STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

CERTIORARI TO ABBEVILLE COUNTY

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No.: 2011-186252

Mark R. Bolte.....Petitioner,

v.

State of South Carolina.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. Did the PCR court properly find Counsel was not ineffective for not objecting to the solicitor's comments during the closing argument and the Petitioner failed to meet his burden of proving any resulting prejudice from Counsel's failure to object to the solicitor's closing argument?

II. Did the PCR court properly find Counsel was not ineffective for not objecting to the conscience of the community argument made by the solicitor and the Petitioner failed to meet his burden of proving any resulting prejudice from Counsel's failure to object to such argument?

III. Did the PCR court properly find the Petitioner failed to meet his burden of proving any resulting prejudice from Counsel's failure to strike Juror #106?

IV. Did the PCR court properly find Counsel was not ineffective for not objecting to the moral certainty instruction in connection with the reasonable doubt charge and the Petitioner failed to meet his burden of proving any resulting prejudice from Counsel's failure to object to such jury instructions?

V. Is the Petitioner entitled to Post-Conviction relief under a cumulative error analysis?

STATEMENT OF THE CASE

Mark R. Bolte, ("Petitioner"), was indicted at the October 2003 term of the Abbeville County Grand Jury for Incest, Committing or Attempting to Commit a Lewd Act upon a Child under Sixteen Years of Age, and Criminal Sexual Conduct With a Minor – first degree, and two counts of Criminal Sexual Conduct With a Minor-second degree (2003-GS-01-296). E. Charles Grose, Esquire, represented the Petitioner. On September 7-10, 2004, the Petitioner proceeded to trial on three of the aforementioned charges: Incest, one count of Criminal Sexual Conduct with a Minor-Second degree, and Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen Years of Age. The jury convicted the Petitioner of those charges as indicted. The Honorable Wyatt T. Saunders, Jr., sentenced the Petitioner to confinement for a period of twenty years for the criminal sexual conduct charge, fifteen years for the lewd act charge, and ten years for incest, all sentences running consecutively.

A timely Notice of Appeal was filed on the Petitioner's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The Petitioner also filed a *pro se* Anders response brief. The South Carolina Court of Appeals dismissed the Petitioner's appeal. State v. Bolte, Op. No. 2009-UP-361 (filed June 24, 2009). The Petitioner then filed a *pro se* Petition for Rehearing, which the Court of Appeals denied on August 25, 2009. The Remittitur was also issued on August 25, 2009.

The Petitioner subsequently filed an application for post-conviction relief (PCR) on December 23, 2009. The Respondent made its Return on April 16, 2010. On October 27, 2010, an evidentiary hearing was held at the Newberry County Courthouse. The Petitioner was present and represented by John E. Newlon, Esquire. The Respondent was represented by Jennifer A. Kinzeler of the South Carolina Attorney General's Office. On January 20, 2011, the Honorable Eugene C. Griffith, Jr. denied and dismissed the Petitioner's application with prejudice by

written Order. The Petitioner subsequently filed a Petition for Writ of Certiorari. The Respondent filed a Return to the Petition for Writ of Certiorari on January 27, 2012. This Court granted certiorari on September 18, 2013. Petitioner filed its Brief of Petitioner on November 18, 2013. This Brief of Respondent follows.

ARGUMENTS

I. The PCR court properly found Counsel was not ineffective for not objecting to the solicitor's comments during the closing argument and the Petitioner failed to meet his burden of proving any resulting prejudice from Counsel's failure to object to the solicitor's closing argument.

The Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for not objecting to the solicitor's comments in her closing argument. During her closing argument, the solicitor made the following comments regarding the testimony provided by both the State and the defense:

> ...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, ln. 23- App. 530 ln. 4).

The PCR court correctly held Counsel was not ineffective for not objecting to the solicitor's closing argument because these comments was proper, and the Petitioner failed to meet his burden of proving any resulting prejudice.

In a PCR action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Petitioner must prove counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

At the PCR hearing, Assistant Solicitor Suzanne Mayes ("Solicitor") testified her use of the word 'undisputed,' while referencing the facts of the case, "was not a comment on Mr. Bolte not testifying. That was a reference to the numerous witnesses presented throughout the case by both the State and then the witnesses offered by the defense and the fact that the testimony did corroborate the victim's account." (App. p. 655 ln. 24- App. p. 656 ln. 3).

The solicitor further explained while she did not qualify the term "undisputed" during her initial closing argument, she did qualify it during her subsequent closing argument.

> On that particular segment [during the first closing argument] it was very broad and I did not [qualify "undisputed"]. However, [during the second closing argument] I did. When I used the same term, undisputed, I stated when we talk about Mark Bolte and his control and isolation of [Victim] it is undisputed in this case. [Victim's] mom called by the defense as a defense witness confirmed every aspect of that.

(App. p. 663 ll. 16-22).

"A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999). "If a solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999).

The PCR court correctly held the solicitor's comments were proper in context with the evidence that was presented at trial. The PCR court explained "[t]he solicitor's remark that the facts of this case were "undisputed" was based on her version of the testimony presented by the State and the defense, rather than a suggestion that the Applicant was under any duty to testify." (App. p. 761). Additionally, the PCR court held "[t]he solicitor's comment did not refer to the Applicant's right to or failure to testify in any way." (App. p. 762). Furthermore, the PCR court was able to judge the credibility of the witnesses presented at the hearing, including Ms. Mayes, and properly found "[i]t is clear from a review of the entire record, which the PCR court had before it, that the solicitor's remark was a clear reference to the defense's witnesses whose testimony did not dispute the testimony and evidence presented by the State." (App. p. 761-762). Thus, the PCR court correctly found the solicitor's comments were proper.

Moreover, even assuming *arguendo* the comments were improper, the PCR correctly held the trial court eliminated any prejudice to the Petitioner with its instructions to the jury concerning the Petitioner's right to remain silent.

If a solicitor makes an improper comment on the defendant's decision not to testify, a curative instruction emphasizing to the jury that it cannot consider his decision not to testify will cure any potential error. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The trial court stated "it is emphasized to you that the fact that a defendant does not

testify on his own in a criminal trial is not a factor to be considered by you in any way in your deliberations." (App. 586) The trial court also explained:

> A defendant has the constitutional right to remain silent. The assertion of that constitutional right cannot and must not be considered by you in your deliberations. Under your oath, then, you are to draw no inference and reach no conclusions whatsoever from the fact the defendant in this case did not testify.

(App. p. 587).

Furthermore, the trial court again instructed: "it's emphasized to you that the facts a defendant does not testify is not a factor to be considered by you in determining the guilt or innocence of a defendant or in any other aspect of your deliberations." (App. p. 587). Clearly, the trial court's instructions stressed the jury's inability to use the Petitioner's right to remain silent against him and cured any potential error on the part of the solicitor. Thus, the PCR court correctly held "any prejudice caused by the solicitor's remarks was eliminated by the trial judge's instruction to the jury prior to deliberation, which emphasized... that [Petitioner's] decision to exercise his constitutional right not to testify was not a factor to be considered by them." (App. p. 762).

Accordingly, there is clear "evidence of probative value" to support the PCR judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

II. The PCR court properly found Counsel was not ineffective for not objecting to the "conscience of the community" argument made by the solicitor and the Petitioner failed to meet his burden of proving any resulting prejudice from Counsel's failure to object to such argument.

The Petitioner asserts the PCR court erred in finding Counsel was not ineffective for not objecting to the solicitor's "conscience of the community" argument during her closing argument. During her closing argument, the solicitor made the following comments:

> 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 criminal sexual conduct with a minor, guilty of incest, and guilty of attempting or committing a lewd act upon a child. Thank you.

(App. p. 572 ln. 1- App. p. 573 ln. 11).

The PCR court properly dismissed this allegation. The PCR court also correctly held Counsel was not ineffective for not objecting as this argument was proper, and the Petitioner failed to meet his burden of proving any resulting prejudice.

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). Additionally, our Supreme Court has held:

> So long as [she] stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.

New at 319, 526 S.E.2d at 240 (citing State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975)); 23A C.J.S. Criminal Law § 1107.

At the PCR hearing, the solicitor testified although she might avoid that particular language in a closing argument today, she found nothing objectionable about the argument in this case. She stated "[i]n terms of the strike back against injustice, I do not find that objectionable at all." (App. p. 666 ll. 21-22) Further, she added "I can only say in that particular case I don't see it [conscience of the community argument] as appealing to anything in particular other than reminding them that they are here for jury duty and they are the conscience of the community in that role." (App. p. 667 ll. 4-7).

The PCR court found when "reviewing the solicitor's comments in the context of the entire record as the Court is required to do, the comments did not 'so infect the trial with unfairness as to make the resulting conviction a denial of due process.'" (App. p. 765). The PCR court also reasoned the solicitor did not inject her personal opinion into the proceeding with her comments and did not attack the courage or lack thereof to convict or acquit the Petitioner. The PCR court further explained the comment came at the end of her closing argument, was isolated to one instance, and the trial court instructed the jury the attorneys' arguments were not evidence to be considered in their deliberations. (App. p. 765). Thus, the PCR court correctly held the solicitor's comments concerning the "conscience of the community" were proper.

Accordingly, there is clear "evidence of probative value" to support the PCR judge's findings. Cherry, *supra.* Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

III. The PCR court properly found the Petitioner failed to meet his burden of proving any resulting prejudice from Counsel's failure to strike Juror #106.

The Petitioner asserts the PCR court erred in finding that Counsel was not ineffective for not striking Juror #106 (Susan New). The PCR court properly dismissed this allegation. The

PCR court also correctly held the Petitioner failed to meet his burden of proving any resulting prejudice of Counsel's failure to strike Juror #106.

During the jury voir dire, the trial court conducted the usual colloquy concerning any potential biases the venire people might have. Included is the court's following question:

> 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 domestic abuse...or any such crime? If so, please stand. This is if this question applies, regardless of whether any charges were brought or not.

(App. p. 53 ll. 11-22)

At that time, Juror New stood in response to this question. The trial court then inquired as to each juror's reason for standing up. When Juror New was questioned, the trial court asked "The lady in the whine(sic) blouse, would you say your name and number?" (App. p. 54 ll. 21-22). Juror New responded "Susan New, 106." (App. p. 54 ln. 23). The trial court said "Thank you" and moved on to the next juror. (App. p. 54 ln. 24). Subsequently, the trial court inquired:

> As to each of you who are standing, who have responded to the question that either you, a close friend of yours or a member of your family has been the victim of a crime and/or charged with a crime, as the case may be, would that in any way at all affect your ability to be absolutely fair and impartial both to the State of South Carolina and to the defendant Mark Richard Bolte?

(App. p. 56 ll. 7-14).

Each standing juror was then asked their response to this question by the trial court. Presumably, Juror New said "no, sir" as the only venire people answering in the affirmative were Mr. Vermillion and Juror #73, both of whom were excused from the jury pool. (App. p. 56 ln. 16- App. p. 57 ln. 19). Additionally, the trial court asked: "Is there any member of the venire who feels that he or she would be unable to give the State of South Carolina and the defendant Mark Richard Bolte a fair and impartial trial, based upon anything whatsoever? If so, please

stand." (App. p. 58 ll. 21-25). To this question, there were no responses. Juror New, along with eleven other jurors, was seated on the jury. After all of the evidence was presented and during the jury instructions, the trial court repeatedly emphasized the jurors must base their verdicts solely on the testimony and evidence presented at trial and nothing else. (App. p. 576 ll. 14-17, p. 581 ll. 15-20, p. 581 ln. 21- p. 582 ln. 5, p. 583 ll. 13-16).

At the PCR hearing, Counsel testified he believes he intended to strike Juror New because he made notes before and during voir dire that listed Juror New as a possible crime victim. (App. p. 707 ln. 21- App. p. 708 ln. 11). Counsel also testified there was an unusual number of people who stood in response to the trial court's questions during voir dire, and he had to process so much information concerning the potential jurors. (App. p. 713 ll. 4-11). Counsel then explained even though he had a pretrial list of jurors to strike that included Juror New, this information must have been lost somehow, as she was picked for the jury. (App. p. 713 ll. 11-13). Lastly, Counsel testified although he made a mistake in not striking Juror New, it was ultimately the PCR court's decision to judge whether the Petitioner was prejudiced by the mistake, as there were eleven other jurors on the Petitioner's jury who unanimously found him guilty. (App. p. 718 ll. 3-5).

The PCR court held "the record is void of any evidence that the juror [Juror New] was unable to serve fairly and impartially." (App. p. 773). Additionally, the PCR court explained the trial court inquired at the end of voir dire if there was any member of the venire who felt he or she could not be fair or impartial to both parties for any reason whatsoever, at which time there were no responses. (App. p. 773). The PCR court lastly held the Petitioner failed to present any evidence which established his right to a trial by a competent and impartial jury was violated and thus, failed to meet his burden of proving resulting prejudice from Counsel's failure to strike

Juror New. (App. p. 773).

"[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). In PCR, the Petitioner must provide credible evidence that Counsel's refusal to strike a juror prejudiced the defense. Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004). Additionally, jurors are presumed to follow the instructions of the trial court. State v. Queen, 264 S.C. 515, 521 216 S.E.2d 182, 185 (1975).

In this case, Juror New stood in response to the trial court's question concerning being a victim of criminal sexual conduct or abuse. While she was not questioned about the details of how she or someone close to her was a victim of criminal sexual conduct or abuse at that time, the trial court subsequently asked Juror New, as well as the other jurors, whether or not the fact that she was a victim or knew of someone who was would affect her ability to be a fair and impartial juror in this case. Juror New affirmatively answered it would not affect her ability to be fair and impartial. Later, the trial court asked yet again whether Juror New, or the other eleven jurors, had any reason whatsoever that would affect her ability to be a fair and impartial jury to both parties in this case. To this, she did not respond, indicating she could be a fair and impartial juror.

The Petitioner has presented no evidence to the contrary. As jurors are presumed to follow the instructions of the trial court, Juror New is presumed to be a fair and impartial juror in this case. To claim Juror New was partial to either party in light of the trial court's questions or to claim Juror New had a decisive outcome on this trial, as Petitioner's PCR Counsel claimed (App. p. 744 ll. 2-5), would be purely speculative. Because the trial court sufficiently questioned Juror New as to any potential biases she may have had and because the Petitioner presented no

evidence Juror New was not fair and impartial, the PCR court correctly denied this allegation.

Furthermore, the Petitioner claims prejudice is presumed due to Counsel's failure to strike or further question Juror New's criminal sexual experience. This analysis is flawed. The Petitioner compares this case to cases in which the erroneous seating or the excusing of jurors resulted in prejudice. *See* State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999) (trial court erred in finding Appellant's strike of prospective juror violated Batson[1]; State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999) (prejudice found when Appellant was denied the right to exercise a peremptory challenge); State v. Floyd, 353 S.C. 55, 577 S.E.2d 215 (2003) (trial court erroneously excused a juror for refusing to take a religious oath). Both Ford and Short were concerned with the denial of the right to exercise peremptory challenges in a Batson context. Floyd proved prejudice through the trial court refusing to seat a juror who would not take a religious oath. This case is readily distinguishable because it deals not with race or religion, but, as the Petitioner claims, with alleged bias on the part of a potential victim of criminal sexual conduct. Those cases are inapplicable because this case does not involve presumed prejudice as would a case involving race or religion. In this context, the Petitioner would have to produce some credible evidence that Juror New was biased and partial to the State during her service as a juror. The Petitioner has simply failed to do so. As a result, the Petitioner has failed to prove the prejudice prong of the Strickland analysis.

Accordingly, there is clear "evidence of probative value" to sustain the PCR judge's findings. Cherry, *supra*. Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

IV. The PCR court properly found Counsel was not ineffective for not objecting to the moral certainty instruction in connection with the reasonable doubt charge and the Petitioner failed to meet his burden

1 Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986).

of proving any resulting prejudice from Counsel's failure to object to such jury instructions.

The Petitioner asserts the PCR court erred in finding Counsel was not ineffective for not objecting to the trial court's 'moral certainty' jury charge in connecting with reasonable doubt. During the jury instructions, the trial court instructed:

> Where circumstantial evidence is undertaken by the prosecution in a criminal case to prove the guilt of the 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. p. 581 ll. 4-20). The PCR court correctly held Counsel was not ineffective for not objecting as this charge was proper in the context of the entire record, and the Petitioner failed to meet his burden of proving any resulting prejudice.

"[M]oral certainty" language, although not *per se* reversible error, is disfavored." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009). However, where the trial court emphasizes the State has the burden to prove guilt beyond a reasonable doubt, this charge is acceptable and does not shift the burden of proof to the Petitioner. Id. Additionally, where a trial court mentions "'moral certainty,' ...the moral certainty language cannot be sequestered from its surroundings." Todd v. State, 355 S.C. 396, 403, 585 S.E.2d 305, 308-09 (2003) (also holding the trial court effectively communicated the State's burden of proving the Defendant's guilt beyond a reasonable doubt through its careful articulation of the reasonable doubt and circumstantial evidence standards).

At the PCR hearing, Counsel testified the trial court's reasonable doubt charge was the charge which was typically given. (App. p. 700). Counsel also testified he was familiar with the Battle case, which affirmed a reasonable doubt charge containing 'moral certainty' language. (App. p. 701). Counsel further explained this charge was consistent with the "old Edwards[2] charge that the defense is always asking for." (App. p. 701-702).

The PCR court held the reasonable doubt charge given in this case was almost identical to the instruction in Battle. (App. p. 770). Additionally, the PCR court explicated the issue in this case was analogous to the issue in the Battle case, in that viewing the reasonable doubt charge in its entirety and not in isolation, there was no reasonable likelihood the jury applied the trial court instruction in a way that violated the Constitution because of the repeated emphasis that the State has the burden to prove the Petitioner's guilt beyond a reasonable doubt. (App. p. 770).

Here, the 'moral certainty' language must be read in context with the entire jury charge and not in isolation. Contrary to the Petitioner's assertion that the trial court did not reinforce the reasonable doubt standard, the trial court emphasized the State's burden of proof at least eleven times in its jury instructions. (App. p. 574 ll. 8-13, p. 574 ll. 19-22, p. 575 ll. 10-13, p. 581 ll. 4-7, p. 584 ll. 7-9, p. 584 ll. 19-21, p. 585 ll. 4-9, p. 586 ll. 2-6, p. 587 ll. 13-19, p. 588 ll. 1-2, p. 588 ll. 20-24). Through the repeated emphasis, the trial court carefully articulated the State's burden of proving the Petitioner's guilty beyond a reasonable doubt as to eliminate any hint of burden shifting to the Petitioner. Since this charge was correct in this context, Counsel was correct in his decision not to object to this jury instruction. Thus, the PCR court correctly held Counsel was not ineffective for not objecting to the 'moral certainty' language in the reasonable doubt jury charge.

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2 Edwards v. State, 298 S.C. 272, 379 S.E.2d 888 (1989).

Accordingly, there is clear "evidence of probative value" to sustain the PCR judge's findings. Cherry, *supra*. Therefore, the Petitioner has failed to meet his burden of proof as to this argument.

V. The Petitioner is not entitled to relief under a cumulative error analysis.

The Petitioner asserts Counsel committed errors which cumulatively prejudiced the Petitioner's case. First, Counsel did not commit prejudicial errors in his handling of this case. Second, to the extent Counsel did commit errors in this case, the Petitioner has failed to produce credible evidence of resulting prejudice. And third, a cumulative error analysis has not been applied in this type of a case under South Carolina law.

"Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

In this case, Counsel testified he should have objected to the solicitor's closing argument and should have stricken Juror New during jury selection. Even assuming these instances were, in fact, errors, the Petitioner has produced no credible evidence Counsel's decisions resulted in prejudice to his case. Additionally, the trial court eliminated any potential prejudice through its instructions to the jury both during voir dire and jury charges. Moreover, none of these instances are related to each other, further eradicating the possibility of these instances combining to produce prejudice. Since the Petitioner produced no credible evidence of prejudice and because the South Carolina Supreme Court has not held a cumulative error analysis applies in this type of a case, the Petitioner has failed to meet his burden of proof as to this argument.

CONCLUSION

For all the foregoing reasons states above, Respondent respectfully requests the judgment of the lower court be affirmed.

Respectfully submitted,

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January 30, 2014

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO ABBEVILLE COUNTY
Court of Common Pleas

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

MARK R. BOLTE,

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Brief of Respondent on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Office of Indigent Defense
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I further certify that all parties required by Rule to be served have been served.

This 30TH day of January, 2014.

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