ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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DEC 10 2015
S.C. Supreme Court

Certiorari to Georgetown County

Steven H. John, Circuit Court Judge

SHANNON MCGEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE # 2014-000297

RE-PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUES PRESENTED[1]

I.

Did the State's calling of petitioner's case for trial violate the South Carolina Constitution and this Court's decision in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), hindering trial counsel's ability to prepare for trial?

II.

Was appellate counsel ineffective for failing to raise additional issues on appeal, namely the trial judge's denial of petitioner's motion for a continuance?

III.

Did the solicitor commit prosecutorial misconduct by misrepresenting his relationship with witness Aaron Kinloch?

IV.

Was trial counsel ineffective in failing to interview witness Michael Jones prior to trial?

V.

Was trial counsel ineffective in failing to object to the solicitor's use of a "Golden Rule" argument in [opening and] closing argument?[2]

VI.

Was trial counsel ineffective in failing to object to the trial judge's instruction that testimony of a victim in a criminal sexual conduct case need not be corroborated?

VII.

Was trial counsel ineffective in failing to object to the solicitor's use of improper vouching and bolstering during his closing arguments?

VIII.

Was trial counsel ineffective in failing to object when the solicitor misstated evidence presented by the State's expert witness?

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[1] Appellate counsel re-ordered the questions presented from the order in which they were listed in this Court's September 29, 2015 Order.

[2] Appellate counsel has rephrased the issue presented to include reference to the opening argument because trial counsel did object to the solicitor's use of a "Golden Rule" argument in his closing but failed to object to that same argument during the solicitor's opening. App. 47, l. 24 – 48, l. 8; App. 48, l. 24 – 49, l. 12; App. 148, l. 21 – 149, l. 12.

STATEMENT OF THE CASE

Indictments

On June 14, 2006, the Georgetown County grand jury indicted Petitioner Shannon McGee for (1) second degree criminal sexual conduct with a minor; (2) a lewd act on a minor child; and (3) assault with intent to commit second degree criminal sexual conduct with a minor. App. 598-605.

Trial and Guilty Verdict

On September 18, 2006, McGee was tried before the Honorable Roger L. Couch and a jury. App. 1. McGee was represented by Stuart M. Axelrod, and the State was represented by Assistant Solicitor Robert Bryan. Id.

The jury returned verdicts of guilty on all three charges. App. 209, ll. 5-14. Judge Couch sentenced McGee to life without parole for second degree criminal sexual conduct with a minor,[3] twenty years concurrent for assault with intent to commit second criminal sexual conduct with a minor, and fifteen years concurrent for lewd act upon a child. App. 215, l. 22 – 216, l. 10.

On September 22, 2006, McGee moved for a new trial. App. 218-243. Judge Couch denied the motion for a new trial. App. 249.

Direct Appeal

Appellate Defender Katherine H. Hudgins filed a direct appeal on McGee's behalf, arguing that the trial court erred in refusing to grant a new trial based on the assistant solicitor's failure to disclose a letter from a witness, Aaron Kinloch, who had been incarcerated with McGee at the county jail, demonstrating a willingness to make a deal in exchange for testimony. App. 245-256. On November 19, 2009, the Court of Appeals issued an unpublished opinion affirming McGee's

[3] The sentence of life without parole was mandatory pursuant to S.C. CODE ANN. § 17-25-45.

convictions. State v. McGee, Op. No. 2009-UP-539 (Ct. App. filed Nov. 19, 2009); App. 277-278. This Court denied certiorari on January 20, 2011. App. 581-582.

Application for Post-Conviction Relief, Evidentiary Hearing and Order of Dismissal

On February 14, 2011, McGee filed his application for post-conviction relief ("PCR") alleging claims of ineffective assistance against trial counsel and appellate counsel, as well as prosecutorial misconduct. App. 280-285. McGee filed a first amendment to the PCR application on March 7, 2011. App. 292-341. The State filed its Return on March 23, 2011. App. 347-354. McGee filed a second amendment to his PCR application on January 25, 2012. App. 358-361.

An evidentiary hearing was held before the Honorable Steven H. John on December 19, 2013. App. 362-439. McGee was represented by William L. Runyon, Jr., and the State was represented by Assistant Attorney General Joshua L. Thomas. App. 362. The witnesses at that hearing included trial counsel Axelrod, witness Michael Jerome Jones, and McGee. App. 366-428.

Judge John denied McGee's PCR application in an Order of Dismissal filed January 23, 2014. App. 580-597.

Petition for Writ of Certiorari

On September 4, 2014, appellate defender Carmen Ganjehsani filed a Johnson[4] Petition for Writ of Certiorari. On September 29, 2015, this Court denied the motion to be relieved as counsel and directed the filing of Re-Petition for Writ of Certiorari addressing eight issues. This Re-Petition for Writ of Certiorari follows.

[4] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

STATEMENT OF FACTS

Relevant Facts of the Trial

McGee was convicted of sexually abusing his stepdaughter. Trial counsel made a pre-trial motion for continuance. Though McGee was on the trial roster, counsel did not learn until the Friday before trial that the State was calling McGee's trial early the next week.[5] He understood from another solicitor that he had protection for part of the week to conduct DUI trials in Horry County Magistrate's Court. Trial counsel had **seven hundred** clients and could not be prepared to go to trial on each of them at the solicitor's whim. He indicated that he had met with his client and some witnesses but needed more time to prepare. App. 14, l. 15 – 18, l. 6. The trial court denied the motion for continuance, but assisted trial counsel with service of his subpoenas and facilitated his viewing of the minor child's interview at the Victim Recovery Center. App. 18, l. 7 – 21, l. 12.

The witnesses at trial included McGee's stepdaughter, McGee's stepson, Dr. Karen Ann Rahter, and jailhouse informant Aaron Kinloch. McGee's stepdaughter admitted that she recanted her allegations of sexual abuse to trial counsel, telling him that she made up the allegations due to pressure from her mother's family and because McGee was mean. App. 75, ll. 18-25. At trial, however, the stepdaughter testified that her mother manipulated her into recanting the allegations. App. 69 – 71. She claimed that the last incident of abuse occurred in November 2004. App. 72, ll. 4-12. McGee's stepson testified that his sister told him that somebody did something nasty to her in their old trailer, and he told his grandmother. App. 87, l. 5 – 88, l. 12. Dr. Rahter testified that she conducted a physical exam of the minor child on September 1, 2005 and found a partial transection of the hymen, which was consistent with penetrating injury to the vagina. She admittedly could not

[5] In a faxed letter from the solicitor to trial counsel dated Friday, September 15, 2006, he indicated that McGee's case would be second for trial. App. 516.

tell how or when the injury occurred, except that it was over 72 hours prior to the examination. App. 128, l. 3 – 131, l.18; App. 132, ll. 16-21.

Aaron Kinloch testified that he wrote to the solicitor about McGee's case at the end of July but did not speak to the solicitor until September 18, 2006. Kinloch claimed that in May or June, while he and McGee were in the county jail, McGee came to his cell and discussed his case. According to Kinloch, McGee denied using his penis but admitted to using his finger on his stepdaughter. Despite the fact that no DNA testing was ever conducted in this case, Kinloch also claimed that McGee told him that a DNA test came back "inconclusive." App. 101, l. 11 – 106, l. 14; App. 109, l. 13 – 118, l. 22.

Prior to the trial the solicitor advised that Kinloch had a pending charge for receiving stolen goods.[6] However, due to its similarity to other charges and absence from the NCIC printed by the solicitor, it became obvious that trial counsel and the trial court were both later misunderstood all of Kinloch's charges to be resolved. App. 24, l. 22 – 26, l. 20; App. 91. l. 7 – 92, l. 14; App. 93, l. 7 – 98, l. 10; App. 168, l. 20 – 171, l. 12; App. 563 (Kinloch NCIC). The solicitor made no effort to correct the confusion regarding Kinloch's pending charge when it became apparent to him.

While the solicitor and Kinloch both contended that no deal was made for Kinloch's testimony, the solicitor failed to disclose the letter that Kinloch wrote to him from the jail until after McGee's trial. App. 220, l. 6 – 232, l. 10. Kinloch indicated his willingness to testify in exchange for "help" in his August 4, 2006[7] letter to the solicitor, which was received by the solicitor's office

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[6] On July 28, 2006, Kinloch pled guilty to one count of receiving stolen goods. See case no. 2006-GS-22-00717. Subsequently, Kinloch was charged with receiving stolen goods on August 1, 2006. He did not plead guilty to that offense until September 21, 2006, the day after McGee's trial. See case no. K104330; App. 536 (Kinloch Arrest Warrant Aug. 1, 2006); App. 538 -540 (Kinloch Indictment Sept. 13, 2006).

[7] Kinloch was served with the arrest warrant in case no. K104330 just three days prior, on August 1, 2006. App. 536 (Kinloch Arrest Warrant Aug. 1, 2006).

on August 7, 2006. App. 523 – 524 (Kinloch letter). At trial, Kinloch said he contacted the solicitor only because he was a father and thought the allegations were "nasty." App. 111, ll. 13-21.

Following McGee's conviction and sentence, trial counsel filed a motion for new trial based upon the solicitor's failure to properly disclose Kinloch's pending charges and the letter he received from Kinloch. The solicitor admitted that he failed to disclose the letter, but asserted that it was not Brady[8] material. App. 533 – 579. In a written order dated November 9, 2006, Judge Couch denied the motion for a new trial. Though he agreed that the solicitor's failure to disclose the letter was "a clear disregard for his responsibility as a prosecutor to seek justice," he found that there was no evidence that an actual deal existed. App. 249; App. 327 – 328.

Relevant Facts of the Post-Conviction Relief Evidentiary Hearing

In addition to the testimony and exhibits presented at the evidentiary hearing, the PCR court reviewed McGee's detailed *pro se* application for post-conviction relief and the amendment filed thereto. App. 292 – 341 (Amend. to PCR Application); App. 580 (Order of Dismissal, p. 1); App. 436, ll. 19-21.

Trial counsel testified that he was appointed to represent McGee through a contract he had with the Georgetown County public defender's office. App. 370, ll. 16-20. He only received notice that McGee's case was being called for trial three days prior to its start date. App. 366, ll. 12-17; App. 368, l. 7 – 370, l. 14. He was not made aware of Aaron Kinloch's testimony prior to trial and was surprised by it. He thought Kinloch's testimony was significant to the jury and caused the jury to convict McGee. App. 371, l. 16 – 374, l. 4. It was not until after McGee's trial that trial counsel understood Kinloch's outstanding charge and saw Kinloch's letter to the solicitor. App. 399, l. 2 – 400, l. 21. Had his request for continuance been granted, trial counsel would have "absolutely seen

[8] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

Shannon [McGee] more than [he] did" and believed he may have found out about Kinloch or other potential witnesses in advance. App. 379, l. 22 – 382, l. 10. Trial counsel testified that McGee always maintained that his stepdaughter's allegations were false and made up because he had reprimanded her. App. 378, ll. 2-10. Trial counsel said that the solicitor's decision to go forward with McGee's trial when it did was "unfair to [him], and ultimately it was unfair to my client [McGee]." App. 388, ll. 7-17; App. 376, l. 16 – 377, l. 9.

Michael Jerome Jones was never contacted by trial counsel. App. 410, ll. 7-15. Jones testified that he was housed in the same cell block in the county detention center as McGee and Kinloch during the summer of 2006. App. 403, l. 9 – 404, l. 22. He was brought to the courthouse regarding his case when assistant solicitor Bryan took him out of the "bull pen" and "wanted to talk about [was] Shannon McGee." The solicitor began telling Jones "about Shannon [McGee]'s wife, their daughter, where they went to [eat], what they had." Though the solicitor never directly asked Jones to lie, that was the inference that Jones made from the solicitor's comments and feeding him information about McGee's case. App. 404, l. 23 – 405, l. 10; App. 410, ll. 21-24. According to Jones:

> [The assistant solicitor] didn't care what I got up on the stand and said about [McGee], long as I testified. That's all he wanted. He just wanted somebody out at the jail to say [McGee] throwed [sic] a piece of paper on the ground, [McGee] did this. That was it.

App. 407, ll. 14 – 25. In exchange for his testimony, the solicitor would grant Jones' request to drop the charges against his female co-defendant. App. 407, ll. 14-17. Jones told the solicitor that Shannon told him "I swear to God I did not do it" and that the allegations were retribution for disciplining Minor Child 1 for sneaking out the window. App. 403, l. 9 – 405, l. 21.

When Jones returned to the jail, he told Kinloch and others about the solicitor looking for someone to testify against McGee. Kinloch wrote the letter to the solicitor after he spoke with

Jones. Kinloch had a significant criminal history and was afraid of the sentence he may receive in his pending case. App. 405, l. 21 – 406, l. 20; App. 409, ll. 4-18. Jones executed an affidavit consistent with his testimony at the PCR hearing. App. 527.

McGee testified that he never discussed his case with Kinloch and did not expect Kinloch to testify at his trial. App. 412, ll. 8-13; App. 423, ll. 4-9. He was also unaware that Jones had spoken with Kinloch until after his trial. App. 413, ll. 15-21. Furthermore, he did not know that his case was being called for trial that Monday until the Friday before. App. 414, ll. 7-17. McGee affirmed that he was pursuing all of the allegations raised in PCR application. App. 415, l. 3 – 423, l. 3.

McGee understood that trial counsel sought a continuance because he was not prepared for his case. App. 414, l. 18 – 415, l. 2. Trial counsel met with McGee two or three times. On at least one of those occasions, trial counsel was also meeting with at least ten other clients at the same time. App. 423, l. 25 – 424, l. 21. Had he been prepared, he would have learned about Kinloch, found out about the letter to the solicitor, and understood Kinloch's criminal history and pending charge. App. 417, l. 8 – 419, l. 4. During the trial, McGee also asked trial counsel to contact Michael Jones about Kinloch's charges and about the solicitor looking for someone at the jail to testify against him. App. 424, l. 22 – 425, l. 9; App. 409, ll. 19 – 410, l. 6. Michael Jones was listed on the State's potential witness list. App. 512-514.

McGee maintained his innocence and explained that he did not accept the solicitor's plea offer because he was not guilty. He had turned himself in and pled guilty for another offense as a teenager because he was in fact guilty, but he would not allow the solicitor to force him to plead guilty in this case. App. 425, ll. 10 – 20.

ARGUMENT

I. The State's calling of petitioner's case for trial violated the South Carolina Constitution and this Court's decision in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), hindering trial counsel's ability to prepare for trial.

Introduction

McGee's case was plagued by both an unethical prosecutor and an ineffective trial attorney. The assistant solicitor, Robert "Bo" Bryan, Jr., failed to disclose Brady information, misrepresented his relationship with State's witness Aaron Kinloch, and abused his prosecutorial control of the criminal docket to the disadvantage of McGee. McGee's trial attorney, Stuart Axelrod, failed to interview Michael Jones, another inmate who would have contradicted Kinloch's trial testimony and testified regarding Kinloch's motive to lie. Trial counsel also failed to object to improper argument and misstatements by the solicitor and to the jury instruction that the testimony of a victim in a sexual conduct case need not be corroborated. Those errors were compounded by the denial of trial counsel's motion for continuance. Trial counsel properly complained that the solicitor's calculated calling of the case when he did hindered trial counsel's ability to prepare for trial and placed the solicitor in a better position to gain a conviction. Nonetheless, the trial court denied the motion to continue. Appellate counsel was ineffective when she failed to raise the denial of the motion to continue on appeal.

Prejudice to McGee from the Prosecutorial Controlled Docket

The PCR court found that this Court's decision in State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012), did not apply retroactively and that McGee's case complied with the law as it existed at the time of his trial. App. 594 (Order of Dismissal, p. 15). The PCR court found that even if Langford were applicable, McGee failed to show prejudice. Specifically, it found that trial counsel did have adequate time to prepare for trial. The PCR court further found that

McGee "failed to articulate any information that could have been uncovered had a continuance been granted." App. 595 – 596 (Order of Dismissal, p. 16-17).

In Langford, this Court held that S.C. CODE ANN. § 1–7–330, which vests exclusive control over the criminal docket in the circuit solicitor, is unconstitutional. 400 S.C. 421, 735 S.E.2d 471 (noting that one of the "prime reasons" for the separation of powers mandated by S.C. CONST. ART. I, § 8 is the prevention of "the concentration of power in the hands of too few" (quoting State ex rel. McLeod v. McInnis, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982)). In doing so, this Court recognized the potential for abuse from a solicitor controlled docket. Id. at 439, 735 S.E.2d at 480-81. Two of those abuses, raised in the amicus brief filed in Langford, apply in McGee's case. They include the calling of cases when the defense is ill-prepared and unable to present the most complete defense possible and the calling of a case when the State has the best possible opportunity to convict. Id.; see also Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot,* 32 AM. J. CRIM. L. 325, 351–69 (2005) (detailing the potential ills of prosecutorial control of the docket).

In the present case, the solicitor argued that trial counsel should have been prepared for McGee's case because it was listed on the September 7, 2006 trial roster. App. 18, ll. 10-12; App. 227, ll. 1-13; App. 232, 16-18. In a letter dated September 15, 2006, the solicitor reminded trial counsel that McGee's case was also on the trial roster in May, June, and July 2006. He thus opined that trial counsel's "preparation to get ready for this trial this term of Court should be minimal given the fact that you have already prepared it three times in the past." App. 516 (Letter from Solicitor, Sept. 15, 2006). As trial counsel noted, due to his heavy caseload of

seven hundred criminal cases, he could not possibly be prepared for every trial every time it was listed on the roster. App. 232, l. 11 – 234, l. 22.

Conveniently, despite receiving a letter from Aaron Kinloch on August 7, 2006, the solicitor chose not to meet with him until September 18, 2006, the same day that the jury was selected in McGee's case. Trial counsel did not learn that Kinloch would be a witness until that same day and was still unaware of the nature of the testimony Kinloch would offer. He was thus unable to discuss the alleged confession with McGee prior to Kinloch's testimony. App. 375, l. 3 – 337, l. 9. The solicitor wanted trial counsel to be unprepared to effectively counter Kinloch's testimony through cross-examination or the presentation of other evidence.

The tenor of the solicitor's remarks about trial counsel during the hearing on the motion for new trial further evidenced his personal disdain for trial counsel. He argued that trial counsel's argument was based upon his own inability "to listen, understand, or know the rules." App. 225, ll. 4-7. He said that when Kinloch's pending charges were discussed, trial counsel was "not listening" and "was probably talking to somebody else in the courtroom." App. 226, l. 22 – 227, l. 1. He then remarked that trial counsel "had to be smart enough to walk to the end of the hall, take a left, walk in the Clerk's Office, and ask for any pending warrants on Aaron Kinloch" and that his ignorance or laziness was not the solicitor's fault. The solicitor said that it was not unethical for him to fail to "repeatedly bring it to his [trial counsel's] attention, perhaps tug on his coat, and suggest that he ask an appropriate question during his proffer." The solicitor then attempted to cite other problems that he had with Mr. Axelrod, at which point the judge instructed him to address only McGee's case. App. 231, ll. 11- 25.

Retroactivity of Langford

The PCR court erred in finding that Langford does not apply retroactively. The court began and ended its analysis regarding retroactivity by finding that Langford "announced a new rule constituting a clear break from past procedure." App. 594 – 595 (Order of Dismissal, p. 15-16). The PCR court failed to consider the exceptions to the general rule against retroactivity, specifically the second exception when "the rule 'requires the observance of those procedures that ... are implicit in the concept of ordered liberty.'" Talley v. State, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007) (quoting Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989)); see also Danforth v. Minnesota, 552 U.S. 264, 282, 128 S.Ct. 1029, 1042 (2008) (holding that state courts can give broader effect to a new rule of criminal procedure even if such would be deemed "non-retroactive" under Teague).[9] This exception "is 'reserved for watershed rules of criminal procedure' which implicate the fundamental fairness and accuracy of the proceeding." Talley, 371 S.C. at 543, 640 S.E.2d at 882 (quoting Teague).

In Talley, this Court noted that the United States Supreme Court "has repeatedly cited Gideon[10] as illustrative of the type of new rule which falls within the second exception in Teague" and has also "applied each extension of the constitutional right to counsel retroactively to collateral proceedings." Id. at 543-44, 640 S.E.2d at 882. This Court concluded that "the right to counsel **undeniably** implicates the fundamental fairness and accuracy of the

[9] This Court noted in Aiken v. Byars, 410 S.C. 534, 539 n. 4, 765 S.E.2d 572, 575 n. 4 (2014), that it "has not addressed whether it should employ a more expansive analysis for determining retroactivity after Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029 (2008)..."

[10] Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963) (holding that the Sixth Amendment right to counsel, applicable to the states pursuant to the Fourteenth Amendment, mandates that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him).

proceeding." Id. (emphasis added). Though the unconstitutionality of solicitor controlled dockets in Langford was premised upon its violation of the separation of powers, the prejudice in McGee's case directly implicated his right to effective assistance of counsel and right to a fair trial under the federal and state constitutions, as discussed more fully *infra*. See U.S. CONST. AMEND. IV; S.C. CONST. ART. I, § 14. Thus, Langford should apply retroactively to McGee's case because the solicitor's calling of the case in time and manner in which he did affected the fundamental fairness of McGee's case.

The PCR court noted in its Order that retroactive application would result in collateral attack upon every conviction that occurred under a solicitor controlled docket. App. 594 – 595 (Order of Dismissal, p. 15-16). On the contrary, while this Court found the system of prosecutorial controlled dockets unconstitutional in Langford, that alone did not warrant reversal of Langford's conviction. 400 S.C. at 436, 735 S.E.2d at 479. Rather, Langford was required to **"demonstrate that he sustained prejudice as a result of the solicitor setting when his case was called for trial."** Id. (emphasis added). Here, trial counsel argued the ill-effects and abuse of the prosecutorial controlled docket. He also cited is unpreparedness for trial, which he reiterated at the PCR hearing. Thus, this presents an exceptional case, where the retroactive application of Langford makes sense. The solicitor purposefully called the case at a time and in a manner that was particularly disadvantageous to McGee. He wanted trial counsel to be unprepared. As will be discussed more fully *infra*, his plan was successful in that trial counsel was unable to properly impeach State's witness Aaron Kinloch, failed to speak with and present testimony from Michael Jones, and failed to make several necessary objections, all of which deprived McGee of effective assistance of counsel. Additionally, the solicitor's failure to disclose the letter from Kinloch and correct the misunderstanding of the trial court and defense

counsel regarding Kinloch's record constituted prosecutorial misconduct, depriving McGee of a fair trial.

Therefore the PCR court erred in finding that the Langford did not apply retroactively to McGee's case and in finding that McGee failed to show prejudice from the solicitor's control of when the case was called. McGee is accordingly entitled to a new trial.

II. Appellate counsel was ineffective for failing to raise additional issues on appeal, namely the trial judge's denial of petitioner's motion for a continuance.

The trial court denied trial counsel's request for a continuance even though counsel asserted that he did not have adequate time to prepare for McGee's case. App. 14, l. 15 – 21, l. 12. The only issue raised by appellate counsel on direct appeal was whether the trial judge erred in refusing to grant a new trial based on the assistant solicitor's failure to disclose a letter from a witness demonstrating a willingness to make a deal in exchange for testimony. App. 248.

The PCR court found that in the absence of any testimony from appellate counsel, it could not "speculate as to why certain issues were not briefed." App. 590 (Order of Dismissal, p. 11). Further, the PCR court found that the allegation was "without merit," citing the standard of review for the denial of a motion for continuance. App. 591 (Order of Dismissal, p. 12).

All criminal defendants are entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Courts review claims of ineffective assistance of appellate counsel using the test announced in Strickland v. Washington, 466 U.S. 668 (1984). See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, the reviewing court asks whether appellate counsel's performance was deficient and whether the defendant was prejudiced by the deficient performance. Id. The prejudice test is whether the defendant was "prejudiced by such deficiency to the extent of there being a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Id. Appellate counsel is not required to raise all non-frivolous claims, but may exercise sound professional judgment in selecting the appropriate grounds for a direct appeal in order to maximize the likelihood of a favorable result. Smith v. Robbins, 528 U.S. 259, 288 (2000).

Thus, the initial inquiry is whether appellate counsel's failure to brief the continuance issue was deficient performance. And the second inquiry is whether the deficient performance prejudiced McGee such that there is a reasonable probability that the result of the appeal would have been different. In other words, there must be a reasonable probability that the appellate court would have determined that the trial court erred in denying the motion for continuance.

In discussing a criminal defendant's right to the effective assistance of appellate counsel, the United States Supreme Court noted the difficulty in demonstrating appellate counsel's incompetency by citing to Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986) to explain that "[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith, 528 U.S. at 288. The Seventh Circuit elaborated on the deficiency prong by explaining that appellate counsel renders deficient performance by "fail[ing] to raise a significant and obvious issue." Gray, 800 F.2d at 646. After identifying "[s]ignificant issues which could have been raised," the reviewing court should compare those to the issues which were raised. Id. Further, "[a] reviewing court can evaluate appellate counsel's choice of issues on appeal by examining the trial record and the appellate brief." Id. The Seventh Circuit accepted the notion that appellate counsel may exercise strategy in selection of the issues on appeal, but held that "the determination of whether the decision was strategic require[d] an examination of the trial record." Id.

In the present case, the PCR court erred in finding that testimony from appellate counsel was required in order to evaluate the deficiency prong of the ineffective assistance of appellate counsel claim. The PCR court cited this Court's decision in Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005), for the proposition that "without a witness's testimony, 'any finding of prejudice is merely speculative.'" App. 591 (Order of Dismissal, p. 12). However, Dempsey is not analogous to the failure of appellate counsel to testify at a PCR hearing regarding her strategy, or lack thereof, in raising certain issues on direct appeal. The Dempsey Court simply reiterated that "a PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." 363 S.C. at 369, 610 S.E.2d at 814. Dempsey failed to call the lay and expert witnesses, who he alleged that trial counsel was ineffective in failing to subpoena and offer at trial, to testify at the PCR hearing. Id. at 369-70, 610 S.E.2d at 814-15. Here, McGee did call Michael Jones to testify at the PCR hearing because he was a fact witness that trial counsel should have called to testify at trial. There was not the same necessity for appellate counsel's testimony at the PCR hearing. Cf. Stacey v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (noting "that labeling counsel's actions as 'trial strategy' does not 'automatically immunize an attorney's performance from Sixth Amendment challenges'" (quoting Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984)).

In remanding the case to the district court on the ineffective assistance of appellate counsel claim, the Gray Court instructed the lower court "to review the trial court record and determine whether the issues which petitioner claims appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial, and were so obvious from the trial record that the failure to present such issues amounted to ineffective assistance of appellate counsel." 800

F.2d at 646. **Reiterating the point that testimony from appellate counsel was unnecessary**, the Seventh Circuit denied the request for an evidentiary hearing and explained that an evidentiary hearing would be necessary "only if a review of the record [was] not sufficient to resolve factual disputes regarding the choice of issues." Id. The court explained that "[w]hen a claim of ineffective assistance of counsel is based on failure to raise issues on appeal, ... **it is the exceptional case that could not be resolved on an examination of the record alone**." Id. (emphasis added).

It is apparent from the record that trial counsel's motion for continuance was properly made and preserved for appellate review. App. 14, l. 15 – 21, l. 12. Had appellate counsel properly raised the denial of the motion for continuance, which was premised in large part upon the inequity and abuse resulting from the solicitor controlled docket, this Court's holding in Langford may have occurred much earlier.[11] Unlike Langford, there was actual prejudice to McGee in that his attorney was unprepared for trial and the solicitor misrepresented his relationship with Kinloch. Further, the deference generally given to the denial of a motion to continuance is not dispositive. In State v. McMillian, 349 S.C. 17, 24, 561 S.E.2d 602, 605-06 (2002), this Court found that the trial court abused its discretion in denying the request for continuance where the denial "prejudiced [the defendant's] ability to effectively cross-examine the witnesses against him." Here, the denial of the continuance left trial counsel unprepared.[12]

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[11] Notably, the issue of constitutionality of the solicitor controlled docket was not raised by trial counsel in Langford. 400 S.C. 421, 432, 735 S.E.2d 471, 477 (2012). Rather, the issue was raised in the amicus brief filed by the Public Defender Association and considered by this Court because it concerned "a matter of significant public interest." Id. at 432-33, 735 S.E.2d at 477.

[12] Trial counsel indicated that he had approximately seven hundred criminal clients and could not be prepared for trial on all of those cases at the solicitor's whim. App. 15, ll. 15-18; App. 236, ll. 19-21; see In re Sturkey, 376 S.C. 286, 291, 657 S.E.2d 465, 467 (2008) (finding part-time public defender who handled a caseload averaging more than 700 cases per year had the obligation to only accept as many cases as he could ethically handle).

He was unaware of the nature of Kinloch's testimony and the solicitor failed to clarify the extent of Kinloch's criminal record. Further, counsel did not have sufficient time to contact Michael Jones, whose testimony would have cast serious doubt on Kinloch's credibility.

Therefore, appellate counsel should have raised the denial of motion for continuance on appeal. Her failure to do so was ineffective such that McGee should be granted a new trial or, at least, entitled to a belated direct appeal on the denial of the motion to continue.

III. The solicitor committed prosecutorial misconduct by misrepresenting his relationship with witness Aaron Kinloch.

The PCR court found that the issue of prosecutorial misconduct was raised and ruled upon in McGee's direct appeal. The court further found that McGee was not prejudiced by any misconduct because "trial counsel extensively attacked Kinloch's credibility" and "[t]he jury was aware of Kinloch's prior conviction **and pending charges**." App. 593 (Order of Dismissal, p. 14) (emphasis added). The PCR court's findings were error. The solicitor's misrepresentation of his relationship with Kinloch went far beyond the failure to disclose the letter sent to him by Kinloch and the narrow matter considered on direct appeal. Additionally, the testimony at trial made it appear that all of Kinloch's criminal charges were resolved without any assistance from the solicitor in McGee's case. The jury never learned that there were pending charges against Kinloch, which gave him a motive to lie in hopes that the State would reference his assistance during his upcoming plea and sentencing hearing.

A prosecutor's misconduct can render a trial fundamentally unfair. See Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006); U.S. Const. Amend. VI. A "prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with

rudimentary demands of justice." Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763 (1972).

> The function of the prosecution in our adversary system of criminal justice is to insure that justice prevails, not to procure convictions at any cost. When the prosecution exceeds the function with which it is charged, both defendant and society are wronged. Thus, appellate courts have traditionally subjected claims of prosecutorial misconduct to intensive review.
>
> Clearly, a state may not sustain a conviction based upon testimony known to be perjured. Nor may the prosecution stand mute while testimony known to be false is received into evidence. Moreover, the latter duty does not cease merely because the false testimony goes only to the credibility of a state's witness.

Birkla v. State, 323 N.E.2d 645, 648. (Ind. 1975).

The letter from Kinloch was not disclosed to trial counsel until the middle of the hearing on the motion for new trial. App. 228, ll. 2-12; App. 232, ll. 5-8. As such, trial counsel did not have the opportunity to interview Michael Jones and get his account of the solicitor's attempt to get him to testify against McGee. Jones' testimony also explained how Kinloch knew about McGee's case even though McGee himself had never discussed it with him. It was not until the PCR hearing that the testimony of Michael Jones was presented, thus the appellate court did not consider it in the direct appeal.

Further, the solicitor's questioning of Kinloch was intended to deceive the jury and made it appear that Kinloch had no reason to be dishonest in his testimony. Kinloch testified that Joe Lewis, Daryl Knowlin, and Michael Jones were other inmates with whom McGee discussed his case. App. 116, ll. 4-15. The solicitor specifically asked Kinloch if the solicitor or anyone else in his office would have been aware of any of the names he listed as being other people with knowledge of McGee's case, to which Kinloch responded "no." App. 118, ll. 8-22. However, the letter from Kinloch in the solicitor's possession clearly referenced Michael "Mike" Jones. App. 523. Kinloch also said that the reason he was testifying was because he thought McGee's

conduct was "nasty" and he was a father. App. 111, l. 13 – 112, l. 17. However, the solicitor knew that Kinloch's letter expressed an additional purpose – **he needed "help" from the solicitor**. App. 523. This would certainly not be the first case where the prosecutor purposefully kept his pretrial discussion with a witness vague so that the witness could say that nothing has been promised to him in return for his trial testimony. See People v. Conlan, 146 A.D.2d 319 (N.Y. App. Div. 1989) (vacating defendant's conviction where a member of the District Attorney's office conveyed a tacit, albeit undefined, promise that the informant's testimony would be rewarded, and whether unwittingly or not, the prosecutor misled the jury by allowing the informant to testify untruthfully regarding promises made, and the prosecutor reaffirmed those misstatements).

Additionally, the solicitor failed to correct the misunderstanding of trial counsel and the trial court regarding Kinloch's pending charges once that misunderstanding became apparent. See State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002) (holding that defense counsel was entitled to cross-examine State's witness regarding the specifics of his pending charges pursuant to Rule 608(c), SCRE to expose possible bias or prejudice because "there was the substantial possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to his future trial judge how he had cooperated in the instant case"). Notably, the NCIC provided to trial counsel by the solicitor did not list the pending charges. App. 563 (Kinloch NCIC). It is likely that the solicitor was aware of the misunderstanding regarding the pending charges during the trial, and he obviously recognized that trial counsel failed to ask Kinloch about any pending charged during the proffer and trial testimony. App. 229, l. 19 – 231, l. 10. It is at the very least suspicious that the solicitor did not question Kinloch about his pending charges himself, as such is often done to "vaccinate" the jury against defense's attacks on the witness' credibility. See

Hon. Stephen S. Trott, U.S. Court of Appeals for the Ninth Circuit, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1424 (July/Aug. 1996). Instead, the solicitor intentionally chose not to raise the pending charges on direct because he knew that trial counsel was confused about Kinloch's criminal record. Even if it was not apparent to the solicitor during the trial, during the hearing on the motion for new trial it was clear that both trial counsel and the trial court did not believe that Kinloch had any pending charges. App. 171, ll. 5-7.

McGee was prejudiced by the prosecutor's misconduct in his case because Kinloch's testimony was used to bolster the testimony of the victim, who had recanted the sexual abuse but then reaffirmed her original allegations at trial. "The jury's estimate of the truthfulness and reliability of a given witness **may well be determinative of guilt or innocence**, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Napue v. People, 360 U.S. 264, 79 S.Ct. 1173 (1959) (emphasis added).

> The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his own case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.

Trott, supra, at 1394. Here, the jury did not have the impression that Kinloch was a "jailhouse snitch." Rather, the solicitor presented Kinloch as being solely motivated by his own disgust for the acts to which McGee allegedly confessed, adding credence to what should have otherwise been highly suspect testimony. McGee should granted a new trial because the solicitor's misconduct rendered his trial fundamentally unfair.

IV. Trial counsel was ineffective in failing to interview witness Michael Jones prior to trial.

The testimony of Michael Jones was essential to undermining the testimony of Kinloch. Jones was not only on the State's witness list, he was also mentioned to trial counsel by McGee regarding the solicitor's efforts to locate a "jailhouse snitch." App. 424, l. 22 – 425, l. 9; App. 409, ll. 19 – 410, l. 6. Trial counsel failed to contact Jones prior to the trial and did not mention a need to speak with Jones in his motion to continue before the trial court. App. 410, ll. 7-15; App. 380, l. 24 – 381, l. 9. Nonetheless, the PCR court found that trial counsel "conducted a proper investigation" and "was thoroughly competent in his representation." The court further found that McGee "failed to articulate any information that could have been uncovered with a further investigation. The testimony revealed trial counsel interviewed witnesses and investigated the case to the extent Applicant provided leads to investigate." App. 590 (Order of Dismissal, p 11). Those findings were not supported by any evidence, especially in light of defense counsel's testimony that he did not have sufficient time to prepare for McGee's trial and felt the trial was an "ambush." App. 379, l. 22 – 381, l. 9. Jones' testimony at the PCR hearing proved that his testimony at trial would have been significant. App. 403, l. 9 – 411, l. 5.

As to allegations of ineffective assistance of counsel, the applicant must show his counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), this Court found that defense counsel was deficient in failing to call a triage nurse as a defense witness. Pauling was convicted

of first degree burglary and first degree criminal sexual assault against the victim, based upon the victim's testimony that he broke in through a second floor window, tied her up, and "put [him]self into" her. 331 S.C. at 607-08, 503 S.E.2d at 469-70. The pelvic examination conducted at the hospital did not show evidence of any lesions, cuts, or tears, and the triage nurse's notes said "pt states pt did not penetrate the vagina." Id. at 608-09, 503 S.E.2d at 470. Defense counsel made no effort to identify or locate the triage nurse. Id. This Court found that "the triage nurse's testimony of the victim's statement shortly after the assault would have been crucial, both as substantive evidence that a sexual battery did not occur (and, therefore, there was no CSC) and as evidence to impeach the victim's credibility. Id. at 610, 503 S.E.2d at 471. Further, defense counsel admitted at the PCR hearing that the nurse's testimony was critical. Id. (citing Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991) (where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance)).

Here, trial counsel testified that he believed that Kinloch's testimony caused the defense to lose the case and McGee to be found guilty. App. 381, ll. 7-18. In that same vein, **Jones' testimony would have been critical to discredit Kinloch.** Jones' testimony explained how Kinloch knew details about McGee's case despite their lack of any discussion on the subject matter and his motivation to lie. In his affidavit, Jones wrote that Kinloch "stated that he was willing to lie about Mr. McGee in order to work out a deal with the State." App, 527. Due to trial counsel's failure to contact Jones, Kinloch's credibility was not properly impeached, which prejudiced McGee. McGee is accordingly entitled to a new trial.

V. Trial counsel was ineffective in failing to object to the solicitor's use of a "Golden Rule" argument in [opening and] closing argument.

The PCR court found that trial counsel was not ineffective in failing to object to various portions of the solicitor's opening and closing arguments. App. 586 (Order of Dismissal, p. 7). The court found that the solicitor's argument was not objectionable and noted that trial counsel did object to improper argument at one point during the solicitor's closing, indicating that "trial counsel was clearly aware of the line which the solicitor was not allowed to cross." App. 587 (Order of Dismissal, p. 8).

"The 'Golden Rule' argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." State v. Reese, 359 S.C. 260, 271, 597 S.E.2d 169, 175 (Ct. App. 2004), *reversed in part on other grounds by* 359 S.C. 260, 597 S.E.2d 169 (2004). Golden Rule Arguments are generally improper and may constitute reversible error. Id. Here, the solicitor made similar improper arguments in both his opening and closing, yet trial counsel only objected to those made during the closing argument. Compare App. 47, l. 21 – 48, l. 8, with App. 152, l. 21 – 153, l. 10; see also App. 298 – 302 (Amend. to PCR Application, pp. 7-11) (citing both the opening and closing remarks of solicitor as improper "Golden Rule" arguments).

In his opening argument the solicitor told the jury:

> [S]he [Minor Child 1] was at the mercy of the adults around her, and so when she's talking and you think, well maybe I wouldn't have known that, or why did she do that. Well, **ask yourself what you would have done if you were twelve year old living [Minor Child 1] with your mother and your step-dad**, who you may have some fear of if you are twelve year old [Minor Child 1]. So try to ask yourself, is it reasonable for her to do what she did, given who she is. It's called **empathy**. Not what you would have done, because if he had done it to me I probably would have well, I would have done something different, I'm sure.

> But I'm not [Minor Child 1] and I don't have a roof over my head only at the mercy of Shannon McGee (unintelligible).

App. 47, l. 21 – 48, l. 8 (emphasis added). With no objection from defense counsel, the jurors had this improper perspective in their minds throughout the presentation of the evidence.

The improper "Golden Rule" argument was exacerbated by the solicitor's additional remarks. He said: "And what, ultimately, your difficult responsibility is going to be, is to make a decision that you are convicted of in your conscience, that it's the right thing, and that's all we are asking for you to do." App. 48, l. 24 – 49, l. 2. The solicitor also implied that if the jury did not convict McGee, the minor child would be returned live with her mother and McGee, saying:

> And she's going home. You know, this ain't -- this is not television. She isn't going to a high-rise apartment in Manhattan, or some house on the hills in Beverly Hills when this is over with. She's not an actor. She's going home (unintelligible) when this is over. You are the only people who can do justice for her today, ...

App. 49, ll. 6-11. The solicitor later elicited testimony from the victim that her mother was still residing with McGee. App. 67, ll. 20-25.

In his closing argument, without objection, he said: "[T]hen this case is going to be yours to decide what the truth is, and ultimately decide on the fate of that Defendant, and **the fate of that victim**, and his family, and her family, and there's a lot of people that testified, [but] y'all decide." App. 152, ll. 2-6. Trial counsel did finally object when, during closing, the solicitor said:

> And so when I was talking about empathy what I was talking about it, if some of this stuff happened probably any of y'all -- well, the first thing you would do is, well, hopefully report it to the law enforce -- to the law, as opposed to, you know, doing something yourself.

App. 148, l. 21 – 149, l. 1. However, that did not undo the damage from the solicitor's other "Golden Rule" remark at the outset of the trial. Trial counsel's failure to object to those other

improper remarks was deficient and caused they jury to improperly consider all of the evidence from the perspective of the victim rather than as impartial factfinders. This violation of McGee's right to a fair trial requires a new trial.

VI. Trial counsel was ineffective in failing to object to the trial judge's instruction that testimony of a victim in a criminal sexual conduct case need not be corroborated.

At the request of the solicitor, the trial court instructed the jury that the testimony of a victim in a criminal sexual conduct case need not be corroborated. App. 142, ll. 15-22; App. 183, ll. 16-17. Defense counsel failed to object to the instruction. App. 190, ll. 12-13. In his *pro se* amendment to PCR application, McGee argued that this Court should overrule its precedent allowing for such an instruction. Specifically, McGee cited the overruling of Lottie v. State, 273 406 N.E.2d 632 (Ind. 1980) by Ludy v. State, 784 N.E.2d 459 (Ind. 2003). App. 332 – 337 (Amend. to PCR Application, p. 34-39). The PCR court found that the instruction was not objectionable and was "not unduly emphasized" by the trial court. App. 589 – 590 (Order of Dismissal, p. 10-11). The PCR court's findings was error in light of this Court's holding that the use of such an instruction is merely permissible, such that trial counsel should have argued against its use in McGee's case. See State v. Rayfield, 369 S.C. 106, 117, 631 S.E.2d 244, 250 (2006).

"In general, the trial court is required to charge only the current and correct law of South Carolina. ... A jury charge is correct if it contains the correct definition of the law when read as a whole." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004)(citations omitted). Some principles of law, however, are not to be charged to a jury. See, e.g., State v. Grant, 275 S.C. 404, 408, 272 S.E.2d 169, 171 (1980) (holding that although evidence of a defendant's flight is admissible as circumstantial evidence of guilt, it is improper for the trial judge to instruct the

jury on the law of flight, because such an instruction "oftentimes has the potential for creating more problems than solutions," as it "places undue emphasis upon that part of circumstantial evidence").

In State v. Schumpert, 312 S.C. 502, 509, 435 S.E.2d 859, 863 (1993), this Court found that a charge to the jury that "the testimony of the victim need not be corroborated," as provided in S.C. CODE ANN. § 16-3-657, was not an improper charge on the facts in light of "the charge as a whole." This Court cited Lottie v. State, 406 N.E.2d 632 (Ind. 1980), as being in accordance with its ruling. 312 S.C. at 509, 435 S.E.2d at 863. In 2003, the Indiana Supreme Court overruled Lottie in its decision in Ludy v. State, 784 N.E.2d 459 (Ind. 2003). The Ludy court found at least three problems with the jury instruction: "First, it unfairly focuses the jury's attention on and highlights a single witness's testimony. Second, it presents a concept used in appellate review that is irrelevant to a jury's function as fact-finder. Third, by using the technical term 'uncorroborated,' the instruction may mislead or confuse the jury." 784 N.E.2d at 461. The court overruled prior precedent that approved the instruction. Id. at 462.

In State v. Rayfield, a majority of this Court relied on the Schumpert opinion and again found that including a charge on S.C. CODE ANN. § 16-3-657 "does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law." 369 S.C. at 118, 631 S.E.2d at 250. However, the dissent in Rayfield noted the overruling of Lottie by Ludy. Id. at 119 n. 4, 631 S.E.2d at 251 n. 4 (Pleicones, J. and Bartlett,J., dissenting). The dissent expressed similar concerns to those espoused in Ludy regarding the giving of such a charge to the jury and would have held that S.C. CODE ANN. § 16-3-657 is not the proper subject of a jury charge. Id. at 119-120, 631 S.E.2d at 251-52. Rather, it is a legal standard for a court reviewing a conviction. Id. The dissent would have overruled Schumpert's

holding that "the charge as a whole can render this no-corroboration charge harmless." Id. at 120, 631 S.E.2d at 252. "Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim's testimony." Id.; see also Gutierrez v. State, 2015 WL 3887354 (Fla. June 25, 2015) (holding special jury instruction providing that testimony of alleged sexual battery victim needs "no corroboration" is improper, as misleading to jury and bolstering the victim's testimony by according it special status, regardless of whether defense counsel has pointed out to the jury that no other witness has corroborated the victim's account).

Here, trial counsel was ineffective in failing to object to the instruction. McGee's trial did not occur until 2006, three years after the Indiana Supreme Court's ruling in Ludy and approximately three and a half months after this Court's decision in Rayfield. The Rayfield majority held that a no-corroboration charge is not reversible error if the "single instruction is not unduly emphasized and the charge as a whole comports with the law." However, this Court importantly also held that "[a] trial judge **is not required** to charge [S.C. Code Ann.] § 16–3–657." 369 S.C. at 117, 631 S.E.2d at 250 (emphasis added). Trial counsel should have pointed out the many dangers associated with such a charge rather than sitting silent when the charge was requested by the solicitor and failing to object after the charge was given. McGee was prejudiced by the undue emphasis that the charge placed on the victim's testimony and the confusing affect that such an instruction has on the jury. McGee is accordingly entitled to a new trial.

VII. Trial counsel was ineffective in failing to object to the solicitor's use of improper vouching and bolstering during his closing arguments.

The solicitor spent a substantial part of his closing argument discussing the credibility and truthfulness of the witnesses. Some of this argument was arguably proper, as found in the PCR Court's Order. App. 586 – 587 (Order of Dismissal, p. 7-8). However, the solicitor crossed the line of proper argument when he said:

> [A]nd when she told her little brother he told, and so we find ourselves here, and [Minor Child 2] Moultrie came in. There's rules which allow certain things in, so basically he was just allowed to talk about time and place, based on the rules, **so that's why he said that she said somebody** did something nasty her in that trailer, and **that's what, basically, he is allowed to say**.

App. 152, ll. 2-8 (emphasis added). The solicitor essentially told the jury that there was more to the story than they were allowed to hear. He implied that Minor Child 2 was only allowed to say that "somebody" did something nasty, but that he really meant McGee. He may have also been implying that Minor Child 2 could have provided additional corroborating details but was not allowed to do so.

Although a prosecutor may argue the credibility of a witness based on the record and its reasonable inferences, a prosecutor may not vouch for the credibility of a prosecution witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (citations omitted). As explained by this Court, "[v]ouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction." Id. Generally, "[a] prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

Here, the solicitor's argument was based upon his personal knowledge regarding the witness. Despite that, trial counsel sat mute at the defense table. He should have objected and moved to strike the solicitor's statement. See Vasquez v. State, 388 S.C. 447, 463, 698 S.E.2d 561, 569 ("[G]iven that trial counsel did not object, there was no opportunity for the trial judge to even attempt to cure the error."); Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013) (reiterating that "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness" and finding the failure to object to improper hearsay testimony was improper where the victim's credibility was "extremely crucial" to the outcome of the case prejudiced the defendant (emphasis in original)). McGee was prejudiced in that the solicitor's comments improperly vouched for and bolstered Minor Child 2's testimony, which in turn bolstered Minor Child 1's testimony. The solicitor argued that the disclosure to Minor Child 2, an eight year old, was inconsistent with the defense's theory that Minor Child 1 was encouraged to make false allegations by her grandmother and father or was acting out of revenge. App. 150, l. 20 – 151, l. 24. The solicitor's improper vouching denied McGee's due process right to a fair trial. See Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) ("The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process."). McGee is accordingly entitled to a new trial.

VIII. Was trial counsel was ineffective in failing to object when the solicitor misstated evidence presented by the State's expert witness.

In his *pro se* amendment to the PCR application, McGee contended that the solicitor's argument that in Georgetown and Horry County delayed reporting occurred in ninety-nine percent of cases was in error. App. 339 – 340 (Amend. to PCR Application, p. 41). During the trial, the solicitor called Dr. Carol Ann Rahter as an expert witness in forensic interviewing and sexual

assault assessment. App. 120, ll. 14 – 122, l. 2. Dr. Rahter was the medical director of the Children's Recovery Center, where she performed all of the forensic medical exams, over 1,500 in total. App. 119, ll. 17-22; App. 122, ll. 7-19. Dr. Rahter gave two different statistics, one regarding delayed disclosure and the other regarding recantation. She first said: "So the majority of our children do not disclose immediately. Out of a hundred and eighty children that we saw last year, only two disclosed at the moment that it occurred . . . ." App. 124, ll. 5-7. She then testified that "anywhere between twenty-five and seventy-five percent of adolescent children recant, depending on which research study you are looking at." App. 125, ll. 6-9.

During his closing argument, the solicitor said:

> I thought what she also testified to, as an expert, was even maybe as interesting, or more informative for you, which is **delayed reporting**. I think, what, **ninety-nine percent of the time** why it's -- **at least in Georgetown and Horry Counties – that's consistent with what happened here**, recantation is part of the known cycle that goes on; it happens in a substantial number of cases.

App. 155, ll. 7-13 (emphasis added). The PCR court found that trial counsel was not ineffective in failing to object the ninety-nine percent statistic cited by the solicitor. App. 557 – 558 (Order of Dismissal, p. 8-9).

The solicitor's extrapolation of the expert testimony was error. Dr. Rahter's statistic was based solely on her experience in one year, 2005, at the Child Recovery Center. Despite that limited sample, the solicitor argued that delayed reporting occurred "ninety-nine percent of the time." The solicitor's qualification that the statistic represented cases "in Georgetown and Horry Counties" was still inaccurate. There was no evidence that Dr. Rahter saw every child who alleged sexual abuse in Georgetown and Horry counties. Further, even she did, one year of cases is not a sufficient basis upon which to make the solicitor's extrapolation.

McGee is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Petitioner Shannon McGee respectfully requests that this court grant certiorari to allow full briefing on these issues.

Respectfully submitted,

Laura R. Baer

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 10th day of December, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Steven H. John, Circuit Court Judge

SHANNON MCGEE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the Re-Petition for Writ of Certiorari and Motion to Exceed Twenty-Five Page Limit for a Petition for a Writ Of Certiorari in this case have been served on Jessica Kinard, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Shannon D. McGee, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 10th day of December, 2015.

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of December, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

STATE OF SOUTH CAROLINA

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Appellate Defender
ATTORNEY FOR PETITIONER

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of December, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.