

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO LEXINGTON COUNTY
The Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

S.C. Supreme Court

Trial Court Case No. 2011-CP-32-0402
Appellate Case No. 2013-002473

Timothy J. Wilson,..... Respondent/Petitioner,

v.

State of South Carolina, Petitioner/Respondent.

**PETITIONER/RESPONDENT'S RETURN TO RESPONDENT/
PETITIONER'S CROSS-PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

- I. Did the post-conviction relief court properly find trial counsel rendered effective assistance in investigating Wilson's case and preparing prior to trial where counsel's pre-trial motion for a continuance in an effort to secure additional time for investigation and trial preparation was denied by the trial court, and where that denial was affirmed by the Court of Appeals "after a thorough review of the record and counsel's brief pursuant to Anders v. California."?
- II. Did the post-conviction relief court properly find trial counsel rendered effective assistance in cross-examining counselor Gregory H. Robinson and Wilson suffered no prejudice as a result of that cross-examination?
- III. Did the post-conviction relief court properly find trial counsel rendered effective assistance by calling Jessica Wilson as a witness for the defense even though this opened the door to arguably detrimental testimony during her cross-examination and from a State's reply witness because counsel articulated a valid strategy for calling her as a witness and knowingly accepted the risk of the arguably detrimental evidence being admitted?

STATEMENT OF THE CASE

Respondent/Petitioner (Wilson) was indicted at the March, 2008 term of the grand jury for Lexington County for four counts of first-degree criminal sexual conduct (CSC) with a minor (Indictment Nos.: 2008-GS-32-789, -790, -791, & -792). He was subsequently indicted at the July, 2008 term of the grand jury for one count of lewd act on a minor under the age of sixteen (Lewd Act) (Indictment No.: 2008-GS-32-2293). On July 29, 2008, a jury trial was commenced at the Lexington County Courthouse in front of the Honorable William P. Keesley. Wilson was present and was represented by Assistant Public Defenders Casey Cornwell, Esquire, and Bennett Casto, Esquire. Petitioner/Respondent (the State) was represented by Assistant Solicitors David M. Stumbo and Ola Johnson of the Eleventh Circuit Solicitor's Office. (App.p.56). At the conclusion of trial the jury found Wilson guilty as indicted. (App.p.731, line 21-p.735, line 25). On August 1, 2008, the Honorable William P. Keesley sentenced Wilson to imprisonment for concurrent terms of fifteen (15) years for Lewd Act (Indictment No.: 2008-GS-32-2293), thirty (30) years for CSC, 1st Degree (2008-GS-32-789), thirty (30) years for CSC, 1st Degree (2008-GS-32-791), fifteen (15) years for CSC, 1st Degree (Indictment No.: 2008-GS-32-792), and a consecutive term of fifteen (15) years for CSC, 1st Degree (Indictment No.: 2008-GS-32-790), for an aggregate sentence of forty-five (45) years' imprisonment. (App.p.13-p.47; p.746, line 20-p.748, line 7). A timely Notice of Appeal was filed on Wilson's behalf and an appeal was perfected by Wanda H. Carter, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals dismissed Wilson's appeal and affirmed his convictions "after a thorough review of the record and counsel's brief pursuant to Anders v. California . . . and State v. Williams." State v. Wilson, Op. No. 2010-UP-472 (S.C. Ct. App. filed October 28, 2010). The Remittitur was issued on November 17, 2010. (App.p.758-p.781).

On February 1, 2011, Wilson filed an application for post-conviction relief (PCR) alleging ineffective assistance of trial counsel. (2011-CP-32-0402). (App.p.1-p.8). On September 7, 2011, the State submitted a Return requesting an evidentiary hearing to resolve Wilson's claims. (App.p.48-p.52). On March 23, 2012, Tricia A. Blanchette, Esquire, was substituted as Wilson's counsel. On December 21, 2012, Wilson submitted an Amendment to his Application for PCR alleging fourteen (14) specific allegations of ineffective assistance of trial counsel and/or appellate counsel:

1. Ineffective assistance of trial counsel for failure to properly prepare and investigate prior to trial. Specifically, but not limited to, failure to review the discovery with Respondent-Petitioner, failure to prepare defense witnesses for trial, failure to investigate the allegations and potential defenses.
2. Ineffective assistance of trial counsel regarding the failure to obtain and/or utilize expert witnesses and failure to make a timely request for a continuance to procure necessary experts.
3. Ineffective assistance of trial counsel for failure to raise an objection to the juror shortage. Transcript pp. 7, 50.
4. Ineffective assistance of trial counsel for agreeing to admit the video of the forensic interview of the victim.
5. Ineffective assistance of trial counsel for failure to protect Respondent-Petitioner's confrontation rights during the testimony of the victim.
6. Ineffective assistance of trial counsel for putting forth an unreasonable defense strategy.
7. Ineffective assistance of trial counsel for failing to fully cross-examine the State's witnesses, including but not limited to Dr. Robinson, Alicia Benedetto, Christalyn Thompson and Heather Smith.
8. Ineffective assistance of trial counsel for failure to object to hearsay and bolstering/vouching testimony of the State's experts. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000), State v. Dawkins, 346 S.C. 151, 551 S.E.2d 260 (2001), Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (2012).

9. Ineffective assistance of trial counsel for failure to address possible bias expressed by the trial court stemming from a prior case. Transcript pp. 209-10.
10. Ineffective assistance of trial counsel for failure to make a directed verdict argument on all charges.
11. Ineffective assistance of trial counsel for failure to object to pitting of witnesses by the State, as pointed out by the trial court.
12. Ineffective assistance of trial counsel for opening the door to testimony during the cross-examination of Jessica Wilson and the State's reply witnesses regarding a completely unrelated allegation of sexual abuse involving Jessica Wilson's father.
13. Ineffective assistance of trial counsel for failure to advise Respondent-Petitioner regarding "Jessica's Law" and the changes to the jury charge and applicable sentencing range.
14. Ineffective assistance of appellate counsel for failure to raise the motion for continuance on appeal.

(App.p.9-p.12).

On January 29, 2013, an evidentiary hearing was held in the Lexington County Courthouse before the Honorable R. Lawton McIntosh. Wilson was present and was represented by Tricia A. Blanchette, Esquire. The State was represented by Assistant Attorney General J. Benjamin Aplin. (App.p.815). During the hearing, Wilson testified on his own behalf. Wilson also called Gaye Allen-Cook, Donna Schwartz-Watts, Gregory Robinson and Casey Cornwell, Esquire, to the stand and introduced a number of exhibits. The PCR court was also provided a copy of the PCR Application, the State's Return, Wilson's Amendment, the records of the Lexington County Clerk of Court concerning the subject convictions, the trial transcript, and Wilson's records from the South Carolina Department of Corrections.

At the end of the hearing, the PCR court took the matter under advisement and subsequently asked Wilson's counsel to submit a proposed order granting PCR solely on the basis of ineffective assistance of trial counsel for failure to object to bolstering/vouching

testimony from the State's expert witnesses. (App.p.1069, line 24-p.1070, line 21). In an order dated September 24, 2013, filed October 9, 2013, and received by the State on October 18, 2013, Judge McIntosh granted Wilson's Application for PCR. (App.p.782-p.811). Neither party submitted a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCF.

On November 15, 2013, the State filed a notice of appeal with this Court and on November 19, 2013, Wilson filed a notice of cross-appeal. (App.p.812-p.815).¹ On June 12, 2014, the State filed a Petition for Writ of Certiorari asking this Court to reverse the grant of post-conviction relief. On September 26, 2014, Wilson filed a return to the State's Petition. On November 3, 2014, Wilson then filed "Respondent-Petitioner's Petition for Writ of Ceritorari" asking this Court to reverse the findings of the lower court on several issues for which post-conviction relief was denied. This Return to Wilson's cross-petition for a writ of certiorari follows.

¹ On February 25, 2014, Wilson submitted a "Petition for Appeal Bond" with attachments, requesting bail pending appellate review pursuant to Rule 243(k), SCACR. On March 7, 2014, the State submitted a Return opposing bail. In an order dated May 7, 2014, this Court denied Wilson's request.

STANDARD OF REVIEW

In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision. Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011); Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996) (“[A] PCR judge’s findings should not be upheld if there is no probative evidence to support them”). In a PCR proceeding, an Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “In order to receive relief for ineffective assistance of counsel, a defendant must make two showings. First, he must show that his trial counsel’s performance was deficient, meaning that ‘counsel’ made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment. Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable.” Edwards, 392 S.C. at 456, 710 S.E.2d at 64. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)); See also Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Where the application alleges ineffective assistance of counsel as a ground for relief, an Applicant 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, 466 U.S. at 686 (1984); Butler, *supra*.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An Applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

ARGUMENT

I.

The post-conviction relief court properly found trial counsel rendered effective assistance in investigating Wilson’s case and preparing prior to trial where counsel’s pre-trial motion for a continuance in an effort to secure additional time for investigation and trial preparation was denied by the trial court, and where that denial was affirmed by the Court of Appeals “after a thorough review of the record and counsel’s brief pursuant to Anders v. California.”

Wilson argues the PCR erred in finding trial counsel was effective in his preparation and investigation of Wilson’s case prior to trial. He also contends the PCR court committed an error of law by “crafting a new standard of reasonableness” when making this finding. Finally, Wilson contends the PCR court erred in failing to address the prejudice prong of the Strickland analysis in rejecting his allegation. The State disagrees and submits Wilson’s arguments are without merit.

The PCR court properly denied relief to Wilson on grounds of “ineffective assistance of trial counsel for failing to properly prepare and investigate prior to trial” because Wilson failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, an Applicant must first prove that counsel’s performance was deficient as measured by “reasonableness under professional norms.” Id. Wilson failed to carry his burden in regard to this first prong of Strickland. There was no evidence of probative value that trial counsel’s performance was deficient for failing to investigate or prepare for trial where counsel’s pre-trial motion for a continuance asking for additional time was denied by the trial court, and where that denial was affirmed by the Court of Appeals “after a thorough review of the record and counsel’s brief pursuant to Anders v. California.”

Prior to trial, counsel made a motion for a continuance, asking for more time to prepare for Wilson's trial. He explained how Wilson was initially represented by private counsel but later had his case assigned to a public defender when private counsel was no longer able to handle the case. Counsel argued he needed more time to prepare, particularly in regard to trying to find expert witnesses to testify on behalf of the defense. After hearing arguments from both parties, the trial court denied the motion and the case proceeded to trial. (App.p.86, line 15-p.104, line 13). After Wilson was convicted, he filed an appeal which was perfected by the South Carolina Office of Appellate Defense. Although the request for a continuance was not the issue specifically raised in the direct appeal, the South Carolina Court of Appeals ultimately affirmed his convictions "after a thorough review of the record and counsel's brief pursuant to Anders v. California . . . and State v. Williams." State v. Wilson, Op. No. 2010-UP-472 (S.C. Ct. App. filed October 28, 2010).

Wilson subsequently pursued PCR on various allegations of ineffective assistance; however, in the order granting relief on other grounds, the PCR court concluded "counsel did conduct a reasonable investigation and prepared with [Wilson] prior to trial." This finding was supported by the evidence in the record, including the testimony at the PCR hearing. At that hearing, Wilson acknowledged that all of trial counsel's concerns in regard to whether he had adequate time to investigate and prepare for trial were brought to the attention of the trial court when counsel moved for a continuance. He complained that counsel did not sit down and go over the individual discovery paperwork with him but admitted the discovery materials referenced at the PCR hearing were all obtained from counsel's file. Wilson testified he met with counsel three separate times in preparation for trial but acknowledged he never asked

counsel to look at or discuss the information counsel had obtained during discovery: (App.p.991, line 8-p.995, line 22; p.999, line 11-p.1001, line 3).

Counsel testified he first met with Wilson four weeks before trial and that due to the short time frame to prepare, he moved for a continuance because he wanted more time to get expert witnesses and to meet one-on-one with Wilson to prepare him for taking the witness stand. He said he had listened to the PCR testimony from Dr. Schwatz-Watts and Gaye Allen-Cook and believed their testimony would have helped him put up a stronger case in defense. (App.p.1009, line 11-p.1015, line 18). In regard to his overall performance counsel explained that he felt he did a decent job at trial but also felt like he could have done more. He said he wished he had been more aggressive with his objections at trial in order to preserve issues for appeal, but testified that of all the issues discussed at the PCR hearing, he felt Wilson's strongest issue for appeal would still have been the trial court's denial of his request for a continuance. Counsel explained he made the arguments at trial about needing more time to prepare in an effort to back up his request for the continuance. (App.p.1027, line 13-p.1029, line 4). On cross-examination, counsel testified that all of the documents introduced by Wilson at the PCR hearing were in his discovery file at trial and that he knew the discovery materials pretty well. (App.p.1046, lines 6-20). At the conclusion of the evidentiary hearing, the PCR judge asked the parties to focus their arguments on Wilson's allegations concerning counsel's failure to object to improper hearsay or vouching testimony because he had not seen any resulting prejudice from any other allegations, even if some might arguably constitute deficient performance. (App.p.1051, line 16-p.1054, line 23).

Discussion / Analysis

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). There are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. Strickland, 466 U.S. at 689. The “brevity of time spent in consultation, without more, does not establish that counsel was ineffective.” Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must also show specific prejudice resulting from counsel’s alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984); U.S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990).

Here, Wilson attempted to point to specific matters counsel failed to discover, fully investigate, or use at trial, such as hiring expert witnesses and exploiting alleged discrepancies between documents gathered during discovery and the testimony offered by the State at trial. Counsel acknowledged that in hindsight there were things he could have done better, but overall he thought he did the best he could with the time he had to investigate and prepare. Furthermore, he requested a continuance in an effort to secure additional time to prepare, and he then

vigorously argued grounds for his request. Nevertheless, both the trial court and the Court of Appeals rejected the notion that Wilson suffered any prejudice from counsel's lack of preparation when they denied his request for a continuance and affirmed that ruling on appeal. Counsel's investigation, preparation, and request for a continuance were clearly within the range of competence required in criminal cases and demonstrated the exercise of reasonable professional judgment.

In regard to Wilson's claim that the PCR court made an error of law by crafting a new standard of reasonableness, the State submits this simply is not true. The court clearly recited the proper standard of review for analyzing claims of ineffective assistance of counsel as set forth in Strickland before concluding that counsel conducted a reasonable investigation and preparation for trial. (App.p.786-p.787). The additional language used by the PCR court that "counsel prepared in an adequate manner in consideration of his caseload as public defender" does nothing to detract from the conclusions that were supported by the evidence in the record and were proper under the PCR court's application of the Strickland standards. It amounts to nothing more than surplusage or inartfully drafted language, which notably was drafted by Wilson's PCR attorney after the evidentiary hearing.

Finally, in regard to Wilson's complaint that the lower court erred in failing to address the prejudice prong under Strickland, the State submits there was no need to address prejudice where the PCR court found counsel was not ineffective. In any event, since Wilson did not address this alleged failure by way of a motion to alter or amend pursuant to Rule 59(e), SCRC, it is not preserved for review. Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 266 (2007); Burgess v. State, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013).

Based on the foregoing, the State submits the PCR court properly found Wilson failed to meet his burden of establishing that counsel was deficient in his investigation and preparation for trial. Wilson simply failed to establish counsel's performance fell below a standard of "reasonableness under professional norms." Strickland, 466 U.S. 668. Additionally, the trial court neither crafted nor relied upon a new or improper standard of reasonableness in assessing counsel's performance, and it did not err in choosing not to address prejudice from the alleged lack of investigation and preparation where counsel was not ineffective. For these reasons, certiorari should be denied and the PCR court should be affirmed on this issue.

II.

The post-conviction relief court properly found trial counsel rendered effective assistance in cross-examining counselor Gregory H. Robinson and Wilson suffered no prejudice as a result of that cross-examination.

Wilson argues the PCR erred in finding trial counsel was effective and that he was not prejudiced as a result of counsel's failure to fully cross-examine Gregory H. Robinson (Robinson) at trial. The State disagrees and submits Wilson's argument is entirely without merit.

The post-conviction relief court properly denied post-conviction relief to Wilson on grounds of "ineffective assistance of counsel for failing to fully cross-examine . . . Robinson" because Wilson failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984). To establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel, a PCR applicant must demonstrate that his attorney's errors had an effect on the judgment against him. See Strickland, 466 U.S. at 691. The applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In other words, he must show that "the factfinder would

have had a reasonable doubt respecting guilt.” Id. at 695; Edwards, 392 S.C. at 459-60, 710 S.E.2d at 65-66.

At trial, the State called Robinson to the stand. He explained he was a licensed professional counselor who does individual and family therapy and had counseled the victim after the alleged assault, at the direction of the family. Robinson testified that in the course of this therapy the victim disclosed sexual abuse by Wilson at her home. (App.p.369, line 3-p.379, line 7). Counsel cross-examined Robinson, getting him to acknowledge he referred the victim to the Assessment and Resource Center for further evaluation because the question of whether she had been abused was inconclusive based on his interviews. He also got Robinson to reiterate that the victim’s family sought help by bringing her to therapy to talk. (App.p.379, line 8-p.383, line 23; p.385, lines 11-21).

At the PCR hearing, Robinson testified he had received a lot of training in the “family systems approach” to therapy. (App.p.885, line 21-p.888, line 7). He explained:

The theory behind that goes something along the lines that if there is some type of behavior in a family member – in my case, I specialize with children and adolescents – that sometimes that behavior can be explained in the context of family and so, therefore, the training that I’ve received entails getting family members involved in trying to, a, problem solve why this behavior exists, why it continues, and looking at how we can use the family as a whole to try and isolate the symptom or the behavior, and if it’s a symptom that is undesirable, to make it go away.

(App.p.888, lines 8-18) (emphasis added). Robinson testified that during the family therapy, he met with the victim, her mother, and Wilson. He said he met with Wilson two times, that Wilson was willing to come to the sessions, and that he would have testified Wilson seemed motivated to meet with him and participate in therapy. (App.p.888, line 8-p.892, line 19). On cross-examination, Robinson acknowledged that when he was hired by the victim’s mother she presented the “problem” that the victim was engaging in some sort of acting-out behavior and

was making up the allegations of sexual abuse because she was angry with Wilson. He also acknowledged the victim's mother was the one paying for his services and that she implied she did not think the allegations were true. (App.p.892, line 22-p.895, line 25).

Next, Wilson testified and acknowledged counsel had cross-examined each of the State's witnesses at trial. (App.p.1008, lines 19-23). Finally, counsel testified that although he cross-examined Robinson, he did not ask any specific questions about him treating Wilson and that this was probably an oversight. He said he thought this testimony would have shown to the jury that Wilson was interested in getting to the bottom of the allegations instead of trying to cover them up. (App.p.1015, line 19-p.1016, line 15). Yet, when questioned on cross-examination, counsel acknowledged that if he had attempted a more detailed cross-examination of Robinson at trial it could have been "a two-edge sword" which invited the State to demonstrate Robinson's bias due to having been hired by the main witnesses trying to discredit the victim's allegations. (App.p.1036, line 7-p.1037, line 8). In regard to his overall performance in conducting cross-examination of the State's witnesses, counsel testified he felt he did fine at trial. (App.p.1044, line 23-p.1045, line 8).

In the order granting relief on other grounds, the PCR court found it was "not convinced that counsel's failure [to further question Robinson] amounts to ineffective assistance of counsel that affected the outcome of trial." The State submits this finding is supported by the evidence and should be affirmed. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. at 456-57, 710 S.E.2d at 64 (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that "every

effort be made to eliminate the distorting effects of hindsight” and evaluate counsel’s decisions at the time they were made. Strickland, 466 U.S. at 689; Edwards, 392 S.C. at 456-57, 710 S.E.2d at 64.

Here, counsel acknowledged the strategic advantages of not attempting to prove Wilson was a cooperative participant in therapy because that could have resulted in the State exploring the inherent bias in Robinson’s role as a paid advocate who was trying to make the victim’s allegations of sexual abuse “go away.” Indeed, the potentially damaging demonstration of bias was shown at the PCR hearing. Viewed under an objective standard of reasonableness, counsel’s strategy in limiting cross-examination of Robinson was certainly valid in this case. Thus, rather than missing a “golden opportunity to utilize the State’s witness to elicit testimony favorable to the defense” as argued by Wilson, counsel effectively avoided testimony which would have been more damning than what was already elicited from Robinson by the State. Because there is ample probative evidence to support the PCR court’s conclusion that counsel was not deficient in his cross-examination of Robinson, and that Wilson was not prejudiced by counsel’s performance, certiorari should be denied and the PCR court should be affirmed on this issue.

III.

The post-conviction relief court properly find trial counsel rendered effective assistance by calling Jessica Wilson as a witness for the defense even though this opened the door to arguably detrimental testimony during her cross-examination and from a State’s reply witness because counsel articulated a valid strategy for calling her as a witness and knowingly accepted the risk of the arguably detrimental evidence being admitted.

Wilson argues the PCR erred in finding trial counsel not ineffective when he opened the door to testimony during the cross-examination of Jessica Wilson and the State’s reply witness

regarding a completely unrelated allegation of sexual abuse involving Jessica Wilson. The State disagrees and submits Wilson's argument is without merit.

The post-conviction relief court properly denied post-conviction relief to Wilson on grounds of "ineffective assistance of counsel for opening the door to testimony during the cross-examination of Jessica Wilson and the State's reply witnesses regarding a completely unrelated allegation of sexual abuse involving Jessica Wilson's father," because Wilson failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984). As noted above, "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. at 456-57, 710 S.E.2d at 64 (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)).

At trial, counsel called the victim's mother, Jessica Wilson, as a witness for the defense. She testified she was standing by her husband's claim that he did not abuse the victim because "my heart and my gut tell me that he did not do this." She went on to characterize the victim as a liar, testifying that the victim has a problem with honesty and usually had to be boldly confronted with her lies before she admits she is lying. (App.p.617, line 10-p.626, line 8). On cross-examination, the solicitor asked Jessica if, when she was young, her sister accused her father of molesting her. Counsel objected; however, after a discussion out of the presence of the jury, the trial court ruled the question was appropriate and that the State could pursue the line of inquiry in an effort to demonstrate bias pursuant to Rule 608, SCRE. The judge found counsel had opened the door to the testimony when he elicited testimony that the witness's beliefs were based on her gut feelings. (App.p.635, line 16-p.643, line 19). The State then proceeded to ask Jessica about the prior allegation involving her father and whether, despite his ultimate

conviction, she had believed her father's denial over her sister's allegation. The State also called a reply witness, Arleen Ann Callahan, in regard to the prior, unrelated allegation. (App.p.635, line 20-p.659, line 25).

At the PCR hearing, counsel testified he agreed that in eliciting testimony from Jessica that "she went with her gut" and believed Wilson over her daughter, he opened the door to cross-examination as well as reply testimony about a prior sexual assault allegation involving Jessica's sister and their father. Counsel however explained that he "really needed" to put Jessica on the stand and that it was simply the "kind of the risk you take when you ask those kinds of questions." He acknowledged the additional testimony was detrimental to the case but never testified he believed calling Jessica as a witness was not worth the risk. (App.p.1023, line 1-p.1025, line 1). On cross-examination counsel reiterated that as part of his trial strategy of using family member "experts" to show the victim was not being truthful, he "really needed" Jessica as a defense witness. Counsel speculated that in hindsight "maybe I wouldn't call her, you know, just to avoid having all of that other stuff come out and having, you know, the distraction that it caused"; however, he never disputed the validity of his strategy. (App.p.1035, lines 3-23) (emphasis added).

Here, both Wilson and trial counsel articulated their defense strategy of offering evidence of the victim's character for being untruthful in an attempt to attack her credibility and convince the jury her allegations of sexual abuse were not true. This strategy permeates the trial as reflected in counsel's opening statement, cross-examination of State's witnesses, presentation of defense witnesses, and closing argument. Using Jessica Wilson to testify she did not believe her own daughter was a crucial part of this trial strategy. Viewed under an objective standard of

reasonableness, this strategy was certainly valid in this case, where the victim's credibility was the central issue.

Furthermore, and contrary to Wilson's claim in this appeal, counsel was not at all clear about whether he would have called Jessica as a witness at trial or not, even if he knew for certain that it would open the door to the arguably detrimental cross-examination and reply. In any event, any such assessment was made in hindsight and would not support a grant of PCR where counsel articulated a valid strategy at the time of trial for calling Jessica as a witness the defense "really needed." For all of these reasons, certiorari should be denied and the PCR court should be affirmed on this issue.

CONCLUSION

For the reasons stated above, this State submits this Court should deny Respondent/Petitioner's cross-petition for a writ of certiorari and should affirm the post-conviction relief court's ruling denying relief on the three issues raised. Should this Court grant Certiorari, Petitioner/Respondent requests permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
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CERTIORARI TO LEXINGTON COUNTY
The Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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PROOF OF SERVICE

I, Angela Bennett, certify that I have served the Petitioner/Respondent's Return to Respondent/Petitioner's Cross-Petition for Writ of Certiorari on Respondent/Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney, Tricia A. Blanchette, Esquire, P.O. Box 12725, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 19th day of December, 2014.



ANGELA BENNETT
Administrative Assistant

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DEC 19 2014

S.C. Supreme Court

December 19, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Timothy J. Wilson v. The State
Appellate Case No: 2013-002473

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Petitioner/Respondent's Return to Respondent/Petitioner's Cross-Petition for Writ of Certiorari along with proof of service in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No: 8729

JBA/ab
Enclosures

cc: Tricia A. Blanchette, Esquire
Ms. Trisha Allen