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SC SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2014-000297

Shannon McGee, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED[1]

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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?

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?

[1] Respondent has adopted Petitioner's re-ordering of the questions, as well as its rephrasing of an issue, for ease of comparison.

STATEMENT OF THE CASE

In June 2006, the Georgetown County Grand Jury indicted Petitioner for second-degree criminal sexual conduct ("CSC") with a minor (2006-GS-22-580), lewd act upon a minor (2006-GS-22-581), and assault with intent to commit CSC with a minor (2006-GS-22-582). Stuart M. Axelrod, Esquire, ("trial counsel") represented Petitioner. On September 18-20, 2006, Petitioner proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Petitioner guilty as indicted. Judge Couch sentenced Petitioner to life imprisonment without the possibility of parole, pursuant to S.C. Code Ann. section 17-25-45, for second-degree CSC with a minor; twenty (20) years for assault with intent to commit CSC with a minor; and fifteen (15) years for lewd act upon a minor, all to be served concurrently

The day after trial ended, on September 21, 2006, trial counsel filed a motion for new trial. Judge Couch convened a hearing on the motion on September 22, 2006. Trial counsel contended Petitioner was entitled to a new trial based upon a Brady[2] violation by the solicitor and upon evidence discovered after the trial. On November 9, 2006, Judge Couch issued an order denying the motion for new trial. Judge Couch found that, although the solicitor committed a Brady violation, Petitioner was not prejudiced and still received a fair trial.

Petitioner filed a timely notice of appeal, and Kathrine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal on Applicant's behalf. On appeal, Petitioner argued Judge Couch should have granted a new trial based upon the Brady violation. On November 19, 2009, the South Carolina Court of Appeals affirmed the

[2] 373 U.S. 83 (1963).

convictions. State v. McGee, Op. No. 2009-UP-539 (S.C. Ct. App. filed Nov. 19, 2009). The Court of Appeals denied Petitioner's petition for rehearing on January 20, 2010. Petitioner appealed to the South Carolina Supreme Court, but the Supreme Court denied certiorari on January 20, 2011. The matter was remitted to the circuit court on February 7, 2011.

Petitioner filed an application for post-conviction relief on February 14, 2011. (App. p. 280-285). He then filed a "Statement of Truth" (App. p. 286-291) and a first amendment on March 7, 2011 (App. p. 292-341), along with a motion to address all issues (App. p. 342) and a motion to invoke full discovery (App. p. 343-346). Respondent ("the State") filed a return on or about March 23, 2011. (App. p. 347-354). Petitioner filed *pro se* subpoenas (App. p.355-357) on April 25, 2011, and a second amendment to his post-conviction relief application (App. p. 358-361.) on January 25, 2012.

The Honorable Steven H. John ("the post-conviction relief judge") convened an evidentiary hearing on the application at the Georgetown County Courthouse on December 19, 2014. (App. p. 362.) Petitioner was present and represented by William L. Runyon, Esquire, and Joshua L. Thomas, Esquire was present on behalf of the South Carolina Attorney General's Office. (App. p. 362). The post-conviction relief judge denied relief in an order signed January 22, 2014 and filed January 23, 2014. (App. p. 580-597.) The Petitioner filed a notice of appeal on February 11, 2015. The appeal was perfected by the filing of a Johnson[3] Petition for Writ of Certiorari by appellate defender Carmen Ganjeshani, Esquire on or about September 4, 2014. On September 29, 2015, this Court denied the motion to be relieved as counsel and directed the filing of a re-petition

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

for writ of certiorari addressing eight (8) issues. Petitioner filed this on December 10, 2015, and the State now files its return.

STANDARD OF REVIEW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)). This standard is the same for both trial and appellate counsel.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id.

(citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

When reviewing questions of fact, this Court will affirm the post-conviction relief judge's grant of relief "if there is any probative evidence to support those findings." Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). Conversely, the Court will not uphold a finding that is not supported by probative evidence. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and can reverse the post-conviction relief judge when a decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014), reh'g denied (Dec. 3, 2014), cert. denied, 135 S. Ct. 2387 (U.S.S.C. 2015) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

Specifically regarding appellate counsel, they need not, and perhaps should not, raise every nonfrivolous claim, "but rather may select from among them in order to maximize the likelihood of success on appeal." Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765 (2000) (referring to Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983)). In a review of the strength of the issues appellate counsel raised, [s]ignificant issues that could have been raised should then be compared to those that were raised. Generally, only when ignored issues are clearly stronger than those presented, will the

presumption of effective assistance of counsel be overcome." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

ARGUMENT

I. The State's calling of petitioner's case for trial did not violate this Court's decision in State v. Langford, 400 S.C. 421, 735 S.E.2d, 471 (2012) or, by implication, the South Carolina Constitution because this decision should not apply retroactively to this case.

Probative evidence exists for this Court to uphold the post-conviction relief judge's findings. In particular, there is no evidence to support Petitioner's argument that the solicitor's control of the docket prejudiced him. Petitioner makes pointed arguments that certain conduct by the assistant solicitor could be construed to show prejudice toward Petitioner, but there is no definitive evidence of this. Because there is only conjecture available to review when looking at the possibility of the assistant solicitor's actions being swayed by prejudice[4], Respondent turns to overarching issue of retroactivity.

A decision's retroactivity must normally be addressed at the time of the decision. Teague v. Lane, 489 U.S. 288, 300, 109 S.Ct. 1060, 1070 (1989). A case announces a new rule when it breaks new ground, imposes a new obligation on States or the federal government, and the result was not dictated by precedent existing at the time the conviction became final. Id. at 301, 1070. "Generally, new procedural rules should be not applied retroactively to cases on collateral review, unless the new rule falls within one of two exceptions to the general rule." Talley v. State, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007). The first exception to the prohibition against retroactivity applicability is if the new rule places certain kinds of primary, private individual conduct beyond the

[4] Most examples of which are cited as occurring during the hearing for the motion for new trial. (Re-petition, p.10.)

power of the criminal legislative authority to proscribe. Teague, *citing* Mackey, 401 U.S. at 692, 91 S.Ct. at 1180. Second, a new rule should be applied retroactively if it requires the observance of those procedures implicit in the concept of ordered liberty. Id., *citing* Mackey, 401 U.S. at 693, 91 S.Ct. at 1180.

To step back to the first aspect of this analysis, the Langford decision itself states that the order included within the opinion went into effect on February 4, 2013. This conviction and the direct appeal were decided well before then, and did not fall under the only exception, which applied to any case that had been pending four (4) or more years since indictment. Langford, 400 S.C. at 453, 735 S.C. at 488. There can be no doubt, and the testimony and arguments at the post-conviction relief hearing demonstrated, that this decision announced a new rule of law that is a deviation from the existing practice in General Sessions courts across the state. See Talley v. State, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." (citing Teague v. Lane, 489 U.S. 288 (1989))).

"Generally, new procedural rules should be not applied retroactively to cases on collateral review[.]" Id. at 543, 640 S.E.2d at 882 (citing Teague, 489 U.S. at 305). A new rule should not be applied retroactively when it is "a clear break with the past[.]" United States v. Johnson, 457 U.S. 537, 549 (1982) (quoting Desist v. United States, 394 U.S. 244 (1969). Because Langford announced a new rule constituting a clear break

from past procedure, the post-conviction relief court found it could be applied retroactively on collateral review. [5]

The record is clear the solicitor complied with the law at the time of Petitioner's trial. Trial counsel was provided a copy of the trial docket well in advance of trial and had the opportunity to make a motion for continuance when he felt the trial should not go forward. Thus, the State complied with section 1-7-33 in calling Petitioner's case for trial.

Regardless, Petitioner could not show he was prejudiced by the solicitor exercising his authority under section 1-7-33. See Langford, 400 S.C.at 446, 735 S.E.2d at 484 (requiring the defendant to show he was prejudiced by the solicitor's exclusive docket control, and finding he was not prejudiced). Petitioner's only argument for prejudice was that counsel did not have adequate time to prepare for trial, and this argument is not supported by the record. As discussed above, trial counsel interviewed witnesses and investigated the case to the extent Applicant provided leads to investigate. Applicant's Exhibit Number 1, trial counsel's trial notebook, shows trial counsel was thoroughly prepared for trial despite the short notice. The trial transcript reveals trial counsel subjected the State's case to a "meaningful adversarial testing[.]" United States v. Cronic, 466 U.S. 648, 659 (1984). Furthermore, Applicant failed to articulate any information that could have been uncovered had a continuance been granted. Thus, the short notice did not render trial counsel's performance so lacking as to make the result of the trial unreliable. Id. (citing Davis v. Alaska, 415 U.S. 308 (1974)); see also Avery v.

[5] The post-conviction relief judge also considered the potential implications to other, previously decided cases that may be overturned based on the retroactive application of this decision.

Alabama, 308 U.S. 444, 450 (1940) (finding no prejudice where counsel was appointed in a capital case only three days before trial and the trial court denied counsel's request for additional time to prepare). Because Applicant was zealously represented by trial counsel at his trial, the Court finds he was not prejudiced by the solicitor's exclusive control of the docket. The finding of the post-conviction relief judge should not be disturbed, and the Petitioner's request for a writ of certiorari should be denied.

II. Appellate counsel was not ineffective in her choice of issues presented on appeal.

Probative evidence exists for this Court to uphold the post-conviction relief judge's findings. In particular, there is no evidence to dispute the finding that "the Applicant failed to demonstrate appellate counsel failed to exercise sound judgment in choosing which issues to present on appeal. See Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983) (holding appellate counsel must be allowed to exercise reasonable professional judgment in determining which non-frivolous issues to raise on appeal)."

As discussed above, the burden rests on the Applicant in a post-conviction relief matter to overcome the strong resumption of adequate assistance and decisions made in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Petitioner argues that the post-conviction relief judge "[found] that testimony of appellate counsel was required in order to evaluate the deficiency prong." (Re-petition, p.14.) However, the post-conviction relief judge did not make a finding when considering this and referring to Dempsev 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).)[6]

Petitioner places weight on the idea that "[g]enerally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Gray v. Greer, 800 F.2d 644 (7th Cir. 1986). After expounding on this and arguing that all evaluation of effective assistance should be based on review of the record, Petitioner returns to the idea that the post-conviction relief judge relied on Dempsey, supra. This is simply not the case. No finding was made in accordance with Dempsey or its general principle that a witness must be presented at the post-conviction relief hearing. For this reason, as well as the case law requiring the Petitioner to prove prejudice, the post-conviction relief judge's ruling must be not be disturbed, and the Petitioner's request for a writ of certiorari should be denied.

III. The solicitor did not commit prosecutorial misconduct when portraying his relationship with Aaron Kinloch.

Probative evidence exists to uphold the post-conviction relief judge's finding that the solicitor did not commit prosecutorial misconduct in his presentation of evidence relating to Kinloch. The post-conviction relief judge found that these issues were raised and decided on direct appeal as part of an alleged Brady violation that centered on the solicitor's failure to provide the letter from Kinloch during trial. Because the issue was ruled upon by the Court of Appeals, Petitioner cannot now challenge it on collateral review. Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001) ("PCR is not a substitute for appeal or a place for asserting errors for the first time which could have

[6] This citation was prefaced by "cf.," thus showing that this material may be worth considering, but not dispositive of the issue.

been reviewed on direct appeal." (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993))).

Petitioner has presented no evidence in his re-petition for writ of certiorari to demonstrate why Humbert should be ignored in this case. Though he expands on the issues that he has with the solicitor's performance, rather than just the presentation of the letter, none of these allegations have merit. Petitioner argues that the solicitor should have known that Kinloch had pending charges that were not listed on the NCIC report provided to trial counsel, and that his failure to make their existence clear is misconduct. The argument surrounding this is purely speculative, as Petitioner cannot know what the solicitor actually knew or intended to do.[7]

Most importantly, there is little, if any, evidence that this activity prejudiced the Petitioner. The only change that knowledge of the pending charges could have had on the trial is a potential change in the cross-examination of Kinloch by trial counsel, which would be minimal, as Kinloch already had prior convictions. Trial counsel extensively attacked Kinloch's credibility. The jury was aware of Kinloch's prior conviction. Because trial counsel effectively called Kinloch's credibility into question with his prior crimes, the impeachment evidence of Kinloch's desire to assist the State did not deprive Petitioner of a fair trial. State v. Cheeseboro, 346 S.C. 526, 554, 552 S.E.2d 300, 314-15 (2001) ("Where there is an abundance of evidence detailing the witness's unabashed disrespect for the law, the nondisclosure of other impeaching evidence does not deprive the defendant of a fair trial." (citing State v. Gunn, 313 S.C. 124, 437 S.E.2d 75 (1993))). Therefore, the solicitor's actions do not rise to the level of prejudice and the truth of the

[7] The assistant solicitor did not testify at the post-conviction relief hearing.

jury's verdict should not be questioned, nor should the ruling of the post-conviction relief judge. The Petitioner's request for a writ of certiorari should be denied.

IV. Trial counsel was ineffective in not interviewing Michael Jones.

Probative evidence exists to uphold the post-conviction relief judge's finding that trial counsel was not ineffective in not interviewing Michael Jones. As Petitioner himself concedes, trial counsel had no knowledge of Michael Jones involvement with Petitioner prior to receiving Aaron Kinloch's letter, which was not made available to him until after the trial. Petitioner had not mentioned Michael Jones to trial counsel so, therefore, there is no way for trial counsel to have known that Jones's testimony could be helpful to Petitioner's case. Even assuming, *arguendo*, that Jones could have presented evidence that would have changed the outcome of the case, trial counsel is not ineffective for failing to interview a witness of whom he had no knowledge.

The post-conviction relief judge found trial counsel's testimony to be credible, and Petitioner's to be not credible. Specifically, he found trial counsel adequately conferred with Applicant, conducted a proper investigation, and was thoroughly competent in his representation. Notably, failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Petitioner 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 Petitioner provided leads to investigate. The post-conviction relief hearing transcript shows that, although Petitioner knew Jones from

incarceration, he did not know of Jones's involvement with Kinloch or his case. (App. p. 413:15-19.) "Counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight." Strickland, 466 U.S. at 680, 104 S.Ct. at 2060. Trial counsel's trial notebook, entered into evidence as Applicant's Exhibit Number 1, shows trial counsel was thoroughly prepared for trial. Therefore, Petitioner has not presented evidence trial counsel did not investigate the case or that further investigation "would have led to a different result." Moorehead, Id. The finding of the post-conviction relief judge should not be disturbed, and the Petitioner's request for a writ of certiorari should be denied.

V. The solicitor did not use a Golden Rule argument; therefore, trial counsel was not ineffective by not objecting.

Probative evidence exists to uphold the post-conviction relief judge's finding that trial counsel was not ineffective. Petitioner took the cited passages out of context and contorted them to seem like Golden Rule arguments. The definition of a Golden Rule argument, as cited by Petitioner, "suggest[s] to jurors...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).

The first passage of the solicitor's opening argument that Petitioner cites is certainly the most likely to be a Golden Rule argument, as it includes the passage "ask yourself what you would have done if you were twelve year old living [Minor Child 1] with your mother and your step-dad." Re-Petition, p.23. On first glance, this seems to be an obvious Golden Rule argument. However, placed back into context within the

transcript, it is apparent that the solicitor is not referring to viewing the evidence through the eyes of the victim, but rather considering how the victim would feel about reporting what happened to her and testifying against the Petitioner. (App. p. 47:14 – p. 48:8.) The post-conviction relief judge understood this and found this line of argument to be permissible because it is commentary on the weight that the testimony should be given. See State v. Caldwell, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) (citing State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976)), overruled on other grounds by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006).

Trial counsel did properly object when the solicitor implied that what the average, reasonable person (or juror) would do is report a crime to the police. This was a proper objection, and was ruled as such by the trial judge. The solicitor's commentary placed inappropriate characterization on the victim and could have swayed the jury.

On top of these facts, there were curative instructions from the trial judge. Judge Couch charged the jury that the solicitor's arguments were not to be considered in determining Petitioner's guilt. (App. p. 41:7-24). Judge Couch also charged the jury that it made the ultimate determination as to witness credibility (App. p. 180:7-181:8). As noted by the post-conviction relief judge, the propriety of a closing argument must be reviewed "in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 914-15 (2009) (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). After doing so, he found that the Petitioner had not proven prejudice because the solicitor's comments did not "so infect[] the trial with unfairness as to make the resulting

conviction a denial of due process." Id. (citing Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002); State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997)). The finding of the post-conviction relief judge should not be disturbed, and the Petitioner's request for a writ of certiorari should be denied.

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

Probative evidence exists to uphold the post-conviction relief judge's finding that trial counsel was not ineffective when he did not object to the instruction that the testimony of a victim in a criminal sexual conduct case need not be corroborated. Pursuant to S.C. Code Ann. § 16-3-657[8] and related case law, the testimony of a victim in a criminal sexual conduct case does not need to be corroborated. See State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006).

In the presentation and argument of this issue, Petitioner calls for a change in the law of this state. As it stands now, "[a] trial judge is not required to charge § 16–3–657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law." Id., 369 S.C. at 118, 631 S.E.2d at 250. There is nothing in the record or the re-petition of Petitioner to suggest that this charge did not comport with the law. Furthermore, this charge comes from a code section that states this concept verbatim. Whether this is something that needs to be done away with has no bearing on whether trial counsel in this matter was ineffective.

[8] "The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658."

Though trial counsel could have objected to the issuance of this charge, he was not required to do so. There is no testimony as to his mindset or whether this was part of his strategy, but it certainly could have been.[9] Because there is nothing improper or wrong about the instruction as given, there is no duty for trial counsel to object. Though an objection to this charge may seem like best practice at this juncture, "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. The finding of the post-conviction relief judge should not be disturbed, and the Petitioner's request for a writ of certiorari should be denied.

VII. The solicitor did not vouch for or bolster testimony during his closing argument; therefore, trial counsel was not ineffective by not objecting.

Probative evidence exists to uphold the post-conviction relief judge's finding that the solicitor did not improperly vouch for witnesses and, therefore, trial counsel was not ineffective in failing to object. Petitioner alleges that a portion of the solicitor's closing argument implied that the victim's brother, also a minor child, was not allowed to testify to the full extent of his knowledge, and that this was improper vouching or bolstering.

The portion of the argument that Petitioner specifies is during closing argument, where the solicitor stated that Minor Child 2 said, "what, basically, he's allowed to say." Petitioner reads this as implying that there is information outside of the record that the solicitor knew of, but that could not be brought forward in court. Respondent disagrees

[9] "Where, as here, counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (see Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

with this interpretation. Rather, the solicitor was saying that the rules of court, mentioned earlier in the same sentence, prevent witnesses from being as detailed as the jury may like. This is clear from the statement "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...." (App. p. 152:3-7.) If the solicitor were alluding to anything outside of the record, it would be information that any reasonable person could assume exists, such as the fact that the victim most likely told Minor Child 2 exactly who had done something to her.

Whether the solicitor knew the answer to the question is immaterial. In stating that rules prevented Minor Child 2 from elaborating, the solicitor was allowing the jury to understand why they may not have heard testimony that they expected, rather than vouching for the content of Minor Child 2's testimony. This cannot be determined to be bolstering or vouching for the content of Minor Child 2's testimony, as it does not allude to any material information outside of the record, nor does it lend any extra weight or credibility to his testimony. The finding of the post-conviction relief judge should not be disturbed, and the Petitioner's request for a writ of certiorari should be denied.

VIII. The solicitor did not misstate evidence presented by the State's expert witness; therefore, trial counsel was not ineffective in failing to object.

Probative evidence exists to support the post-conviction relief judge's finding that the statement by the solicitor was proper and, therefore, trial counsel had no basis on which to object. Petitioner argues that the solicitor inaccurately presented the percentage of cases that arise out of delayed reporting. The specific testimony follows:

> 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.p. 155:7-13).

Petitioner alleges that this statement exaggerates the actual number of cases that present because of delayed reporting. However, the math is actually correct. Based on Dr. Rahter's testimony, only two of one hundred eighty children seen by the Children's Recovery Center in the prior year disclosed immediately. This does, indeed, mean that 99% of the cases exhibited delayed reporting. This was stated clearly earlier in the solicitor's closing argument, when he said, "there was a delayed reporting, which happens, according to Dr. Rahter, in a hundred and seventy-eight out of a hundred and eighty cases, two times where the victim comes forward and says what happened when it happened." (App. p.148:18-21.)

Petitioner further argues that this should not be viewed as a statistic for Horry and Georgetown counties, as the Center did not see every case in those counties. There is no testimony about from where the Center receives cases, though there is nothing to discount the assumption that the Center works along with the Fifteenth Judicial Circuit in receiving referrals, which is the implication. Regardless, there is no prejudice in the presentation of any of this information. As stated above, the propriety of a closing argument must be reviewed "in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 914-15 (2009) (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). As considered before, the jury received a specific charge on weighing the expert's testimony. (App. p. 185:1-17). Lastly, this argument was not repetitive, but only

stated once, and then as a restatement of information contained earlier in the closing argument. There is simply no evidence that trial counsel performed deficiently, or that Petitioner was prejudiced by any of the happenings surrounding this allegation. The finding of the post-conviction relief judge should not be disturbed, and the Petitioner's request for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court deny a writ of certiorari to review the post-conviction relief judge's proper findings.

Respectfully submitted,

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April 11, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County

The Honorable Steven H. John, Circuit Court Judge

SHANNON D. MCGEE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

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:

Laura R. Baer, Esquire
Appellate Defender
SC Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

This 11th day of April, 2015.

NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

April 11, 2015

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

RE: **Shannon D. McGee v. State of South Carolina**
Appellate Case No: 2014-000297

Dear Mr. Shearouse:

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

Sincerely,

Jessica E. Kinard
Assistant Attorney General
Bar No: 77889

JEK/nb
Enclosures

cc: Laura R. Baer, Esquire (2 copies)