STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable George C. James Jr., Circuit Court Judge

Appellate Case No. 2014-002027

Steven L. Hewitt, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel ineffective for eliciting testimony about a prior molestation accusation where the record supports a conclusion this testimony was part of trial counsel's trial strategy and where a curative instruction sufficiently cured any prejudice from the testimony?

2. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel ineffective for eliciting testimony from a witness about whether she believed the victim where the record supports a conclusion this testimony was part of trial counsel's trial strategy and where this testimony was not repeated to the jury?

3. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel ineffective for failing to elicit testimony from a witness that the victim recanted where the record supports the conclusion trial counsel made a strategic decision to not pursue this issue and where the testimony, if presented, would not have changed the outcome of the trial?

4. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel ineffective for failing to impeach the victim with a prior conviction where the trial judge already forbade trial counsel from exploring this avenue of impeachment and where trial counsel presented this information to the jury through other testimony from the victim?

5. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel ineffective for eliciting testimony about the identity of the perpetrator where the record supports a conclusion this testimony was part of trial counsel's trial strategy and where the testimony was otherwise admissible?

STATEMENT OF THE CASE

In November 2009, the Horry County Grand Jury indicted Respondent for first degree criminal sexual conduct with a minor and lewd act on a minor. (App. pp. 288-89; p. 291-92). Verdell Bar, Esquire ("trial counsel") represented Respondent.[1] (App. p. 1). On May 24, 2010, Respondent proceeded to trial before the Honorable Steven H. John and a jury. (App. p. 1). On May 26, 2010, the jury found Respondent guilty as indicted. (App. p. 277, lines 18-25). Judge John sentenced Respondent to concurrent terms of imprisonment for twenty-five years for first degree criminal sexual conduct with a minor and fifteen years for lewd act on a minor. (App. p. 290; p. 293).

LaNelle C. DuRant, Esquire, perfected Respondent's direct appeal. State v. Hewitt, Op. No. 2012-UP-117 (S.C. Ct. App. filed Feb. 29, 2012). The South Carolina Court of Appeals affirmed Respondent's convictions on February 29, 2012. Id.

Respondent filed an application for post-conviction relief on August 14, 2012. (App. p. 294). The Honorable George C. James Jr. ("the post-conviction relief judge") convened an evidentiary hearing on the application at the Georgetown County Courthouse on March 21, 2014. (App. p. 313). Respondent was present and represented by Tristan M. Shaffer, Esquire. (App. p. 28). The post-conviction relief judge granted relief in an order dated June 26, 2014, and filed July 11, 2014. (App. p. 388). The post-conviction relief judge denied Petitioner's motion for reconsideration by order dated July 21, 2014, and filed August 13, 2014. (App. p. 407) This Petition for a Writ of Certiorari follows.

[1] Trial counsel passed away prior to the evidentiary hearing in this case.

ARGUMENT

In a post-conviction relief action, the 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) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). The post-conviction relief judge in this case unconstitutionally placed the burden on Petitioner to disprove Respondent's allegations that trial counsel's actions were not supported by a valid trial strategy. However, Petitioner was unable to meet this burden because trial counsel is deceased and unable to answer for his actions, and the post-conviction relief judge granted a new trial to an inmate who testified he would lie to get out of prison. (App. p. 362, lines 16-18). Because the trial record contains evidence of trial counsel's strategy, the post-conviction relief judge's findings are not supported by probative evidence in the record. See Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) ("[I]f there is no probative evidence to support the PCR judge's findings, the findings will not be upheld." (citations omitted)). Because the post-conviction relief judge substituted his hindsight judgment for that of trial counsel's at the time of trial, he applied an incorrect legal standard of review. See Talley v. State, 371 S.C. 535, 540, 640 S.E.2d 878, 880 (2007) ("The Court will reverse the PCR judge's decision when it is controlled by an error of law." (citations omitted)). Therefore, certiorari is warranted in this case to correct the post-conviction relief judge's failure to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Strickland v. Washington, 466 U.S. 668, 689 (1984).

I. The post-conviction relief judge erred in finding trial counsel ineffective for eliciting testimony about a prior molestation accusation.

Trial counsel presented Respondent's sister as a witness in Respondent's defense. During her testimony, the sister testified to a prior accusation levied against Respondent by the victim's mother regarding their other child. (App. p. 186, line 15-p, 187, line 2). The solicitor later attempted to introduce evidence Respondent had attempted to intimidate a witness to testify the victim's mother persuaded the victim to make the current allegation, as she had with their other child. (App. p. 215, line 11-p. 216, line 23). Judge John took umbrage at this line of questioning, and issued a curative instruction to the jury to disregard the testimony regarding the witness intimidation and the prior accusation. (App. p. 226, line 3-p. 229, line 14). The post-conviction relief judge found trial counsel's strategy of "attempting to establish that [Respondent's] estranged wife had prompted a report of a false molestation charges with regard to the daughter and that, therefor, the wife was behind a false report of charges with regard to the instant victim" was a "risky strategy[,]" had "no substance[,]" and was not properly implemented. (App. p. 391). However, whether the post-conviction relief judge personally approved of trial counsel's strategy is not the appropriate standard of review.

Initially, Petitioner submits the post-conviction relief judge erred in finding trial counsel's strategy was not valid. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" Strickland, 466 U.S. at 690; see also Meyer v. Branker, 506 F.3d 358, 374 (4th Cir. 2007) ("[L]egal judgments based on thorough investigation are virtually unassailable on collateral review."). Here, the record demonstrates trial counsel discussed the prior allegations with Respondent's sister before calling her as a witness. (App. p. 355, lines 5-10; p. 356,

lines 12-20). Furthermore, in his arguments prior to Judge John's *sua sponte* decision to strike the sister's testimony, trial counsel indicated his trial strategy was to implicate the victim's mother was at fault in bringing the accusations. (App. p. 222, lines 1-22). Finally, trial counsel argued, as best he could with Judge John's limitation, to the jury that someone else encouraged the victim to bring these allegations against Respondent. (App. p. 245, lines 21-25). Thus, the record clearly indicates trial counsel's strategy was to blame the victim's accusation on the victim's mother. The fact trial counsel could not testify at the hearing as to his decision making process does not automatically invalidate a strategic reason that is apparent from the record. See Wood v. Allen, 558 U.S. 290, 297 (2010) (upholding lower court decision that a trial strategy was reasonable where a "silent record created a presumption that counsel exercised sound professional judgment"); see also Greiner v. Wells, 417 F.3d 305, 326 (2d Cir. 2005) (inmate must present more than an attorney's "inability to remember his reasons for conducting the trial in the manner that he did" to overcome "the presumption of constitutionally effective counsel sustained by the record"). As the record demonstrates trial counsel formulated this strategy after discussing the prior accusation with witnesses, the post-conviction relief judge had no authority to second-guess the propriety of the strategy simply because it was "risky." See Strickland, 466 U.S. at 689 ("It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (citing Engle v. Isaac, 456 U.S. 107 (1982))).

Furthermore, the post-conviction relief judge's reliance on Respondent's testimony that the victim's mother's subversive acts "kind of cooled down five years prior to the trial" is disingenuous. This reliance conveniently ignores the testimony of Respondent's sister that Respondent and the victim's mother were "feuding" over the last two years. (App. p. 185, lines 5-11). It also conveniently ignores the evidence in the record that the victim's mother attempted to have Respondent's bond revoked based on allegedly false accusations. (App. p. 222, lines 14-19). Instead of reviewing trial counsel's strategy "from counsel's perspective at the time[,]" Strickland, 466 U.S. at 689, the post-conviction relief judge improperly cherry-picked portions of the record that supported his post hoc trivialization of trial counsel's actions.

The post-conviction relief judge also erred in determining trial counsel never discussed this trial strategy with Respondent. Initially, Petitioner submits the determination of what strategy to pursue was trial counsel's to make, not Respondent's. See Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (Piepher, J., concurring) (discussing decisions primarily involving trial strategy and tactics that are left to counsel's discretion), cert. denied (Jan. 15, 2015). Furthermore, the record does not support a determination Respondent was not aware of this strategy. At trial, the solicitor was prepared to offer evidence Respondent attempted to intimidate a witness to testify the victim's mother was involved in the allegations. Respondent's trial testimony and evidentiary hearing testimony that he did not want to blame the victim's mother is in direct contravention to his actions prior to trial. The post-conviction relief judge did not consider the possibility Respondent knew of this strategy, but repudiated it once the State learned of his efforts to intimidate a witness.

The record clearly demonstrates trial counsel employed a strategy to place blame on the accusation on the victim's mother. However, Judge John *sua sponte* prevented trial counsel from pursuing this strategy by issuing an instruction for the jury to disregard testimony about the victim's mother instigating a prior accusation. The fact Judge John prevented counsel from pursing his strategy does not mandate a finding the strategy was unreasonable. See Harrington v. Richter, 562 U.S. 86, 110 (2011) (an attorney cannot be deficient for not being "prepared for 'any contingency[,]'" an attorney need not be a "flawless strategist or tactician[,]" and an attorney cannot be faulted for a "reasonable miscalculation or lack of foresight"). In light of the record before the post-conviction relief judge, his characterization of trial counsel's strategy of implicating the victim's mother as "conceivable" and "supposed" (App. p. 391) is not supported by the evidence in the record and should be reversed. Furthermore, the post-conviction relief judge's substitution of his hindsight judgment of the reasonableness of trial counsel's strategy is a misapplication of the Strickland standard of deferential review and should be reversed.

Furthermore, even if this Court agrees trial counsel's strategy was unreasonable, Judge John's *sua sponte* instruction to disregard the testimony about the prior accusation eliminates any prejudice from the testimony. The post-conviction relief judge erred in concluding Judge John's curative instruction was insufficient. (App. p. 394). This Court has consistently held that "a curative instruction to disregard the testimony is deemed to have cured any alleged error" in the admission of incompetent evidence. State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009) (citations omitted). Petitioner's research only uncovered two cases where this Court found a curative instruction insufficient to ameliorate the prejudice of otherwise inadmissible evidence. In State v.

Britt, 235 S.C. 395, 426, 111 S.E.2d 669, 685 (1959), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), this Court found a curative instruction did not cure the prejudice from testimony the defendant was guilty of previous crimes and refused to take a lie detector test. In State v. Reid, 324 S.C. 74, 77, 476 S.E.2d 695, 696 (1996), overruled on other grounds by State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002), this Court found a curative instruction to disregard testimony the defendant did not show remorse when arrested was insufficient because it was given at the end of trial and did not specifically address the improper testimony.

The post-conviction relief judge's finding the instruction here was insufficient is inapposite to the cases where this Court has previously found instructions insufficient. Unlike Britt, the testimony regarding the previous allegations against Respondent was likely helpful to Respondent's case because it indicated he was innocent of the previous crimes. Unlike the instruction in Reid, Judge John's instruction came soon after the testimony was introduced and included a polling of each juror to determine if they would disregard the comments. Under the facts of this case, the admission of testimony indicating Respondent was previously wrongfully accused of a similar crime was not so prejudicial it could not be cured by the instruction. Furthermore, the post-conviction relief judge engaged in wild conjecture in speculating Judge John would likely have declared a mistrial had the solicitor elicited the same testimony. The more likely scenario is Judge John would have issued the exact same curative instruction he issued when trial counsel elicited the testimony. In light of the thoroughness of the instruction, the post-

conviction relief judge erred in finding this was one of those particular cases where the instruction was insufficient to cure any prejudice from the testimony.[2]

II. The post-conviction relief judge erred in finding trial counsel ineffective for eliciting testimony from a witness about whether she believed the victim.

The State presented Patricia Brown to corroborate the timing of the victim's disclosure. (App. p. 91, lines 17-25). In cross-examination, trial counsel asked Brown why she waited so long to inform authorities about the victim's disclosure. (App. p. 97, line 2-p. 98, line 5). Trial counsel then asked Brown if she did not report the disclosure to authorities because she did not believe the victim. (App. p. 98, lines 6-11). Trial counsel argued to the jury in closing that Brown did not report the disclosure because she did not believe the victim. (App. p. 246, lines 7-11). The post-conviction relief judge found trial counsel had no valid trial strategy for asking Brown about whether she believed the victim. (App. p. 396). Again, the post-conviction relief judge erred by ignoring the clear evidence of trial strategy in the record and substituting his own hindsight judgment to discredit that strategy.

The post-conviction relief judge relied on this Court's line of precedent holding a witness cannot vouch for the credibility of another witness. See, e.g., Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010). However, the mere fact the testimony was otherwise inadmissible does not preclude the possibility trial counsel had a strategic

[2] The post-conviction relief judge's reliance on dicta from this Court's opinion in State v. Warren, 341 S.C. 349, 351, 534 S.E.2d 687, 688 (2000), that the inmate there "may be entitled to relief in a collateral proceeding" based on similar actions by his attorney, is disingenuous and unfounded. Although the post-conviction relief judge may have found the dicta "interesting to note[,]" (App. p. 393), reliance upon it had no place in the analysis of the particularized facts of this case. Petitioner notes Mr. Warren did not receive collateral relief on this issue, but instead voluntarily withdrew his application for post-conviction relief. Order of Dismissal at 1, Warren v. State, No. 2000-CP-18-816 (Dorchester Cnty. Ct. Com. Pl. filed July 29, 2003).

reason to elicit the testimony. See Janosky v. St. Amand, 594 F.3d 39, 48 (1st Cir. 2010) (no ineffective assistance of counsel where a decision to elicit otherwise inadmissible hearsay testimony "was part of a calculated trial strategy aimed at poking holes in" the state's case); Figueroa v. Heath, No. 10-CV-0121 JFB, 2011 WL 1838781, at *16 (E.D.N.Y. May 13, 2011) (no ineffective assistance of counsel where "[t]he trial record demonstrates that counsel's decision [...] was part of a strategy designed not only to show that the prosecution engaged in improper Rosario violations, but also to undermine the police's credibility by highlighting their failure to turn over relevant evidence to the defense."); Krist v. Foltz, 804 F.2d 944, 947 (6th Cir. 1986) (no ineffective assistance of counsel for eliciting otherwise inadmissible evidence).

The record clearly indicates trial counsel's strategy was to implicate the victim's story was unbelievable based, in part, on the fact Brown delayed in reporting the disclosure to authorities. Trial counsel attempted to confront Brown with her delayed reporting in cross-examination, and asked the jury to presume the delay was because the victim's story was unbelievable. Considering the only viable trial strategy in this case was to discredit the victim, this line of questioning was reasonable. The post-conviction relief judge again erred in finding trial counsel did not have a strategic reason for asking this question where the record demonstrates a strategy existed. Wood, 558 U.S. at 297; Greiner, 417 F.3d at 326; see also Janosky, 594 F.3d at 48 ("When, as in this case, counsel's decision to elicit potentially damaging testimony is part of a *plausible* trial strategy, that decision does not fall below an objective standard of reasonableness." (citations omitted) (emphasis added)).

The post-conviction relief judge also erred in determining Brown's testimony irreparably prejudiced Respondent. In Smith v. State, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010), this Court found the testimony of a forensic interviewer prejudiced the inmate where "[t]he State relied heavily on the forensic interviewer's testimony to overcome inconsistencies in the Victim's testimony." Here, the solicitor's discussion of Brown's testimony in the closing was limited to rebutting trial counsel's argument Brown was dismissive of the victim's disclosure. (App. p. 257, line 2-p. 258, line 17). The solicitor did not attempt to use the imprimatur of Brown's belief of the victim's story to bolster the victim's credibility. Furthermore, there was not "a great deal of conflicting testimony from virtually every State and defense witness[,]" Smith, 386 S.C. at 569, 689 S.E.2d at 633, regarding the victim's disclosure. Instead, the time and place corroboration testimony from the witnesses was consistent in this case. Based on the entire record, the post-conviction relief judge erred in finding trial counsel's strategy of exploring this line of questions prejudiced Respondent.

III. The post-conviction relief judge erred in finding trial counsel ineffective for failing to elicit testimony from a witness that the victim recanted his allegations.

Respondent's sister testified at the evidentiary hearing that the victim told her the accusations against Respondent were false. (App. p. 354, lines 19-23; p. 358, line 16-p. 359, line 2). The post-conviction relief judge concluded evidence of the victim's recantation was admissible as a prior inconsistent statement and that trial counsel "was simply not aware of or had misinterpreted the relevant hearsay rules" in failing to ask Respondent's sister about the victim' statement. (App. p. 397). Again, the post-conviction relief judge made an assertion about trial counsel's strategy from a silent

record, and failed to indulge the presumption trial counsel had a strategic reason for not pursuing this avenue of questioning. Wood, 558 U.S. at 297; Greiner, 417 F.3d at 326.

The examination of witnesses is a matter left wholly to the discretion of trial counsel. Abney, 408 S.C. at 48, 757 S.E.2d at 547; Sallie v. N.C., 587 F.2d 636, 640 (4th Cir. 1978) ("Marzullo [v. Maryland, 561 F.2d 540 (4th Cir. 1977),] was not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness."). The decision to not present evidence of a prior inconsistent statement is also within the ambit of trial strategy and left to trial counsel's discretion. See Lavayen v. Duncan, 311 F. App'x 468, 471 (2d Cir. 2009) (no ineffective assistance of counsel for failure to impeach prosecution witness with evidence of prior inconsistent statement (citing Dunham v. Travis, 313 F.3d 724 (2d Cir. 2002))); Foster v. Ray, No. 1:14CV645 CMH/TCB, 2015 WL 1383181, at *5 (E.D. Va. Mar. 20, 2015) (same) (citations omitted). The record demonstrates trial counsel was aware of the alleged recantation by the victim based on his interview with Respondent's sister. Because he chose not to explore this recantation after learning of it, the post-conviction relief judge was required to indulge the strong presumption this decision was a strategic one. Strickland, 466 U.S. at 690; Meyer, 506 F.3d at 374. Instead, the post-conviction relief judge engages in speculation and conjecture about trial counsel's understanding of the rules of evidence, in direct contradiction to his constitutional mandate to indulge a presumption of competence. Harrington, 562 U.S. at 109 ("There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'" (citing Yarborough v. Gentry, 540 U.S. 1 (2003))). Such speculation was in error.

Furthermore, the evidence in the record does not support the post-conviction relief judge's finding testimony of the alleged recantation would have changed the result of the trial. Although this case depended largely on whether the jury believed the victim or Respondent, trial counsel fully articulated his theory that the victim fabricated the allegations. Furthermore, Respondent's sister testified she spoke to the victim after Respondent was arrested (App. p. 185, lines 15-19) and she still was comfortable with Respondent being around her children (App. p. 188, lines 16-20). Thus, trial counsel presented an inference Respondent's sister had reason to believe the victim fabricated the allegation. Cf. id. at 109 ("To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates."). Accordingly, the post-conviction relief judge erred in finding trial counsel ineffective for failing to elicit testimony about the victim's alleged recantation.

IV. The post-conviction relief judge erred in finding trial counsel ineffective for failing to cross-examine the victim on a prior conviction.

The State moved *in limine* to prevent trial counsel from asking the victim questions about his marijuana conviction. (App. p. 34, line 5). Judge John ruled trial counsel could not question the victim about his marijuana conviction or his assault and battery charge because they were not admissible under Rule 609, SCRE. The post-conviction relief judge found trial counsel ineffective for failing to argue the marijuana conviction was admissible under Rule 608, SCRE. (App. p. 399). In the alternative, the post-conviction relief judge determined the State opened the door to the admission of the conviction. (App. p. 400). The post-conviction relief judge engaged in a tortured analysis to determine trial counsel may have been able to convince Judge John to change

his mind about the admissibility of the convictions, essentially concluding he would have admitted the conviction if he had been the trial judge. This analysis, although legally correct, would have been unnecessary had the post-conviction relief judge not abdicated his mandate to indulge a strong presumption trial counsel acted reasonably under the circumstances.

The examination of witnesses is a matter left wholly to the discretion of trial counsel. Abney, 408 S.C. at 48, 757 S.E.2d at 547; Sallie, 587 F.2d at 640. Generally, trial counsel is not required to argue every possible ground for admission of evidence, but is only required to make his strongest argument. Cf. Johnson v. Bowersox, No. 4:10CV00947 ERW, 2013 WL 4517760, at *16 (E.D. Mo. Aug. 26, 2013) ("Given the jury's rejection of Johnson's self-defense theory, it is not likely that Johnson was prejudiced by counsel's decision not to advance a similar and weaker alternative theory of defense."). Here, trial counsel attempted to argue for the admission of the marijuana conviction, but was rebuffed by Judge John. The post-conviction relief judge' undertook a painstaking analysis to determine trial counsel should have advanced additional arguments to Judge John to justify the admissibility of the prior conviction. However, this analysis ignores the possibility Judge John would have nevertheless ruled the conviction inadmissible. The post-conviction relief judge improperly presumed trial counsel neglected to pursue this avenue of admissibility, instead of considering the fact trial counsel might have chosen to not further argue with Judge John. Harrington, 562 U.S. at 109. Therefore, the post-conviction relief judge erred in finding trial counsel ineffective for failing to advance alternate theories of admissibility where the trial judge already determined the evidence was inadmissible. He also erred in finding trial counsel

ineffective for failing to argue the State opened the door to the admission of the conviction.

Furthermore, Respondent was not prejudiced by trial counsel not further exploring his marijuana conviction. The post-conviction relief judge faults trial counsel for not presenting the conviction as a reason for the victim to fabricate the allegations. However, the post-conviction relief judge conveniently ignores the fact trial counsel made the same argument through alternate methods. The victim admitted he "got in a lot of trouble" for using marijuana. (App. p. 124, lines 7-10). Trial counsel argued in closing that the victim fabricated the allegations because he was in trouble, in part, because of his marijuana use. (App. p. 246, lines 1-6). Thus, trial counsel presented the jury with the same theory of fabrication the post-conviction relief judge now faults trial counsel for not presenting. The mere fact the theory could have been further explored with evidence of the conviction does not support a finding of prejudice. See Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) ("[T]he Confrontation Clause guarantees an opportunity for effective cross examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish"); Mills v. Singletary, 161 F.3d 1273, 1288 (11th Cir. 1998) (right to confront witnesses is satisfied where the cross-examination exposes the jury to facts sufficient to evaluate credibility and "enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable"); see also Simpson v. Moore, 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case." (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998))). Accordingly, the post-

conviction relief judge erred in finding trial counsel ineffective for failing to introduce the victim's marijuana conviction.

V. The post-conviction relief judge erred in finding trial counsel ineffective for eliciting testimony about the victim identifying Respondent.

The State presented Kathy McGroggin as the victim's treating therapist. On cross-examination, trial counsel again attempted to explore the reasons McGroggin did not immediately report the victim's disclosure to the authorities. She testified she did not immediately report the disclosure because the victim informed her Respondent was incarcerated for the charges. (App. p. 168, line 22-p. 169, line 15). The post-conviction relief judge concluded trial counsel had no strategic reason for asking these questions. (App. p. 401). Again, this conclusion ignores evidence of trial strategy in the record.

As noted supra, the record indicates trial counsel attempted to demonstrate the corroborating witnesses did not report the victim's disclosure because it was not credible. Trial counsel's questions to McGroggin were designed to elicit testimony he could use to support his trial strategy. Trial counsel argued to the jury McGroggin's excuse for not reporting the disclosure was not believable. (App. p. 246, lines 14-23). In light of the record before him, the post-conviction relief judge erred in not presuming trial counsel intended to elicit this testimony. Harrington, 562 U.S. at 109.

The post-conviction relief judge also erred in finding McGroggin's testimony was prejudicial to Respondent. The State could have easily elicited testimony about the particulars of the victim's disclosure because Respondent's defense was that the victim fabricated the allegation. See State v. Jeffcoat, 350 S.C. 392, 396, 565 S.E.2d 321, 323 (Ct. App. 2002) (holding Rule 801(d)(1)(B), SCRE, allows testimony of the details of a disclosure beyond time and place if introduced to rebut an allegation of recent

fabrication). Therefore, the post-conviction relief judge's finding the testimony was otherwise inadmissible was incorrect. Respondent also notes the post-conviction relief judge did not specifically indicate how the testimony prejudiced Respondent.[3] Based on the entire record, the post-conviction relief judge's finding of ineffectiveness in this regard is legally flawed and devoid of evidentiary support.

[3] The post-conviction relief judge stated the testimony, "[c]oupled with the other errors noted herein," was prejudicial to Respondent. To the extent this statement can be viewed as a finding of cumulative error, Petitioner notes this Court has consistently declined to recognize the doctrine of cumulative error. Lorenzen v. State, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n.3 (2008); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006); Green v. State, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002); see also Walker v. State, 407 S.C. 400, 407 n.1, 756 S.E.2d 144, 147 n.1 (2014) (granting relief on a single ground and declining to address a cumulative error argument). Petitioner further notes a majority of jurisdictions have declined to adopt cumulative error theories of relief. Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998), cert. denied, 526 U.S. 1035 (1999).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant certiorari to review the post-conviction relief judge's erroneous findings of ineffectiveness.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
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STEVEN L. HEWITT,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and the Appendix**, has been served upon opposing counsel by mailingtwo (2) copies in the United States mail, postage prepaid:

Appellate Defender Susan B. Hackett
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 6th day of April, 2015

Norma Bigbee
NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

April 6, 2015

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Steven L. Hewitt v. State of South Carolina**
Appellate Case No: 2014-002027

Dear Mr. Shearouse:

Enclosed for filingare the original and six (6) copies of the **Petition for Writ of Certiorari and the Original and One Bound Copy of the Appendix** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Appellate Defender Susan B. Hackett (2 copies)