the front?
> JUROR: Bobby Gaillard, I don't know the number.
> THE COURT: What's your last name?
>
> JUROR: Gaillard.
>
> THE COURT: Number 52. Yes, sir?
>
> JUROR: Circuit Court, CDV.

THE COURT: Who was charged?

JUROR: I was charged.

THE COURT: Okay. One time?

JUROR: Yes, sir.

THE COURT: All right, just remain standing. The lady behind you, your name and juror number?

JUROR: Lucia Belcher, number 6. My daughter was a defendant.

THE COURT: Your daughter was a defendant?

JUROR: Yes. She was the one that the crime was committed against.

THE COURT: Your name and number?

JUROR: Number 49. My daughter has been convicted of murder.

THE COURT: Thank you. Remain standing, please. The lady in the whine [sic] blouse, would you say your name and number?

JUROR: Susan New, 106.

THE COURT: Thank you.

THE COURT: Yes, sir, Mr. Vermillion, say your name and number.

JUROR: Dalton Vermillion, 150. My daughter was a defendant.

THE COURT: She was a defendant?
JUROR: Yes, sir.

THE COURT: All right, sir. Remain standing, please. The lady behind you?

JUROR: Ruby White, 156, my brother was accused of murder.

THE COURT: Remain standing, please. Yes madam? The lady in blue?

JUROR: 33, I had - -

THE COURT: You had a family member what, now.

JUROR: Charged with murder.

THE COURT: Yes, ma'am, I'm sorry, I apologize to you madam. Okay.

JUROR: Frances Carter, number 25. I have a daughter who was a victim of domestic violence.

THE COURT: Thank you, madam. Remain standing, please. Yes, sir?

JUROR: Ronald Tiller, 146. My mother was a victim of domestic violence.

THE COURT: Thank you. Remain standing. Yes, ma'am.

JUROR: Martha Tucker, I had a brother was charged with murder.

App. 53, l. 11 – p. 57, l. 19.

Subsequently, the trial judge moved on to the next question without any query of Juror New about the nature of her criminal sexual contact.

As reflected above, is it obvious that this juror New was the only venireperson who did not give an explanation of her connection with sexual abuse and counsel failed to request that this information be revealed. Counsel admitted that obviously he did not want juror New on the petit jury and that she was a bad juror for petitioner's case. App. 717, l. 25 – p. 718, l. 8; App. 736, ll. 19-25.

It is the duty of the trial judge to ensure that every prospective juror is unbiased. State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

S.C. Code Ann. §14-7-1020 reads as follows:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is

> related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror is not indifferent in the cause, he must be placed aside as to the trial of that cause and another must be called.

Therefore, upon motion by either party, a trial judge must examine a prospective juror in or to ensure that he or she is unbiased. State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972). Also, after the statutory questions have been asked and answered, any further examination is left to the discretion of the trial judge. State v. Cherry, 353 S.C. 263, 577 S.E.2d 719 (2001). The trial judge must determine whether a juror must be disqualified or excused by law. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999); State v. Wise, 359 S.C. 14, 596 S.E.2d 475 (2004). Also, see United States v. Thompson, 744 F.2d 1065 (4th Cir. 1984), where the court held the trial judge erred in failing to excuse a juror who proved to be partial because he could not assure his impartiality.

Clearly, it was error for counsel to fail to request that the court conduct additional questioning of juror New to learn the details surrounding her apparent contact with the crime of criminal sexual conduct because of the potential likelihood of her being a biased juror in favor of the state's case against petitioner. Moreover, because juror New stood and acknowledged her criminal sexual experience, then counsel should have at the very least challenged juror New for cause and/or in the alternate moved to excuse her from the petit jury panel. And finally, counsel's error in failing to strike juror New from the petit jury panel denied petitioner his Sixth Amendment right to a trial by a fair and impartial jury, and the resulting prejudice is presumed. Compare cases where the erroneous seating of jurors resulted in presumed prejudice. State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999); State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999); State v. Floyd, 353 S.C. 55, 577 S.E.2d 215 (2003). Counsel's error in this regard violated petitioner's Sixth

Amendment right to effective assistance of counsel at trial, (see Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984)); such that that but for the error, a reasonable probability exists that the outcome of petitioner's trial would have been different as petitioner would have been tried by a jury of impartial jurors, which would have been his right under the Sixth Amendment also.

ARGUMENT IV

Trial counsel erred in failing to object to the trial judge's unconstitutional "moral certainty" instruction given in connection with the reasonable doubt charge because this lessened the state's burden of establishing petitioner's guilt beyond a reasonable doubt.

The trial judge's reasonable doubt charge follows:

> Where circumstantial evidence is undertaken by the prosecution in a criminal case to prove the guilt of an accused, not only must the circumstances be proven beyond a reasonable doubt, but they must also point conclusively, that is, to a moral certainty to the guilt of the accused. They must be wholly and in every particular perfectly consistent with each other and they must further be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused. You should weigh all of the evidence, Madam Forelady and ladies and gentlemen of the jury, and if after weighing all the evidence you are not convinced of the guilt of the defendant beyond a reasonable doubt you must find him to be not guilty.

App. 581, ll. 4-20.

During the PCR hearing, trial counsel testified in effect that there was no error with the "moral certainty" language and that this was approved and "consistent with the old Edwards charge." App. 701, l. 21 – p. 702, l. 1; App. 699, l. 17 – p. 701, l. 17.

The PCR judge ruled that:

> In the Applicant's case, the trial court used the "moral certainty" language one time, in the circumstantial evidence charge...and .... this court finds that, not only is the use of this language not reversible

> *per se*, [but] when read in its entirety, the trial court's use of this language did not result in burden shifting or a deprivation of the Applicant's right to a fair trial. Accordingly, this allegation is denied.

App. 770.

As a rule, this "moral certainty" language is disfavored. See Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009); Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003). In Battle, the "moral certainty" language was not held to be per se reversible error because the trial judge repeatedly (at least eight times) emphasized that the state had the burden to prove guilt beyond a reasonable doubt. See also Todd, where the court held that the reasonable doubt instruction in its entirety was sufficient to nullify the defective "moral certainty" language where the "moral certainty" language was used in connection with a full explanation of the "rule of righteousness" and reasonable doubt.

In the case at bar, the trial judge did not repeatedly emphasize the "beyond a reasonable doubt" standard in connection with the "moral certainty" language. Rather, the trial judge made a single reference to a "reasonable doubt" in the same breath that he mentioned "moral certainty." Also, even though the trial judge mentioned the proof beyond a reasonable doubt after giving the definition of the crimes charged, we clearly don't get repeated references to the "beyond a reasonable doubt standard" as in Battle to offset the erroneous "moral certainty" language.

Due process requires the state to prove a defendant guilty beyond a reasonable doubt and any definition that would lead the jury to convict on a lesser showing than what due process would require in a criminal case would constitute error. Todd v. State, supra, citing to Holland v. United States, 348 U.S. 121 (1954); Estelle v. McGuire, 502 U.S. 62 (1991). In the case at bar, the "moral certainty" language given in the trial judge's charge resulted in a constitutional violation and trial counsel erred in failing to object to the same. It is established that if a jury charge includes an

improper instruction where there is a reasonable likelihood that the jury applied the instruction in a way that violates the constitution, then the infirm instruction violated the defendant's due process rights. Battle v. State, supra; Todd v. State, supra. Here, trial counsel erred in failing to object to the trial judge's unconstitutional "moral certainty" instruction given in connection with the reasonable doubt charge because this violated the due process. Counsel's error violated petitioner's Sixth Amendment right to effective assistance of counsel at trial, (See Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984)), such that but for the error, the outcome of petitioner's trial would have been different.

ARGUMENT V

Trial counsel's cumulative errors denied petitioner effective legal representation to the extent that prejudice was presumed in his case.

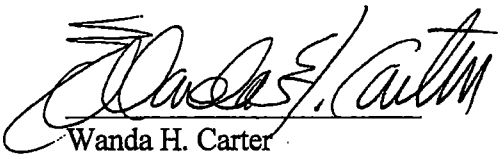
The numerous errors made by trial counsel in this case denied petitioner the right to effective legal representation and prejudiced his defense; and cumulatively speaking, counsel's ineffectiveness resulted in presumed prejudice in the case.

In Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988), the court held that counsel's ineffectiveness was so persuasive that the impact (personally cumulatively) of the errors in effect resulted in presumed prejudice. Collectively speaking, counsel's errors in the case at bar were so numerous and the prejudice so great, that petitioner was denied a fair trial. There can be no denying of the fact that counsel's representation was deficient and that the prejudice that resulted therein permeated the entire trial, all in violation of Strickland v. Washington, supra, and the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing arguments, petitioner requests that the Court grant the petition and allow full briefing on the issues.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of November, 2013

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MARK R. BOLTE,

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RESPONDENT

APPELLATE CASE NO. 2011-186252

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of November, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of November, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.