STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

ILA MICHELLE CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001293

PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED

I.

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to challenge the county corner's qualifications to render expert opinion testimony on the existence and applicability of battered child syndrome in the Petitioner's case when the Coroner did not have any professional experience or medical education in psychology enabling him to make such a diagnosis?

II.

Whether Petitioner's Sixth Amendment rights were violated when counsel failed to object to the solicitor's closing arguments which inferred that Petitioner's invocation of her Fifth Amendment right to counsel was evidence of her guilt where counsel opened the door to this otherwise inadmissible evidence in undertaking an objectively unreasonable trial strategy, based on an erroneous understanding of constitutional law; thus so infecting the trial with unfairness as to make the resulting conviction a denial of due process?

STATEMENT

Indictment

Petitioner was indicted by the Anderson County Grand Jury on March 27, 2001 for Homicide by Child Abuse and on May 1, 2001 for Great Bodily Injury on a Child. App. 946-949.

Jury Trial and Direct Appeal

On June 25, 2001, Petitioner proceeded to a jury trial before the Honorable John W. Kittredge. App. 1 – 733. Petitioner was represented by Robert Gamble (hereinafter "counsel"), and the State was represented by Circuit Solicitor Druanne White. App. 1.[1] The jury found Petitioner guilty on both charges. App. 726, ll. 3-19. Judge Kittredge sentenced Petitioner to life imprisonment for Homicide by Child Abuse and a consecutive twenty year term for the Great Bodily Injury charge. App. 732, ll. 10-14.

A notice of appeal was filed and an *Anders* brief was submitted on Petitioner's behalf by Joseph Savitz III.[2] App. 753 – 762. The South Carolina Court of Appeals dismissed the appeal by an unpublished opinion, *State v. Ila Carter*, Op. No. 2003-UP-160 (S.C.Ct. App. filed February 25, 2003).

Post-Conviction Relief and Evidentiary Hearing

On February 7, 2004, Petitioner filed an application for post-conviction relief. App. 763-835. On October 5, 2004, Respondent filed its Return. App. 836-840. An evidentiary hearing was

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[1] On September 4, 2013, counsel was suspended from the practice of law for a definite period of time not to exceed eighteen (18) months. *In Re Gamble*, 405 S.C. 436, 748 S.E.2d 219 (2013). Counsel was arrested for misuse of county and state funds and habitual neglect of duties. *Id.* at 436-437, 748 S.E.2d at 219. He was allowed to enter a Pre-Trial Intervention Program in exchange for the charges being *nol prossed* and expunged. *Id.* Counsel had previously received a public reprimand after he pled guilty to one count of willfully and knowingly failing to timely file a federal income tax return. *In re Gamble*, 278 S.C. 651, 300 S.E.2d 737 (1983).

[2] *Anders v. California*, 386 U.S. 738 (1967).

held on October 7, 2010 before the Honorable J. Cordell Maddox. App. 842- 936. Petitioner was represented by Tara Shurling and Assistant Attorney General A. West Lee represented the State. App. 842. On January 4, 2012, Judge Maddox filed an Order of Dismissal denying Petitioner's PCR application. App. 937- 938. Subsequently, on January 5, 2012, Petitioner filed a Rule 59(e) SCRCP Motion to Alter or Amend to conform the Order of Dismissal to the testimony presented at the evidentiary hearing. App. 947-942. On May 19, 2014, Judge Maddox issued a second Order of Dismissal incorporating the grounds raised by Petitioner's motion, but denying Petitioner's PCR application. App. 953 -954. Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

I.

Petitioner's Sixth Amendment rights were violated when counsel failed to challenge the county corner's qualifications to render expert opinion testimony on the existence and applicability of battered child syndrome in the Petitioner's case when the Coroner did not have any professional experience or medical education in psychology enabling him to make such a diagnosis.

Relevant Facts

On October 14, 2000, Petitioner and her husband, Derek Carter, brought their minor child to Greenville Memorial Hospital because she was experiencing seizures. App. 186, ll. 20-25. Petitioner informed the doctor's treating the minor child that she had tested positive for lupus and was generally clumsy. App. 306, ll. 15-24. Minor child died three days later. App. 459, ll. 4-15. An autopsy conducted by Dr. Brett Woodard, a forensic pathologist and county coroner, revealed minor child died as a result of a subdural hematoma likely caused by a blow to the head. App. 268, ll. 3-16. The autopsy also revealed a pattern of bruising and evidence of malnutrition. App. 255, ll. 23 – App. 226, ll. 17; App. 250, ll. 8-24. Based on this information, the hospital contacted law enforcement which then opened an investigation into the minor child's death. App. 369, ll. 1-6.

Pre-Trial Hearing and Expert Testimony at Trial

At trial, the State sought to introduce evidence of alleged prior abuse to the minor child through the testimony of Dr. Woodard. App. 93, ll. 15-25. The State sought to show to show the similarities between the fatal injury and previous injuries; suggested a common scheme or plan on the part of Petitioner and husband pursuant to *State. v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). *Id.* The State explained that Dr. Woodard would give opinion testimony on the applicability and relevance of battered child syndrome to Petitioner's case and testify that the injuries on the minor

child could not be self-inflicted because of their locations on the body and the minor child's developmental level. *Id.*

Counsel declined to challenge the proposed testimony, stating "I personally think it's going to have to be admissible....I don't know of any way I challenge it because it's been recognized in this State as a valid syndrome." App. 94, ll. 13-19. Counsel also declined to challenge Woodard's qualification to render an opinion on the syndrome. *Id.* Woodard had previously testified in the trial of Petitioner's husband, which ended in a guilty plea. *Id.* at ll. 20 – App. 95, ll. 4. At Petitioner's trial, the state established Woodard's professional background: graduate of Tulane School Medicine, completed an internship in pediatrics, and a pathology residency. App. 183, ll. 3-10. He began practicing in Anderson in 1982 as a licensed forensic pathologist. App. 184, ll. 1-10. He was recognized by the trial judge as an expert in forensic pathology. *Id.* at 11-17.

Woodard testified that, in his expert opinion, the minor child suffered from battered child syndrome because: (1) the autopsy revealed "repetitive instances of non-accidental trauma," (2) his analysis of Petitioner's answers to the October 25, 2000 questionnaire and (3) the Petitioner's October 26th statement."[3] App. 211, ll. 19 – App. 212, ll.10. The State provided Woodard with an article titled, "The Battered Child Syndrome" which he identified as "one of the initial articles concerning battered child syndrome that was brought to the attention of the medical community. And it is one of the basic or referee [*sic*] or quoted articles when this subject is brought up". App 210, ll. 9-21. Woodard posited that the minor child would not have the knowledge or developmental ability to strategically self-inflict wounds in easily concealed areas. App. 213, ll. 4-

22. He testified that the article on battered child syndrome provided by the State advised that perpetrators of child abuse insulate themselves from the abusive events and that seeking healthcare is typically separate in time from the infliction of the abuse. App. 211, ll. 6-18. *Id.*

Woodard relied on the above-referenced article at length in his testimony. For example, Woodard stated that, in his opinion, Petitioner's October 26, 2000 statement was a classic example of a perpetrator's story in a case of battered child syndrome:

> "Again, just from what you had me read in the article, that is one of the classic medical diagnostic things that are looked for in battered child syndrome where the care giver trolls with different stories, if you will, to try and find something that the healthcare givers will say, oh, well, I guess that's okay. That explains it. So there's a repetitive changing of stories sort of looking for a story that you will believe or accept versus one that I started out telling.

App. 214, ll. 11-19. Woodard further testified that, in keeping with the syndrome, Petitioner did not immediately report all of minor child's injuries to medical authorities and told conflicting stories to explain the injuries. App. 215, ll. 1-10. Specifically, Woodard theorized that he would have expected a reasonably prudent, non-abusive adult to "either take the child in a panic stricken behavior to the nearest emergency or I'd call 9-1-1 for immediate assistance." App. 215, ll. 10-12. Woodard's testimony concluded with an explanation of the cause of death, the admission of autopsy photographs into evidence, and other results from his autopsy. App. 215, ll. 16- App. 261, ll. 13.

PCR and Evidentiary Hearing

At the evidentiary hearing, Counsel conceded that Woodard had only been qualified as a forensic pathologist and had presented no credentials suggesting an expertise in psychology

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[3] The questionnaire was drafted by law enforcement to determine the cause of the minor child's death and the role Petitioner and husband may have had. App. 368, ll. 11 – App. 369, ll. 18. Petitioner and her husband completed the questionnaire individually at the Sherriff's Department. *Id.* Their answers provided law enforcement with information later used to interrogate Petitioner; ultimately leading her to make October 26th statement admitting to abusing the minor child. *Id.*

allowing him to comment on Petitioner's state of mind or on the mental development of a child. *Id.* Counsel candidly admitted that he should have objected to Woodard's testimony:

> PCR Counsel: ... Dr. Woodard giving an opinion on this issue [battered child syndrome], which would deal with the psychological development of this child, would be outside the scope of his expertise?
>
> Counsel: Yes.
>
> PCR Counsel: Do you agree with that?
>
> Counsel: I agree with that.
>
> PCR Counsel: And you didn't object to this testimony, did you?
>
> Counsel: I did not.
>
> PCR Counsel: Should you have?
>
> Counsel: In retrospect, yes.

App. 875, ll. 23 – App. 876, ll. 8. Counsel acknowledged that the testimony allowed the State to infer that, in light of this syndrome, Petitioner was responsible for deliberately inflicting injuries on the child. App. 876, ll. 23 – App. 877, ll. 5. Counsel also testified that his familiarity and professional respect for Woodard may have influenced his decision to not object to the expert opinion on battered child syndrome. App 875, App. 2-8; App. 900, ll. 15-25.

Order of Dismissal

The PCR Court held that, despite Woodard's testimony being objectionable, counsel was not ineffective because the testimony on battered child syndrome did not have any effect on the outcome of the trial. App. 941. Further, the court held, in conclusory fashion, that counsel stated valid reasons for not objecting to Woodard's testimony. *Id.*

Discussion

Counsel's failure to object to Dr. Woodard's opinion testimony regarding battered child syndrome, which was beyond the scope of his expertise as a forensic pathologist, constituted deficient performance under prevailing professional norms. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). To establish ineffective assistance of counsel, the Petitioner must satisfy a two-prong test set forth in *Strickland. Id.* at 687-88, 104 S.Ct. at 2064. "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). *v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067).

The second prong of the *Strickland* test requires a showing that the deficient performance of counsel prejudiced the petitioner to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 117-118, 386 S.E.2d at 625. Specifically, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068); see also *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Deficient Performance

Rule 702 of the South Carolina Rules of Evidence governs the admission of expert testimony as an exception to general rule that witnesses must testify from personal knowledge:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an *expert by knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion or otherwise.

(*emphasis added*). Expert opinion testimony on the ultimate issue in a case is not objectionable because it embraces an ultimate issue to be decided by the trier of fact, but such testimony must be otherwise admissible. Rule 704, SCRE, *State v. Wilkins*, 305 S.C. 272, 276, 407 S.E.2d 670, 672 (*citing* Rule 704, SCRE).

An expert's testimony may not exceed the scope of his expertise. *State v. Ellis,* 345 S.C. 175, 547 S.E.2d 490 (2001) (finding police officer, qualified as an expert in crime scene processing and fingerprint identification, exceeded the scope of his expertise when he testified to conclusions drawn from the location and position of the victim's body at the time of the shooting). Competency to testify as an expert requires a witness to "have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Gooding v. St. Francis Xavier Hosp.,* 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). Expert medical testimony on the cause of death or injuries has the potential to invade the province of the jury where the medical expert's testimony only enhances the circumstantial evidence available to the jury with the prestige of medical expertise. *State v. Commander,* 396 S.C. 254, 267, 721 S.E.2d 413, 420 (2011). Expert testimony addressing the state of mind or guilt of the accused is inadmissible. *Id.*

South Carolina courts have long held that medical experts, once qualified, may render an opinion concerning the scientific bases of a victim's injuries or death in a criminal trial. *Id.* at 265, 721 S.E.2d at 419. South Carolina law requires medical examiners to make an initial inquiry, forming the basis of a medical conclusion, as to the cause and manner of death in certain instances. *See* S.C.Code Ann. § 17–5–530(A)(5) (Supp.2010) ("If a person dies ... in any suspicious or unusual manner ... a person having knowledge of the death immediately shall notify the county coroner's or medical examiner's office). However, pathologists are limited to testifying on the

mechanical aspects of certain injuries or a cause of death; such as: the number and extent of the wounds, the amount of bleeding, whether the wounds were caused by a knife or a blunt instrument, whether a gunshot wound is a contact wound, whether the wounds could or could not have been the result of an accident, or the cause of death. *Commander* at 268, 721 S.E.2d at 421 (quoting *State v. Provost,* 490 N.W.2d 93, 101–02 (Minn.1992)). Pathologists are not allowed to testify on the intent to kill or injure from their findings. *Id.*

In contrast with pathologists and medical examiners, psychologists are qualified by virtue of their specialized training and education to give expert opinion as to an individual's mental and emotional condition. *Howle v. PYA/Monarch, Inc.*, 344 S.E.2d 157, 160 (Ct. App. 1986) (*citing Kravinsky v. Glover*, 263 Pa.Super. 8, 396 A.2d 1349 (1979)). In order to testify as to an accused's state of mind, a perspective expert must state what training or specific experience enabled the expert to comment as to the accused's state of mind at the time of the incident. *State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995) (licensed clinical psychologist with four years of mental health experience and six months of counseling with defendant was not qualified to render an opinion as to defendant's state of mind at the time of the incident). Moreover, an expert witness is not necessary to testify to the existence of prior injuries, but only a properly qualified expert may offer a conclusion that a child has been a victim of the battered child syndrome. *State v. Lopez*, 306 S.C. 362, 366, 412S.E.2d 390, 393 (1991) (diagnosis of a victim's injuries and determination of the cause of those injuries based on the symptoms is beyond the ability of the average trier of fact and a qualified expert opinion is essential for the trier of fact to connect the physical findings to a cause). Therefore, qualifications for expert witnesses in child abuse cases focus on whether the proffered expert possessed the requisite skill, training, experience, learning, and knowledge to render a psychiatric or psychological diagnosis of the victim and the abuser.

There is nothing in the trial record suggesting that Woodard had the requisite skill, training, experience, learning, and knowledge to render a conclusion that minor child was suffering from battered child syndrome and that the Petitioner was the source of the abuse. Woodard never interviewed Petitioner. His diagnosis of Petitioner's alleged state of mind, based on his assumption that she was the perpetrator of the child abuse, was totally reliant on second hand information provided by law enforcement. App. 211, ll. 19 – App. 212, ll.10. Woodard's background only supports his qualification as an expert witness in forensic pathology and as such his testimony should have been limited to the existence of prior injuries based on the autopsy and the mechanical or physical aspects of the cause of death. App.183, ll. 2 – App. 184, ll. 13.

Counsel had an obligation to object to excludable testimony and improper evidence, or his decision to no object must be based on an objectively reasonable trial strategy. *Dawkins v. State*, 346 151, 156, 551 S.E.2d 260 (2001) (counsel deficient in criminal sexual conduct case for failing to object to introduction of inadmissible evidence); *See also Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness"). The State's emphasis at trial on Woodard's limited pediatrics background to suggest an expertise in child psychology was misleading and counsel admitted he should have objected to the testimony. App. 875, ll. 23 – App. 876, ll. 8. Counsel was aware of Woodard's background but, nevertheless, failed to act on this knowledge. App.877, ll. 2-3. The State was able to use Woodard's testimony to improperly augment circumstantial evidence available to the jury with the "prestige of medical expertise." *Commander* at 267, 721 S.E.2d at 420.

Therefore, counsel's failure to object to Woodard's testimony on battered child syndrome fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland,* 466 U.S. at 692, 104 S.Ct. at 2067.

Prejudice

As to prejudice, counsel's failure to object to the improper testimony "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2068). Woodard's testimony inextricably linked the minor child's injuries to the Petitioner on the basis of a psychological condition that Woodard was not qualified to testify on.

His testimony on battered child syndrome was especially prejudicial because the jury legitimately relied on his expertise as the medical examiner who conducted the autopsy to determine the physical cause of minor child's death. *State v. Douglas*, 380 S.C. 499, 505, 671 S.E.2d 606, 610 (2009) (Pleicones, J., dissenting) (qualification as an expert clothes the witness with an air of authority that does not attach to "ordinary" witnesses); *See also State v. White*, 372 S.C. 364, 388, 642 S.E.2d 607, 619 (Ct. App. 2007) (expert testimony runs the risk of the jury according it more credibility and weight than is appropriate).Woodard's testimony went to the critical issue in Petitioner's case and, therefore, could not be harmless. *Id.* (improper non-expert opinion testimony which goes to the heart of the case is not harmless on); *See also In Re Thomas*, 402 S.C. 373, 380, 741 S.E.2d 27, 30 (2013) (trial court erred in allowing opinion testimony of defendant's social worker, she was not qualified as an expert and presented the only evidence suggesting defendant would reoffend).

Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. at 688, 104 S.Ct. at 2062. Thus, the PCR judge erred in holding that counsel provided effective assistance of counsel. *Id.*

II.

Petitioner's Sixth Amendment rights were violated when counsel failed to object to the solicitor's closing arguments which inferred that Petitioner's invocation of her Fifth Amendment right to counsel was evidence of her guilt where counsel opened the door to this otherwise inadmissible evidence in undertaking an objectively unreasonable trial strategy, based on an erroneous understanding of constitutional law; thus so infecting the trial with unfairness as to make the resulting conviction a denial of due process.

Relevant Facts

Pre-Indictment Investigation and Interrogation

On October 25, 2000, one week after the death of Petitioner's step-child, Petitioner and her husband were taken to separate rooms at the Sheriff's department to complete a questionnaire on the circumstances of the minor child's death. App. 114, ll. 4-9; App. 742 – App. 752. Investigator Jean Sutton led Petitioner and her husband to separate interrogation rooms. App. 114, ll. 3-19. Each was left alone to complete the questionnaire. *Id.* Investigator Sutton would testify in the *Denno* hearing that Petitioner and her husband were not in custody at the time of the questionnaire and were free to leave. App. 114, ll. 20-23. However, Petitioner was never told that she was free to leave or that the questionnaire was optional.

Once Petitioner completed the qu`estionnaire, she was told by Investigator Sutton to get lunch and return to the station after. App. 121, ll. 21-23. During a pause in questioning, Petitioner asked if she could pick up her three remaining children, but was told that the children were being brought to her. App. 678, ll. 5-14. Petitioner also asked about her husband's whereabouts; law enforcement suggested that she "go get lunch for herself. Go get lunch for Derek." App. 119, ll. 11-23. At 5:00 P.M. Investigator Sutton reinitiated the interrogation and *Mirandized* Petitioner for the first time App. 128, ll. 10-24; App. 734. Sutton questioned Petitioner on her answers to the questionnaire. *Id.* During the interview, Petitioner was told her husband was cooperating with law enforcement. App. 664, ll. 22-25. At that point she invoked her right to counsel. App. 136, ll.4-11.

Immediately thereafter, law enforcement executed search warrants for the couple's vehicle and residence. App. 125, ll. 1-6. The vehicle was searched at law enforcement's impound lot. App. 408, ll. 16-25. As the van was her only vehicle, Petitioner was unable to leave the Sheriff's department during the search. *Id.* Petitioner drove home escorted by police cars in front and without her husband who remained in custody. App. 146, ll. 13-20. The search of Petitioner's residence was conducted with Petitioner present and concluded at 1:00 A.M. App. 149, ll. 1-3. After asking about her children and husband again, Petitioner was told that law enforcement could not discuss their whereabouts because she had invoked her *Miranda* rights.[4] App. 121, ll. 24 – App. 122, ll. 24; App. 147, ll. 2-13. Petitioner was given a contact card if she wanted to talk to law enforcement. *Id.* At 1:30 A.M., Petitioner left a message requesting to speak with law enforcement. App. 619, ll. 11-16. The next day, October 26, 2000, law enforcement contacted Petitioner and arranged for her to come in for questioning. App. 123, ll. 9-12. Petitioner arrived at the Sheriff's Department at about 10:00 A.M. on October 26th, was *Mirandized* and interrogated. App. 139, ll. 12 – App. 140 ll. 22; App. 735. At 6:00 P.M., Petitioner was subjected to a polygraph. *Id.* Upon being told she failed the polygraph, Petitioner wrote a statement implicating her and her husband in minor child's death. App. 155, ll. 2-19; App. 733-741. Petitioner testified that she took two Xanax and an undisclosed amount of Anaprox, both prescription, prior to the statement. App, 625, ll. 20-25.[5]

Pre-trial *Jackson v. Denno* Hearing

Counsel requested a *Denno* hearing to determine the admissibility of the written statement made by Petitioner on October 26, 2000. App. 111, ll. 1-5. Counsel argued that the interrogation was continuous over the two days and Petitioner had not knowingly and voluntarily waived her

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Miranda rights on October 26th due to the coercive pressure of law enforcement. App.163, ll. 5-21. Counsel based his argument on *Michigan v. Jackson,* a Sixth Amendment right to counsel case, despite *Miranda's* protections resting on the Fifth Amendment. *Id.*[6] The State maintained that Petitioner was not in custody or under coercion when completing the questionnaire or during law enforcement's search of the vehicle and residence. App. 165, ll. 16 – App. 166, ll. 13. The judge found that the statement given by the Petitioner on the 26th was voluntary and admissible. App. 167, ll. 11-19. The judge noted there was, "no Sixth Amendment violation for no critical stage in the proceeding was presented by the execution of the search warrant." App. 169, ll. 5-8.

Trial and Direct Appeal

At trial, counsel cross-examined Investigator Sutton regarding her interrogation of Petitioner on October 25th. App. 403, ll. 16-21. Out of concern that counsel's cross-examination was going to elicit testimony from Sutton on Petitioner's assertion of her right to counsel, Solicitor White requested a discussion outside the presence of the jury. App. 404, ll. 21-24. Counsel informed the court that he planned to reference the invocation, on the grounds that: "the jury has the right to determine that the statement ... was freely, voluntarily, and all that given, And this, in my opinion, this request with no assistance to get the lawyer and the later search...overcame [Petitioner's] will." App. 405, ll. 315-24 – App. 407, ll. 9. As anticipated, Sutton testified on cross-examination that once Petitioner exercised her right to counsel, law enforcement stopped questioning her:

> Counsel: That waiver says you have –'you have the right to talk to a lawyer for advice before we ask you any questions and have him with you during questions?'

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[5] During her pre-trial incarceration, Petitioner was diagnosed with Bi-Polar Conversion disorder. She was unaware of this condition prior to trial. App. 842, ll. 12-21.

[6] *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404 (1986) *overruled by Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079 (2009) (Sixth Amendment right to counsel attaches if police initiate interrogation after a defendant's assertion of right to counsel, at an arraignment or other similar proceedings).

Sutton: That's correct.

Counsel: And isn't it true that while you were questioning [Petitioner] on the 25th day of October, 2000, she, in fact, say she thought she needed to talk to a lawyer?

Sutton: The interview was terminated when she said that.

App. 407, ll. 18 – App. 408, ll. 1. Counsel then focused his cross examination on the search of Petitioner's van and residence, repeating his argument at the *Denno* hearing; that the pressure placed on Petitioner overcame her will and the October 26th statement was involuntary. App. 408, ll. 2 – App. 410, ll. 24. Counsel returned to Petitioner's invocation on his direct examination of Petitioner. App. 624, ll. 2-16. Counsel cited the *Miranda* sheet asking:

Counsel: Did one of those say that you had a right to an attorney?

Petitioner: Yes, sir.

Counsel: And did another one say that if couldn't afford an attorney, one would be provided for you?

Petitioner: Yes, sir.

Counsel: Did you stop this interview at any time?

Petitioner: Yes, sir.

Trial Counsel: How did you stop it?

Petitioner: I told them I would rather speak to an attorney.

App. 624, ll. 7-16.

In response, Solicitor White crossed-examined Petitioner on the circumstances surrounding her invocation, "when you were told that [law enforcement] had talked to your children...and that Derek [her husband] had 'fessed up about what was happening in this torture chamber of a house, then you said, I don't want to talk anymore; is this right?" App. 663, ll. 22 – App. 664. ll. 1. When Petitioner denied this contention, White continued probing the October 25th invocation, "when you

asked for an attorney, they immediately stopped, didn't they?" App. 664, ll. 3-7. Petitioner conceded they had. *Id.* In the State's closing argument, Solicitor White highlighted Petitioner's invocation as evidence of her guilt, "when she was told that her husband had disclosed things to the police, she asked for an attorney." App. 690, ll. 23 – App, 691, ll. 1. Solicitor White continued:

> The *Miranda* form ... says 'if cannot afford a lawyer, one will be appointed for you before any questioning if you wish.' Before any questioning. Once she asked for an attorney, they stopped talking to her. That's the law. You're not allowed to talk to the person anymore once they ask for an attorney.

App. 691, ll. 1-10.

PCR and Evidentiary Hearing

At the evidentiary hearing, counsel admitted the solicitor's comments constituted a *Doyle* violation. App. 877, ll. 21-23.[7] Counsel testified that it was his practice not to object to closing arguments unless the statements were truly egregious. App. 879, ll. 9-12. Counsel reflected:

> Well it was close. But there was also an *Edwards v. Alabama*, [verbatim] which I think would have cured the *Doyle* violation. And I was relying also on *Jackson v. Michigan*, a portion of what, from the Supreme Court. Of course, *Edwards* would have cured *Jackson* if it were, in fact, an *Edwards* where she volunteered to go back in and give a statement.

App. 910, ll. 13 – App. 912, ll. 1.[8] Counsel also noted that he did not object because the suppression argument under *Michigan v. Jackson* had failed. *Id.* Counsel agreed that the purpose of the statements on Petitioner's invocation of her right to counsel was to show she had a guilty mindset.

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[7] *Doyle v. Ohio*, 426 U.S. 640, 96 S.Ct. 2240 (1976) (the use for impeachment purposes of petitioners' silence, at the time of arrest and after *Miranda* warnings, violates due process).

[8] Counsel references "*Edwards v. Alabama*" in support of his decision not to object. It appears counsel is confusing *Alabama v. Shelton* and *Edwards v. Arizona*.. *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 1885 (1981) (Under Fifth Amendment, once an accused requests counsel, interrogation must cease unless the accused initiates further communication with police); *Alabama v. Shelton*, 535, U.S. 654, 122 S.Ct. 1764 (2002) (Right to counsel under the Sixth Amendment attaches when defendant receives a sentence, including a suspended sentence, that may result in the actual deprivation of a person's liberty).

App. 918, ll. 1-12. Counsel also expressed concern that objecting to the comments would bring them to the jury's attention. App. 878, ll. 7-19. Counsel then admitted that he could have asked the trial judge to take up the objection or a motion for mistrial outside of the presence of the jury and was unable to explain why he failed to do so. App. 918, ll. 13 – App. 919, ll. 16.

Order of Dismissal

In dismissing Petitioner's application the PCR judge specifically found counsel's testimony at the evidentiary hearing was credible. App. 956. Further, the PCR judge determined that counsel's failure to object to statements in the prosecution's closing arguments on the Petitioner's invocation of her *Miranda* rights was a legitimate trial strategy in light of the October 26th statement's admissibility and the risk of drawing the jury's attention to the statements. App. 961. PCR counsel subsequently filed a Rule 59(e) Motion, which was addressed by the PCR judge in issuing the 2014 Order of Dismissal. App. 947-950; App. 954-964.

Discussion

Counsel's failure to object to comments in solicitor's closing arguments implying that Petitioner's assertion of her Fifth Amendment right to counsel was evidence of her guilt constituted deficient performance despite counsel having opened the door to some otherwise inadmissible evidence of Petitioner's assertion of a constitutional right. This unprofessional failing so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Therefore, the PCR court erred in holding that counsel provided effective assistance of counsel as these failings rendered Petitioner's conviction a denial of due process. App. 940 – 941; *See Strickland*, 466 U.S. at 692, 104 S.Ct. at 2068 (establishing the standard for ineffective assistance of counsel claims: a PCR

applicant must show that counsel's performance was deficient and that the deficiency prejudiced the outcome of the proceedings).

Deficient Performance

Generally, "[i]t is impermissible for the state to argue in favor of guilt or punishment based upon the accused's assertion of a constitutional right." *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882, 887 (1986). "Comments on the assertion of a constitutional right may not be made either directly or indirectly. *State v. Hawkins*, 292 S.C. 418, 357 S.E.2d 10, 13 (1987). *See also, State v. Johnson*, 293 S.C. 321,360 S.E.2d 317 (1987). Protection of an accused's right to due process prohibits the State from commenting on the accused's exercise of a constitutional right, as the United States Supreme Court concluded:

> Silence in the wake of these warnings may be nothing more than the arrestees exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, *while it is true the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings.* In such circumstances, *it would be fundamentally unfair and a deprivation of due process to allow the arrested persons silence to be used to impeach an explanation subsequently offered at trial.*

Doyle, 426 U.S. at 617–618, 96 S.Ct. at 2244–2245 (1976) (emphasis added). However, conduct that would otherwise be improper may be excused under the "invited reply" doctrine if the prosecutor's conduct was an appropriate response to statements or arguments made by the defense. *Vaughn v. State*, 302 S.C. 163, 607 S.E.2d 72 (2004).

Where the defense has opened the door to otherwise inadmissible evidence and invited a reply by the State, such a reply is limited to evidence was necessary to "right the scale" in the wake of defense counsel's argument. *U.S. v. Young*, 470 U.S. 1, 13, 105 S.Ct. 1038, 1045 (1985); *See also State v. Allen,* 266 S.C. 468, 224 S.E.2d 881 (1976), *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991) (by presenting character witnesses, defendant placed

his good character; by submitting evidence of his criminal past, with the admitted purpose of establishing his propensity for nonviolence, *defendant placed this specific character trait in issue*)(emphasis added). A party cannot complain of prejudice from evidence to which he opened the door. *State v. Robinson,* 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991).

The Sixth Amendment's right to counsel attaches when adversarial judicial proceedings have been initiated against the accused and at all critical stages in the judicial process. *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404 (1986); *State v. Kennedy,* 325 S.C. 295, 479 S.E.2d 838 (Ct. App.1996). In the interrogative setting, the Sixth Amendment right to counsel only attaches post-indictment. *Michigan v. Harvey,* 494 U.S. 344, 110 S.Ct. 1176 (1990); *State v. Register, supra.* There was no evidence that Petitioner was arraigned or indicted by October 26th. At trial, the judge noted that the Sixth Amendment right to counsel had yet to attach when the statement was made. App.165, ll. 2-6; App. 169, ll. 2-7. Even after the trial judge's ruling, counsel argued to the jury that the State had some duty to secure Petitioner counsel. App. 408, ll. 6-11. The State correctly countered that it was under no such obligation. App.406, ll. 14-24. Counsel's reliance on *Michigan v. Jackson* was in error and completely unnecessary as *Edwards v. Arizona*, provides the correct test for determining whether a statement is voluntarily given after a waiver of *Miranda* protections..

Notwithstanding counsel's unreasonable strategy opening the door to evidence on Petitioner's request for counsel, the State's comments were still improper because they went beyond replying to counsel's argument. *See Allen, 266 S.C. 468, 224 S.E.2d 881.* After explaining his strategy for introducing normally inadmissible testimony, counsel's only asked about Petitioner's invocation twice in either direct or cross-examination. App. 406, ll. 25 – App. 407, ll. 9, App. 624, ll. 7-16. In both instances the questioning was brief and centered on the irrelevant issue of law enforcement's failure to provide Petitioner with an attorney. *Id.*

In contrast, the State went beyond the scope of counsel's argument and turned Petitioner's assertion of a constitutional right against her on cross-examination. App. 663, ll. 22 – App. 664, ll. 25. In closing argument, the State portrayed Petitioner's invocation of her right to an attorney as proof of her guilt. *Id.* Counsel's references to Petitioner's invocation of her right to counsel only sanctioned the State to examine law enforcement witnesses and the Petitioner to the extent necessary counter the argument made by counsel. *See State v. Foster*, 354 S.C. 614, 622, 582 S.E.2d 426, 430 (2003) (defense counsel's questions did not allege fabrication, only questioned witness's credibility, so door was not opened to the admission of witnesses' consistent out-of-court statement).

Counsel admitted that the solicitor's statements were a likely *Doyle* violation, which could result in a mistrial had he objected. App. 878, ll. 12-17. Counsel's fear of drawing attention to the comments by objecting, is not objectively reasonable as he admitted that he could have asked the trial judge to excuse the jury. App. 918, ll. 13 – App. 919, ll. 16; *See Dawkins*, 346 S.C. at 157, 551 S.E.2d at 263 (counsel's failure to object because he did not want to confuse or upset the jury does not constitute valid strategy); *Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (presumption of adequate representation based on a valid trial strategy disappears when counsel acknowledged there was no trial strategy in mind when he failed to object to the improper comments. The testimony on Petitioner's assertion of her right to counsel elicited by counsel was for the limited purpose of arguing that law enforcement failure to provide an attorney was a factor in rendering the October 26th statement involuntary. App. 405, ll. 24 – App. 407, ll. 9. Thus, counsel should have objected to any questions or comments by the State attempting to equate the assertion of Petitioner's right to counsel with guilt.

Accordingly, the PCR court erred in finding that counsel's performance was not deficient because counsel was unable to demonstrate how his professed trial strategy was objectively reasonable "under prevailing professional norms." *See Strickland*, 466 U.S. at 687-688, 104 S.Ct. at 2064-2065; *Cherry*, 300 S.C. 115, 386 S.E.2d 624.

Prejudice

On appeal from a PCR hearing, improper comments rise to the level of a prejudice requiring reversal if: (1) the record shows the reference to the defendant's right to silence or to an attorney was more than a single reference; (2) the prosecutor tied the defendant's exercise of her right directly to her exculpatory story; (3) the exculpatory story was not totally implausible; and (4) the evidence of guilt was not overwhelming. *Edmond v. State*, 341 S.C 340, 348, 534 S.E.2d 682, 686-87 (2000). Inappropriate prosecutorial comments must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. *Id.* In other words, the Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly. *Id.*

If a defendant opens the door to otherwise improper comments, the relevant question in determining if a defendant's rights were violated is whether the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The idea of an invited response is used not to excuse improper comments, but to determine their effect on the trial as a whole. *Young,* 470 U.S. at 13, 105 S.Ct. at 84. Fundamental fairness supports allowing the State a fair response when defense counsel has opened the door made by defense counsel; even if that requires presenting commenting on or introducing otherwise inadmissible evidence. However, protecting an accused's right to due process requires that inadmissible comments and evidence

introduced in response to defense's counsel opened door or under invited reply, be limited to evidence necessary to right the scale. *See Edmond* 341 S.C at 348, 534 S.E.2d at 687;*see also State v. Holliday*, 333 S.C. 332, 340, 509 S.E.2d 280, 284 (Ct. App. 1998).

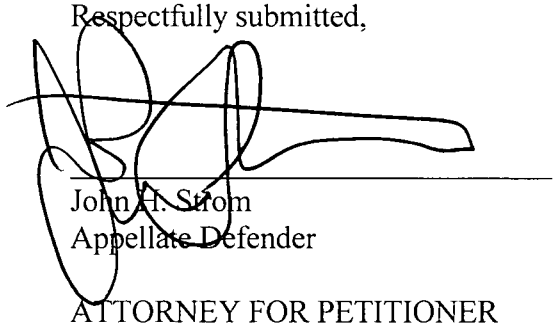
Here, Petitioner was prejudiced because, once counsel opened the door, the State elicited damning testimony on the context surrounding Petitioner's assertion of her constitutional rights. These comments went beyond merely "righting the scale" and should have been objected to. *Young*, 470 U.S. at 13, 105 S.Ct. at 1045. Unlike counsel's isolated references to the request for an attorney, the State wove the circumstances surrounding Petitioner's assertion into the broader facts of the case to imply Petitioner's guilt. App. 573, ll. 1-4. In eliciting testimony on the context in which Petitioner exercised her rights, the State linked her request for counsel to her exculpatory story. Her exculpatory story was not completely implausible as she alleged that her husband, who was significantly larger than her and an alcoholic, had been the architect and instigator of the abuse. App. 694, ll. 16-25.

Accordingly, counsel's failure to object to the solicitor's improper comments in closing argument rises to a level of prejudice meriting reversal because solicitor's four references to Petitioner's right to counsel were directly linked to Petitioner's exculpatory story and were the product of counsel's failure to protect Petitioner's assertion of her constitutional rights. Therefore, the PCR court erred in finding counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); See *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

CONCLUSION

For the foregoing reasons, this Court should grant the petition with the ultimate relief of a new trial for Petitioner Ila M. Carter.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of December, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

ILA MICHELLE CARTER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001293

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of September, 2014.

John H. Strom
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of December, 2014.
Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021.