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STATE OF SOUTH CAROLINA  
In The Supreme Court

**S.C. Supreme Court**

CERTIORARI TO ANDERSON COUNTY  
Court of Common Pleas

The Honorable John Kittredge, Trial Judge  
The Honorable J. Cordell Maddox, Jr., PCR Judge

Appellate Case No. 2014-001293

Ila Michelle Carter, ..... Petitioner,

v.

STATE OF SOUTH CAROLINA, ..... Respondent.

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. Is the grant of Certiorari necessary to review whether probative evidence supports the PCR Judge's sound ruling that Petitioner failed to meet his burden to prove counsel's purported failure to object to certain portions of testimony from the State's expert forensic pathologist concerning battered child syndrome constituted deficient and ineffective performance?
2. Is the grant of Certiorari necessary to review whether probative evidence supports the PCR Judge's sound ruling that Petitioner failed to meet his burden to prove counsel's purported failure to object to references made by the Solicitor in closing argument and on cross-examination to Petitioner's invocation of her right to counsel constituted deficient and ineffective performance where Counsel opened the door to these references pursuant to a valid trial strategy?

**STATEMENT OF THE CASE**

Respondent adopts Petitioner's statement of the case.

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

- 1. Certiorari is unwarranted to review whether probative evidence supports the PCR Judge's sound ruling that Petitioner failed to meet his burden to prove counsel's performance defective for failing to object to certain portions of testimony from the State's expert forensic pathologist concerning battered child syndrome; moreover, probative evidence supports the PCR Judge's ruling that Petitioner failed to prove prejudice in light of the overwhelming evidence of his guilt.**

Petitioner argues that counsel's performance in failing to object to certain portions of testimony from the State's expert forensic pathologist concerning battered child syndrome constituted deficient performance.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "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 668).

### A.

The PCR judge made a sound ruling in finding that Petitioner failed to prove either constitutionally deficient performance or ineffective assistance at trial. The applicable

case law on the subject does not appear to support Petitioner's argument that a background in psychology is necessary to diagnose battered child syndrome.<sup>1</sup>

Expert testimony regarding the "shaken baby" and "battered child" syndromes is also admissible and must be given by a properly qualified expert. State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991). The testimony may support the inference that the child's injuries were not sustained by accidental means. Id. As discussed in Lopez, the purpose of introducing evidence of battered child syndrome is *not* to link a child's injuries with any particular individual. Instead, it is introduced to support an inference that the child's injuries were *not accidental*. The South Carolina Supreme Court has held that "[t]he finding of battered child syndrome" ... "is made based on a number of *physical findings* which are inconsistent with the history of the injuries given by the parents or caretakers." State v. Lopez, 306 S.C. 362, 367, 412 S.E.2d 390, 393 (1991).

Medical evidence is sufficiently reliable scientific evidence to support an inference that child's injuries were not sustained by accidental means. State v. Morgan, 326 S.C. 503, 514, 485 S.E.2d 112, 118 (Ct. App. 1997) (overruled on other grounds) (citing State v. Lopez, 306 S.C. 362, 412 S.E.2d 390 (1991)). Such testimony is typically based on a physician's clinical diagnostic examination and the child's medical history. Id. The medical witness is often called to describe the results of the examination, offer an opinion as to the cause of any injuries, establish whether penetration occurred, and

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<sup>1</sup> Interestingly enough, in many of the cases in South Carolina involving the issue of battered child syndrome, the diagnosis is made by a *pathologist*—just like Dr. Woodard. See, e.g., State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) (Burnett, joined by Toal, JJ., dissenting) (battered child syndrome properly diagnosed by a forensic pathologist, where the majority found the issue of battered child syndrome was not properly before the court); see also, South Carolina Dept. of Social Services v. Brown, 317 S.C. 332 n. 3, 454 S.E.2d 335 n.3 (Ct. App. 1995) (overruled on other grounds) (diagnosis of battered child syndrome made by *forensic pathologist* who performed the autopsy, based on characteristics of injuries, including the fact that they "would be easily observed by a caretaker of the child and the injuries ... would have been very painful, causing the child to cry out whenever picked up or moved around").

answer questions as to whether the injuries could have been inflicted in a particular way or whether the caretaker's explanation is reasonable. Id.

Dr. Woodard was clearly a "qualified expert" for the purpose of both determining that the injuries to [Minor child] were not accidental, as well as making a diagnosis of battered child syndrome.

The Solicitor's voir dire of Dr. Woodard established that he received his medical degree from the Tulane University School of Medicine. **App.p.183, ln. 3-5.** He did an internship in pediatrics in New Orleans, and a pathology residency at Duke, where he served on the faculty for two years as a surgical pathologist and pediatric pathologist. **App.p.183, ln. 5-11.** For the next twelve years, Dr. Woodard practiced with the Piedmont Pathology Associates in Anderson, South Carolina. **App.p.183, ln. 11-13.** In 1994, he returned to North Carolina to do a fellowship training in forensic pathology. **App.p.183, ln. 13-15.** Dr. Woodard is licensed in South Carolina, North Carolina, Georgia, Louisiana, and Pennsylvania. **App.p.183, ln. 17-18.** Moreover, he is Board Certified as a Forensic Pathologist by the American Board of Pathology and Forensic Pathology. **App.p.184, ln. 1-6.**

Dr. Woodard stated that "beyond a reasonable doubt, the findings that we had in [minor child's] autopsy are consistent with battered child syndrome." **App.p.225, ln. 3-5.** In explaining the diagnosis of battered child syndrome to the jury, Dr. Woodard said: "[Minor child] suffered from battered child syndrome. She had had repetitive episodes of non-accidental trauma." **App.p.211, ln. 25 – p.212, ln. 1.**

In addition, Dr. Woodard explained how the nature of the injuries ruled out single

or accidental trauma: he said that “[t]he fact that the injuries were of different ages say that they could not have occurred at the same traumatic event,” so there “had to be multiple traumatic events.” **App.p.212, ln. 5-8.** Further, he noted that “[t]he hospitalizations for two traumatic head injuries that were non-accidental occurred at far separated time periods.” **App.p.212, ln. 8-10.** He also testified that the locations of the multiple injuries were not consistent with injuries that would have resulted from accidents or self-infliction. **App.p.213, ln. 22 – p.214, ln. 4.**

The fact of the matter is that Dr. Woodard, as a forensic pathologist, is obviously qualified to look at injuries and use his knowledge, experience, and expertise to deduce their cause.

#### **B.**

Even assuming, for the sake of argument, counsel was deficient in failing to object to Dr. Woodard’s expert testimony on battered child syndrome, Petitioner has failed to meet the second prong of the Strickland analysis and show resulting prejudice. Strickland, 466 U.S. 668, 691, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984) (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”). Prejudice is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceeding would have been different.

#### Overwhelming Evidence of Guilt

Respondent first argues that Petitioner is unable to meet this burden because there is overwhelming evidence of guilt. See, e.g., Harris v. State, 377 S.C. 66, 79, 659 S.E.2d

140, 147 (2008) (finding PCR judge erred in finding counsel ineffective in failing to obtain previous trial transcript in preparation for retrial where evidence was overwhelming); Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied*, 535 S.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); *cf.* Ford v. State, 314 S.C. 254, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request and alibi charge where there was overwhelming evidence of guilt).

In the present case the trial judge, the PCR judge, and trial counsel all agreed that there was overwhelming evidence of guilt. Immediately prior to sentencing, then Judge Kittredge stated for the record: "The evidence of guilt against this defendant is overwhelming. [Minor child] left this earth on October the 14th. Her spirit left her much earlier. Words can never adequately convey or describe the life of unmitigated torture suffered by this poor child." **App.p.732, ln. 1-5**. The PCR judge also specifically noted that there was overwhelming evidence in this case. **App.p.925**.

Finally, Counsel, referring to the strength of the state's case, noted that Petitioner "needed to plead and get out of there because it was a conviction all the way down – coming ninety miles an hour down the road." **App.p.884, ln. 17-19**. Counsel agreed that the evidence was overwhelming. **App.p.884, ln. 20-21**. Counsel further speculated that,

in light of the evidence against Petitioner, he didn't think his failure to object would have affected the outcome of the trial. **App.p.890, ln. 1-18.** When asked, specifically, whether there was “some pretty overwhelming evidence of guilt” in this case, Counsel does not mention the qualification of the expert – instead, he states that “[t]he film [depicting Minor child's physical transformation after Petitioner moved in] killed this case dead.” **App.p.894, ln. 1-3.**

#### Contested Testimony Cumulative to Other Admissible Evidence

The outcome could not have been different where the allegedly impermissible testimony was cumulative to other testimony – by the same witness – that was clearly admissible and is not contested. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625 (for prejudice to exist must be a *reasonable probability* that, but for counsel's unprofessional errors, outcome of proceeding would have been different); see also State v. Drayton, 411 S.C. 533, 769 S.E.2d 254, 263 (Ct. App. 2015) (direct appeal case finding any error in the exclusion of evidence was not reversible where the evidence was cumulative to other references in the record regarding same topic) (*citing State v. Patterson*, 290 S.C. 523, 528, 351 S.E.2d 853, 856 (1986)).

Here, Dr. Woodard's diagnosis of battered child syndrome was cumulative to his previous testimony. Prior to responding to the Solicitor's direct question as to whether Minor child suffered from battered child syndrome, Dr. Woodard went through child's injuries – wound by wound – and explained why each one was not consistent with accidents but was instead consistent with abuse.<sup>2</sup> Dr. Woodard first explained that he discovered nothing in [Minor child's] autopsy that would lead him to label her an “easy

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<sup>2</sup> Petitioner does not take issue with this portion of Dr. Woodard's expert testimony.

bruiser,”<sup>3</sup> because the injury patterns on her constituted “very focal bruising” and were “in such a pattern” that they appeared to have been caused by “being either pushed into objects” or by “objects pushed into her.” **App.p.186, ln. 15-21.** Elaborating, he said that if she were an “easy bruiser,” he would expect more “unusual bruises over wide areas across the body.” **App.p.21-23.** Dr. Woodard testified that injuries to [Minor child’s] genital area could not have been caused by a catheter, even by a “very inept or incapable person,” because of the size and location of the bruises. **App.p.188, ln. 18 – p.189, ln. 9.** Dr. Woodard said they were inconsistent with a child stepping over a tub and falling.<sup>4</sup> **App.p.190, ln. 22 – p.191, ln. 1.** Dr. Woodard explained why they were inconsistent with self-infliction. **App.p.191, ln. 16-25.** Instead, Dr. Woodard said that the genital injuries were consistent with “chronic, sustained, long-term poor hygiene in [the] area with feces and urine in the area.”<sup>5</sup> **App.p.190, ln. 7-12.** He described injuries on [Minor child’s] feet that, because of the sizes and various ages, were consistent with “repetitive blows in a close area, but not in the same exact area.”<sup>6</sup> **App.p.194, ln. 10 – p.195, ln. 2.** Dr. Woodard testified that burns on [Minor child’s] abdominal area were inconsistent with running into a space heater.<sup>7</sup> **App.p.195, ln. 15-24.** Dr. Woodard described how an injury to the nose was not consistent with an accident or with sickness, but instead with a “blow to the nose.”<sup>8</sup> **App.p.196, ln. 18 – p.15.** Dr. Woodard explained how an injury to

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<sup>3</sup> One of the explanations Petitioner gave for [Minor child’s] injuries on a questionnaire at the hospital was that she “bruise[d] easily.” **App.p.376, lns. 22-25.** Petitioner also listed, *inter alia*, “lupus, clumsiness, cuts not healing rights,” ... “falling, losing balance,” and “big feet.” **App.p.377, ln. 22 – p. 377, ln. 4.**

<sup>4</sup> Petitioner stated in the hospital questionnaire that [Minor child] “would slip sometimes on the tub and straddle it.” **App.p.378, lns. 22-23.**

<sup>5</sup> Petitioner stated in the hospital questionnaire that “[Minor child] had diaper rash.” **App.p.379, ln. 20.**

<sup>6</sup> Petitioner stated in the hospital questionnaire that “the board or level, whatever, hit her feet.” **App.p.378, lns. 19-20.**

<sup>7</sup> Petitioner stated in the hospital questionnaire that the “burn came from the heater.” **App.p.377, lns. 5-6.**

<sup>8</sup> When asked about [Minor child’s] nose bleeding around the time of the autopsy, Petitioner started talking

[Minor child's] ear was consistent with coming into contact with a manmade object rather than a bee sting. **App.p.197, ln. 21 – p.198, ln. 14.** Dr. Woodard describes scars on [Minor child's] back consistent with cigarette burns rather than a lumbar puncture. **App.p.198, ln. 22 – p.199, ln. 17.** He explained how areas of missing hair (of various ages) was consistent with being traumatically or forcibly removed – with “taking [Minor child's] head and yanking it back by the hair,” rather than “just falling out” or being cut. **App.p.200, ln. 4 – p.201, ln. 8.** Dr. Woodard also testified to the poorness of [Minor child's] nutritional status. **App.p.208, ln. 10-11.**

By the time the Solicitor gets around to asking Dr. Woodard about battered child syndrome, nothing new is being added his testimony. Dr. Woodard has already gone through all of [Minor child's] injuries and explained either why they are inconsistent with accidents or are consistent with abuse. The fact that Dr. Woodard also made an actual diagnosis of battered child syndrome, in light of this evidence of abuse, is cumulative.

## ARGUMENT

- 2. Certiorari is unwarranted to review whether probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove counsel's performance defective for failing to object to references made by the Solicitor in closing argument and on cross-examination to Petitioner's invocation of her right to counsel where Counsel opened the door to these references pursuant to a valid trial strategy; moreover, probative evidence supports the PCR Judge's ruling that Petitioner failed to prove prejudice in light of the overwhelming evidence of his guilt.**

Petitioner argues that Counsel was ineffective in “opening the door” to the Solicitor's otherwise inappropriate comments on Petitioner's invocation of his Fifth Amendment rights, that the Solicitor's comments went outside the scope of the “open

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about [Minor child] “having a cold and putting medicine on her nose” and “stuffing tissues up [Minor child's] nose” when her nose was running. **App.p.385, lns. 10-14.**

door” and touched on guilt, and that those comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.

A.

Opening the Door

As a general rule, it is improper for the State to refer to or comment upon a defendant’s request for an attorney. See State v. Weston, 367 S.C. 279, 291-92, 625 S.E.2d 641, 648 (2006) (citing Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986)). However, one of the limited exceptions to this general rule where the State may cross-examine a defendant about his post-arrest, post-Miranda<sup>9</sup> silence is when a defendant actually “opens the door.” State v. McIntosh, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004) (finding that particular defendant did not open the door because he had not actually made the assertion that the state wanted to “respond” to); see also State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (one who opens the door to evidence cannot complain of its admission).

However, a defendant who opens the door to evidence cannot complain of its admission.

Important that both Δ and prosecutor have the opportunity to meet fairly the evidence *and arguments* of one another. [Robinson] (emphasis added).

Here, Counsel “opened the door” by inquiring into whether Petitioner’s statement to police following being issued a Miranda warning was voluntary. **App.p.405, ln. 12 – p.406, ln. 12.** The first issue, then, is whether counsel was *deficient* in opening the door to this line of questioning.

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<sup>9</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

As stated above, Counsel’s performance under the first prong of the Strickland test is judged under the standard of “reasonableness under prevailing professional norms.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674). [W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel.”<sup>10</sup> Edwards at 456, 710 S.E.2d at 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). “The validity of counsel’s strategy is viewed under an ‘objective standard of reasonableness.’” Id. 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. Edwards at 456-57, 710 S.E.2d at 64 (quoting Strickland 466 U.S. at 689, 104 S.Ct. 2052)). Accordingly, reviewing courts must be wary of second-guessing trial counsel’s tactics. Edwards at 457, 710 S.E.2d at 64 (citing Whitehead v. State, 308 S.C. 119, 112, 417 S.E.2d 529, 531 (1992)).

In the present case, Counsel clearly articulated a valid trial strategy of convincing the jury that Petitioner’s statement to the police was not freely and voluntarily given. **App.p.405, ln.12 – p. 406, l. 12.** This strategy was articulated *during the trial*, as evidenced by Counsel’s conversation with the trial judge outside the presence of the jury.<sup>11</sup> In pursuing this strategy, Counsel elicited testimony from the investigating

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<sup>10</sup> “[A] strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn’t have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record.” Wood v. Allen, 558 U.S. 290 (2010).

<sup>11</sup> **Court:** Mr. Gamble has indicated his desire to go into the Defendant’s invocation of her right to counsel.... Is that correct, sir?

**Counsel:** That’s correct, your Honor. And the reason I want to go into that stopping of the interview and the request for counsel and the non-assistance in getting counsel was that the jury has the right to determine that the statement given, finally given, was freely, voluntarily and all that given. And this, in my opinion,

officers that could have convinced the jury to infer that Petitioner was coerced into giving a statement to police – even *after* requesting an attorney. Specifically, Counsel succeeded in getting police to testify that after Petitioner requested an attorney and ended her interview with police she was still unable to leave the sheriff’s office for an additional two hours because her vehicle was being searched. **App.p.408, lns. 13-25.** Then, police testified that when Petitioner was finally able to leave, she arrived to find her house being searched for another three hours by police. **App.p.409, lns. 13-25.** At this point, she had already been advised that her children were in emergency protective custody with the South Carolina Department of Social Services. **App. p. 418, lns. 6-8.**

On direct examination, Petitioner corroborated this testimony. She stated that she was questioned by police, and at one point asked for an attorney. **App.p.620-624.** She testified that she waited, stranded at the police station, while her van was searched. **App.p.624, ln. 20 – p.625, ln. 7.** Finally, Petitioner stated that when she arrived at her house somewhere around ten o’clock at night, she found police conducting a search of the premises. **App.p.625, lns. 14-19.** She said they were there until around midnight. Id. Petitioner then testified that one of the officers informed her she would not be given any information concerning the status of her husband or children *until she cooperated.* **App.p.627, lns. 7-9.** She was then given a card and told to set up an appointment.

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this request with no assistance to get the lawyer and then the later search from ten o’clock until one o’clock and the continued police involvement with [the Defendant] Overcame her will, in my opinion, and she finally just gave the statement. I’ll go into her opinion of it. And I’m going to put her on the stand and she’s going to tell her opinion about trying to find her children and thought that this was the only way that she could get – to find her children was to finally give a statement and cooperate.

**Court:** *So the decision to pursue this particular area of inquiry is done after careful thought and strategy as to what you deem to be an appropriate strategy and approach at this state?*

**Counsel:** Yes, sir, because I believe your honor is going to charge the jury that they have to determine that this statement was freely and voluntarily given, also.

**Trial Judge:** Thank you, sir.

**App.p.405, ln.12 – p. 406, l. 12** (emphasis added)

**App.p.627, Ins. 11-12.** She said she did so almost immediately. **App.p.627, ln. 14.**

Clearly Counsel's strategy was to use this testimony to convince the jury that her subsequent statement was not voluntary and should not be relied upon. The Trial Judge even charged the jury that they could only consider the statement if they concluded it was freely and voluntarily given.<sup>12</sup>

Because there is evidence to support the PCR Court's finding that Counsel's decision to bring up Petitioner's invocation of her right to counsel was based on the objectively reasonable trial strategy of convincing the jury that her subsequent statement to police was not voluntary, certiorari is not warranted.

#### Failure to Object

Petitioner further argues that even if Counsel's strategy *was* reasonable, the State's comments were still improper because they went beyond replying to counsel's argument. Such an assertion is unsupported by the record. Petitioner states, in conclusory fashion, that the State went beyond the scope of Counsel's argument and turned Petitioner's assertion of a constitution right against her on cross-examination. In fact, the section of the record Petitioner cites to deals directly with whether the statement was voluntary and self-initiated, as opposed to coerced. The Solicitor notes the point at which Petitioner asserts her right to a lawyer, emphasizing that Petitioner was aware of the fact that an attorney would be provided to her if she could not afford one. **App.p.663,**

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<sup>12</sup> The Trial Judge charged the jury on what weight to give to Petitioner's statement, saying it must be "the product of a free and unconstrained choice by [the] Defendant." **App.p.713, Ins. 8-9.** The Trial Judge clarified that if the jury concluded that "the alleged statement was not the free and voluntary willed expression of the Defendant, then [they] should not consider the statement at all." **App.p.713, Ins. 13-16.** The Trial Judge also stated that "an accused, having expressed her desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to her unless the accused herself initiates further communication, exchanges or conversations with the police. **App.p. 715, Ins. 7-12.**

**ln.22 – p.664, ln 8.** The Solicitor then examines with Petitioner whether or not the fact that she “reinitiated” was coerced or not. **App.p.664, ln. 9-20.**

Further, the relevant comments made by the Solicitor during closing argument are confined to the issue of whether Petitioner’s statement was voluntary. The Solicitor tells the jury when Petitioner requests an attorney. **App.p.690, lns. 23-25.** The Solicitor emphasizes that the Miranda form Petitioner signed informed her of her right to counsel, and that police questioning stopped as soon as Petitioner invoked that right. **App.p.691, lns. 1-5.** The Solicitor further states that it was *Petitioner* who reinitiated contact with authorities. **App.p.690, ln. 25 – p.691, ln. 1.**<sup>13</sup> Finally, the Solicitor tells the jury that the State complied with the law, which forbade police from further interrogation once an accused has expressed her desire to deal with the police through counsel, “unless the accused himself initiates further communication exchanges or conversations with the police.” **App.p.691, lns. 11-18.** The point the Solicitor made did not relate to guilt, but to whether the statement given was voluntary and in compliance with the law.

Because Counsel’s trial strategy was to convince the jury that Petitioner’s statement was coerced, and because the Solicitor’s comments on cross-examination and in closing addressed whether the statement was voluntary, Counsel had no ground on which to base an objection.

## **B.**

When a Doyle violation has occurred, the prejudice prong of the PCR analysis runs parallel to the harmless error analysis applied in a direct appeal. Edmond v. State, 341 S.C. 340, 348, 534 S.E.2d 682, 686 (2000) (In deciding prejudice prong in PCR action,

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<sup>13</sup> The Solicitor also informs the jury that at that point, the State was under no obligation to find an attorney for Petitioner.

the facts are the same ones analyzed in deciding harmless error on direct appeal).

Even where deficient performance is present, “[a] court’s confidence in the outcome of [a] trial likely [will] not be undermined” if the following factors are met: 1) the record shows the reference to the defendant’s right to silence or to an attorney was a single reference, which was not repeated or alluded to; 2) the prosecutor did not tie the defendant’s exercise of his right directly to his exculpatory story; 3) the exculpatory story was totally implausible; and the evidence of guilt was overwhelming. *Id* at 348, 534 S.E.2d at 686-87.

Petitioner’s argument here clearly fails on the prejudice prong for reasons discussed in previous sections. Most clearly, the evidence in this case is *utterly overwhelming*. Second, contrary to Petitioner’s assertions, the Solicitor did *not* tie her invocation of the right to counsel directly to her exculpatory story, but instead narrowly tailored the comments in response to Counsel’s trial strategy. Finally, Petitioner’s exculpatory story – that she was not the abuser and, alternatively, [Minor child’s] injuries were accidental – is entirely implausible in light of the evidence and testimony presented at trial.

### CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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April 20<sup>th</sup>, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APR 20 2015

S.C. Supreme Court

Honorable Frank R. Addy, Circuit Court Judge  
Appellate Case No. 2014-001293

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ILA MICHELLE CARTER,

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STATE OF SOUTH CAROLINA,

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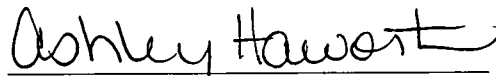
**CERTIFICATE OF SERVICE**

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

**John H. Strom, Esquire  
S.C. Commission on Indigent Defense  
Appellate Defense  
PO Box 11589  
Columbia, SC 29211**

This 20<sup>th</sup> day of April, 2015



Ashley Haworth  
LEGAL ASSISTANT for the Respondent



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APR 20 2015

S.C. Supreme Court

ALAN WILSON  
ATTORNEY GENERAL

April 20, 2015

The Honorable Daniel E. Shearouse  
Clerk of Court, South Carolina Supreme Court  
Post Office Box 11330  
Columbia SC 29211

**RE: Ila Michelle Carter v. State of South Carolina**  
**Appellate Case No: 2014-001293**

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six (6) copies in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire  
Assistant Attorney General  
SC Bar No: 100793

JWW/ah  
Enclosures

cc: John H. Strom, Esquire  
Trisha Allen, Victim Services