STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

Appeal from Dillon County
Court of Common Pleas

The Honorable J. Michael Baxley, Trial Judge
The Honorable Thomas A. Russo, Post-Conviction Relief Judge

Appellate Case No. 2014-002401

Jeffrey Caulder, No. 336973, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether probative evidence supports the PCR Court's finding that trial counsel was not ineffective in failing to object to the following elements: to the testimony of expert witnesses.

a. Testimony of expert witnesses;
b. Testimony of investigating officer;
c. Testimony of child victims to the effect that it put Applicant's character at issue;
d. Reasonable doubt jury charge[1].

[1] Respondent submits that these are four separate and distinct allegations of ineffective assistance of counsel. As a result, each allegation should have a separate analysis of deficiency and prejudice as required by Strickland, and which will be done in the following sections.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. In September 2009, the Dillon County Grand Jury indicted Petitioner for three (3) counts of unlawful neglect of a child (2009-GS-17-274, -275, and -276). Rosalind L. Sellers, Esquire ("trial counsel") represented Petitioner. On September 17-18, 2009, Petitioner proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Petitioner guilty as indicted. Judge Baxley sentenced Petitioner to consecutive terms of ten (10) years for each count.

Petitioner filed a timely notice of appeal, and Robert M. Pachak, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders[2] brief. The South Carolina Court of Appeals dismissed Petitioner's appeal on May 18, 2011. State v. Caulder, Op. No. 2011-UP-223 (S.C. Ct. App. filed May 18, 2011). The remittitur was returned to the circuit court on June 6, 2011.

Petitioner filed an application for post-conviction relief (PCR) on April 10, 2012 (2012-CP-17-156). (App.pp.14-17). Respondent filed a return on or about July 24, 2012. (App.pp. 24-27). An amended application was filed on July 23, 2014. (App.pp. 18-23). A hearing was held at the Darlington County Courthouse on July 21, 2014. (App.pp.29-77). Petitioner was present and represented by John D. Elliott, Esquire. Joshua Thomas, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Thomas A. Russo denied relief in an order dated September 8, 2014 and filed September 30, 2014. (App.pp.1-13). A notice of appeal was filed at this Court on

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

October 29, 2014. John D. Elliott, Esquire represented Petitioner. Petitioner filed his petition for writ of certiorari on or about July 15, 2015.

This return to the petition for writ of certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'any evidence' of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

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

The proper measure of performance is whether Petitioner's 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, at 668. The petitioner must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

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

300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Probative evidence supports the PCR Court's finding that trial counsel was not ineffective in failing to object to the testimony of expert witnesses.

Petitioner argues that the PCR Court erred in finding that trial counsel was not ineffective when she did not object to the testimony of Ms. Tuck and Ms. Allen-Cook, both of whom were qualified as experts in the field of child abuse counseling and treatment. However, this argument is meritless as ample evidence supports the PCR Court's finding that trial counsel was not ineffective.

As a primary matter, the PCR Court found that the qualification of these witnesses was proper because it could assist the trier of fact in determining whether the alleged crimes actually occurred. See State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993) (expert testimony and behavioral evidence admissible to prove crime occurred). Accordingly, the PCR Court found that trial counsel was not deficient in failing to object to the counselor's qualification as expert witnesses.

Petitioner argues trial counsel failed to object to certain testimony of the experts and, in doing so, allowed in testimony that spoke to the credibility of other witnesses, namely the child victims. Petitioner further argues that the therapists were also called upon to corroborate the identity of the perpetrator, and that these combined alleged failures were prejudicial to the Petitioner. Petitioner appears to argue that these witnesses were called solely for these purposes, when they actually provided useful and relevant testimony, as determined by the PCR court. In reviewing the trial transcript, it is apparent that trial counsel was attempting to elicit testimony that some children do, in fact, lie to

their therapists – an answer that would be expected. Therefore, trial counsel's failure to object to or avoid this testimony is certainly not ineffective, as it shows her intent to discredit the witness. (App. pp. 440:13-441:9.) Furthermore, she made timely objections where appropriate in attempts to regulate the scope of the experts' testimony (App. p. 392:8-10; p. 419:5-6; p. 432:15-16; p. 435:7-8.)

Regarding prejudicial effect of trial counsel's failure to object, there is simply no evidence to support this claim. Most of the testimony that Petitioner argues is improper vouching or corroboration is merely testimony about the treatment of the victims. Though each of the experts made individual statements that Petitioner questions, the PCR court found that the failure to object to these was not prejudicial as these statements spoke to the elements of the crime.[3] The testimony of the experts was referred to once in closing argument by the prosecution, but Judge Baxley issued instructions to the jury both before and after the cases in chief on how to consider arguments: before the trial, he instructed the jury that neither opening nor closing arguments are evidence. (App. pp. 149:8-24.) At the close of case presentations, Judge Baxley also instructed the jury that they were the sole judges of the credibility of witnesses, both generally (App. pp. 496:6-497:3) and specifically in regard to expert witnesses. (App. pp. 497:21-498:18.) The PCR Court found these instructions to be curative and proper, especially in light of the entire record.[4]

Petitioner relies on State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), for the broad proposition that corroborative testimony by experts can never be harmless, though

[3] See S.C. Code Ann. § 63-5-70(A)(1) ("It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child [...] to place the child at unreasonable risk of harm affecting the child's life, physical or mental health[.]"). This was also cited as footnote 2 in the Order of Dismissal.

[4] See State v. Kromah, 401 S.C. 340, 359, 737 S.E.2d 490, 500 (2013). ("Based on the entire record, including the physical evidence documented in this case, the challenged testimony could not reasonably

other case law in this state defines this standard more narrowly. One can differentiate the facts in the more recent case of State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (2015) from Jennings for many reasons, but initially because Brown did not involve a forensic interviewer. The case at bar does not involve forensic interviewers and, just as a forensic interviewer can be distinguished from the experts in this case, so can the other elements distinguished between Brown and Jennings. These include, importantly, whether an explicit statement of credibility was made regarding *any* child abuse victims or the particular ones in this matter.[5] The overall facts of the case support the PCR Court's finding that trial counsel was not ineffective. For these reasons, the petition for writ of certiorari should be denied.

II. Probative evidence supports the PCR Court's finding that trial counsel was not ineffective in failing to object to the testimony of the investigating officer.

Petitioner argues the PCR Court erred in finding that trial counsel was not ineffective when she did not object to the testimony Deputy Randolph Tyler of the Dillon County Sheriff's Department. However, this argument is meritless as ample evidence supports the PCR Court's finding that Trial Counsel was not ineffective.

Petitioner places great weight on the fact that Deputy Tyler testified repeatedly that he believed he had probable cause to make an arrest, and points to the matter of S.C. Dep't of Soc. Servs. v. Lisa C., 380 S.C. 406, 417, 669 S.E.2d 647, 653 (Ct. App. 2008) for the proposition that this testimony is both irrelevant and highly prejudicial in a civil

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have affected the result of the trial[.]"). This was also cited as footnote 3 in the Order of Dismissal.

[5] The State notes that neither Brown nor Jennings had been decided at the time of trial in this matter and, therefore, should be considered carefully, as attorneys are not expected to anticipate changes to the law not in existence at the time of trial. See Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (citations omitted), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in

child protection proceeding. Respondent avers that the types of testimony at issue in these matters are easily distinguishable. In Lisa C., supra, the testifying deputy's statement suggested that the Father was guilty of sexual misconduct. In the case at bar, the deputy merely stated that he believed there was probable cause to make an arrest, and that he relied on other experts to come to that conclusion. These statements do not portray an implication of guilt, but rather the belief that the much lower legal standard of probable cause existed and, therefore, it was reasonable to begin an investigative process. Furthermore, Lisa C., supra, was a civil matter, while the underlying case at bar was a criminal prosecution. To require the omission of any mention of probable cause in a criminal prosecution would severely hinder the litigation of every criminal matter.

Similarly, Petitioner argues that Deputy Tyler gave a direct opinion on the "guilt of the applicant" (here, Petitioner), yet does not provide a citation for this in the Petition. (Petition, p. 3.) Instead, Petitioner cites case law from other states in an attempt to bolster this claim. Though it had not been issued at the time of trial, Respondent notes the findings in Kromah, supra (footnote 4), because Deputy Tyler merely testified as to what he did following receipt of information from his Chief Deputy. (App. pp. 157:17-25.) This can be distinguished from the Petitioner's reliance on State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), in which a police investigator was qualified as an expert and the court found that he had testified outside the scope of his expertise. Deputy Tyler's simple description of the actions he took and what prompted those actions is not an indication his belief regarding the guilt of the Petitioner. Furthermore, it did not reveal any of the contents of the reports on which Deputy Tyler relied. Such testimony is admissible, and

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existence at the time of trial.").

was found as such by the PCR Court. (citing Kromah, 401 S.C. at 355, 737 S.E.2d at 498).

It follows, then, that because Deputy Tyler's testimony was neither irrelevant nor prejudicial, trial counsel's failure to object to it was not prejudicial to the Petitioner. Petitioner relies on the Lisa C. and Ellis, supra, cases for propositions that the state has refuted above. Petitioner also alleges that Deputy Tyler's testimony was improper corroboration pursuant to Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001), though this cannot be viewed as corroborative of any other witness's testimony because Deputy Tyler only testified to his own individual actions. If anything, trial counsel was effective in eliciting testimony from Deputy Tyler about his lack of qualification as an investigator, lack of experience in cases of this type, and other facts that were potentially harmful to the State's case. (App.pp. 159:22-160:8.) For these reasons, the petition for writ of certiorari should be denied.

III. Probative evidence supports the PCR Court's finding that trial counsel was not ineffective in failing to object to the testimony of child victims to the effect that it put Applicant's character at issue.

Petitioner argues the PCR Court erred in finding that trial counsel was not ineffective when she did not object to the testimony of the children that allegedly put Petitioner's character at issue. However, this argument is meritless as ample evidence supports the PCR Court's finding that trial counsel was not ineffective.

The statement to which Petitioner points was elicited as a result of the prosecution asking a child victim, Jonathan, how he felt about the Petitioner. Petitioner directs the Court to the South Carolina Rules of Evidence regarding defendants testifying and opening their character up to discussion. However, Respondent submits that the question

does not reach this level of analysis because specific no prior bad acts were described during testimony; instead, Jonathan merely stated a feeling. Petitioner cites State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) for the idea that questions regarding "feelings" are "rarely, if ever, going to elicit relevant, admissible evidence." (Petition, p. 8.) In Saltz, the testimony was a very detailed and poignant description of how the witness felt about other players in the case – quite different than the simple and brief statement given by the child witness. It is certainly reasonable to believe that trial counsel chose to elicit more useful testimony on cross-examination instead of arguing the potential admissibility of this statement. This is particularly noteworthy because the allegedly harmful portion Jonathan's statement is short and vague – "I don't think Jeffrey has a heart. I think that he doesn't care about no one but himself, and I don't think he ever will. I think he hates the whole world." Had he stated something more concrete (*e.g.*, "Jeffrey beat me on April 23."), Jonathan's testimony may have been as damning as Petitioner alleges. What was actually elicited, though, comes far short of putting the Petitioner's character at issue or presenting evidence that he may have the motive or state of mind to commit any bad acts.

As Petitioner mentions, the PCR Court ruled that this testimony was allowable based on the *res gestae* theory. (App.p.11.) Because it helped to present the overall picture of evidence in this case, including the children's understanding of the abuse that they allegedly sustained from Applicant, this testimony is admissible. Similarly, as stated in prior sections, the fact that the State referred to this testimony in its closing argument was found not to have been prejudicial as the trial court provided curative instructions both before and after the presentation of the cases in chief regarding the fact that arguments are not evidence.

When arguing the potential prejudice to the Petitioner because of these failures to object, Petitioner asserts that there is a reasonable likelihood that the outcome of the trial would have been different absent this evidence (in other words, the second prong of the Strickland, supra, test.). There is simply no probative evidence to support this theory. Petitioner's argument that the prosecutor relied on this as evidence is not supported by the transcript in either the trial or PCR courts. For these reasons, the petition for writ of certiorari should be denied.

IV. Probative evidence supports the PCR Court's finding that trial counsel was not ineffective in failing to object to the court's instruction on reasonable doubt.

Petitioner argues the PCR Court erred in finding that trial counsel was not ineffective when she did not object to the trial court's instruction on the meaning and application of reasonable doubt. However, this argument is meritless as ample evidence supports the PCR Court's finding that trial counsel was not ineffective.

The PCR Court found that Petitioner/Applicant failed to meet his burden of proof to show trial counsel ineffective in failing to object to Judge Baxley's reasonable doubt charge. "[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)). The PCR Court agreed with trial counsel's testimony that she found nothing objectionable about Judge Baxley's charge. Judge Baxley's charge on reasonable doubt is largely a recitation of the charge cited with approval in Todd v. State, 355 S.C. 396, 401, 585 S.E.2d 305, 308 (2003). Furthermore, the charge that a "full and free discussion of the issue ... does not mean that reasonable

doubt automatically exists" (App. p.505 8-12) is not an improper comment on the facts because it does not reference any specific facts of the trial. In light of the entirety of Judge Baxley's thorough charge, the PCR Court found that the Petitioner/Applicant had not shown a reasonable likelihood the jury misapplied the law or misunderstood the State's burden of proof and, accordingly, trial counsel was not deficient for failing to object to the charge.

Respondent avers now that the argument as stated in the Petition is devoid of actual evidence and is rather a lengthy speculation on what a juror may have interpreted. Though it cannot be known what a juror thought in this matter, the elements in Petitioner's logical equation do not amount to an inappropriate jury instruction. Rather, the elements show that Judge Baxley's charges merely informed the jury that there is no typical jury or typical jury deliberation, and that discussion is normal part of deliberation. There is no mention of facts, no language that minimized or changed the burden of proof[6], and no description of morality, all of which were described by the Court in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), as elements of potentially defective charges. Because these do not exist, there was no reason for trial counsel to object, and therefore no possibility that her performance was prejudicial or ineffective pursuant to Strickland, supra. For these reasons, the petition for writ of certiorari should be denied.

[6] Respondent notes that the language Petitioner cites in State v. Jeffries regarding vitiation of the jury's findings is limited to the context of the charge affecting the burden of proof:"In *Sullivan,* the Court held a harmless error analysis could not be made "where the instructional error consists of a misdescription of the

CONCLUSION

For the reasons stated above, the State submits that the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By: _____
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November 30, 2015

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burden of proof, which vitiates *all* the jury's findings." 316 S.C. 13, 21, 446 S.E.2d 427, 432, citing Sullivan v. Louisiana, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

STATE OF SOUTH CAROLINA
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Appellate Case No. 2014-002401

Jeffrey Caulder,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Jessica E. Kinard, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

John D. Elliott, Esquire
Post Office Box 607
Columbia, SC 29202

I further certify that all parties required by Rule to be served have been served. This 30th day of November, 2015.

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ALAN WILSON
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November 30, 2015

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

Re: **Jeffrey Caulder v. State of South Carolina**
Appellate Case No. 2014-002401
Lower Court Case No. 2012-CP-17-0156

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Jessica E. Kinard
Assistant Attorney General
S.C. Bar # 77889

JEK/jacc
Enclosures

cc: John D. Elliott, Esquire
Trisha Allen, Victim Services Counselor