

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Greenville County  
Court of Common Pleas  
The Honorable Perry H. Gravely, Circuit Court Judge

**RECEIVED**

**MAR 23 2017**

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Appellate Case No. 2016-000283  
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S.C. SUPREME COURT

FREDERICK R. CHAPPELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

\_\_\_\_\_  
**RETURN TO PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

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## **RESPONDENT'S QUESTIONS PRESENTED**

Did Trial counsel err by failing to make a specific objection as to improper vouching in regards to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well?

## STATEMENT OF THE CASE

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Applicant was indicted at the December 2010 term of the Greenville County Grand Jury for lewd act upon a child (2010-GS-23-7901) and first-degree criminal sexual conduct (CSC) with a minor (2010-GS-23-7902). He was represented by Susannah C. Ross, Esquire.

After the State called the case to trial, the Applicant was found guilty. On August 7, 2012, the Honorable D. Garrison Hill sentenced the Applicant to concurrent terms of 15 years for lewd act upon a child and life imprisonment for first-degree CSC with a minor.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Chappell, Op. No. 2014-UP-272 (S.C. Ct. App. filed June 30, 2014). The remittitur was sent on July 16, 2014.

Petitioner filed a PCR application November 5, 2014. The Respondent made its return on March 31, 2015. An evidentiary hearing was held on December 17, 2015. The Applicant was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent. The Honorable Perry H. Gravely denied and dismissed the PCR application by order filed January 21, 2016.

Petitioner filed a notice of appeal. His attorney submitted a notice of appeal to the South Carolina Supreme Court on February 9, 2016. His attorney submitted a petition for writ of certiorari and appendix on October 3, 2016. This return follows.

## STANDARD OF REVIEW

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

## ARGUMENT

**Trial counsel did not err by not making a specific objection as to improper vouching in regards to the portion of the child sex abuse expert's testimony that informed the jury that children do not lie about sex abuse incidents because this constituted impermissible bolstering of the testimony of the prosecutrix and in effect the state's case as well.**

Petitioner asserts that Counsel was ineffective in his representation of Petitioner in failing to make a specific objection as to improper vouching. This argument is without merit.

### A.

As previously mentioned, Petitioner was sentenced to concurrent terms of 15 years for lewd act upon a child and life imprisonment for first-degree CSC with a minor. The charges stem from incidents where the Petitioner touched the victim's "private" and "bottom". (App.p.116.LL.1-6). During the course of the trial the state called Shauna Galloway-Williams as an expert in child sex abuse and treatment to testify. Prior to being qualified as an expert, Petitioner's Counsel made an objection of relevancy with regard to Ms. Galloway-Williams' testimony since she had not been involved in the case. (App.p.184.LL.8-15). The trial judge ruled allowing Ms. Galloway-Williams to testify as an expert. (App.p.184.LL.17-19).

### B.

At the PCR hearing, Petitioner made the allegation of ineffective assistance of counsel. Specially, Petitioner argued that Counsel did not object to improper vouching. (App.p.293.LL.9-13). At the hearing Counsel testified that she was mindful of potential vouching and did not believe there was any in this case. (App.p.310). In denying Petitioner's application for post-conviction relief, the PCR judge found the Petitioner failed to meet his burden of proving trial counsel should have objected to Ms. Shauna Galloway-Williams' testimony. (App.p.310). Additionally, the PCR judge found there was no error in trial counsel's lack of objection during

Galloway-Williams' testimony because her testimony did not contain vouching statements. (App.p.311). Further, the court found the recent appellate decision in State v. Brown, 411 S.C. 332,768 S.E.2d 246 (Ct. App. 2015) is instructive in this case (and, in fact, deals with the same expert witness testifying about the same topic of delayed disclosure of abuse by minors). (App.p.310). Finally, the court found that there was no basis for trial counsel to have made an objection to vouching. (App.p.310).

C.

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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.

D.

The PCR judge did not err in its ruling that Petitioner failed to meet his burden entitling him to post-conviction relief. Here, the Petitioner alleged that the expert the state used to testify for them vouched and bolstered the creditability of the victim. In giving her testimony the expert, Ms. Shauna Galloway-Williams testified to the following:

Children don't often lie about sexual abuse incidents. They don't often lie about things that are beyond their real scope of knowledge. And children often are unable to anticipate what the next question is that someone is going to ask them. So if a child is - you know, has been interviewed by law enforcement, and they've been - talked to DSS, and they've talked to a forensic interviewer, you know, generally, if the child is lying, there are going to be some - someone is going to - at some point, the child is going to - it's going to become apparent among those interviewers. They're just not sophisticated enough to carry a story out over multiple interviews like that. (App.p.189.LL.22-25-p.190.LL.1 -9).

The expert's testimony discusses generally how children react and respond to sexual abuse. At no time did Ms. Galloway-Williams comment on the victim specifically or make mention to anything that the victim said. More specifically, Ms. Galloway-Williams' answer was in response to a question from the state which asked "Do children lie about things like - - of a sexual nature or abuse? And can you tell us the dynamics of lying and sexual abuse?" (App.p.189.LL.14-17). At no time did the witness bolster or vouch for the credibility of the

victim but merely gave her opinion. "An expert may give an opinion based upon personal observations or in answer to a properly framed hypothetical question that is based on facts supported by the record." State V. Weaverling 337 S.C. 460, 474-75, 523 S.E.2d 787, 794 (Ct. App. 1999)

At the PCR hearing the judge referenced an appellate decision in State v. Brown 411 S.G. 332, 768 S.E.2d 246 (Ct. App. 2015) that speaks to the issue the Petitioner presently addresses. In Brown, Ms. Galloway-Williams, the same expert witness in this case testified about child sex abuse and more specifically delayed disclosure of abuse by minors. The court ruled in Brown that Ms. Galloway's testimony did not amount to vouching because she never directly or indirectly commented about the creditability of the victims' allegations. That case is applicable here because there exist many of the same facts. Among them are that Ms. Galloway-Williams was never the forensic interviewer for the victim and had no prior knowledge of the facts of the case. She simply offered her expert opinion about sexual abuse among children, Additionally, during the PCR hearing the judge asked the Petitioner and his PCR Counsel about Ms. Galloway-Williams' testimony. (App.p.297.LL.10-25-p.298.LL.1 -2).

THE COURT: Let me ask you a question, are you aware of any place in the transcript where they discuss the credibility of the particular victim? Did she ever make any discussions about this victim or was it just all general type comments about how victims in general react?

APPLICANT: I do know that she said that she'd never spoke to her.

THE COURT: Did she ever give an opinion as to whether this girl was telling the truth or not, in the transcript? Are you aware of anything?

APPLICANT: I'm not aware of that, to be honest with you.

BRIAN JOHNSON: I don't believe so, Your Honor.

The Petitioner made the allegation that his trial Counsel failed to object to improper vouching or bolstering by the witness but when asked by the PCR judge about any discussions regarding comments on credibility the Petitioner's response along with his PCR Counsel suggest that Ms. Galloway-Williams' testimony did not comment on the creditability of the victim. Because of this, there is probative evidence to support the PCR Court's ruling.

E.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. As Petitioner failed to meet his burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See *Frasier v. State*, 351 S.G. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

*[Signature follows]*

## CONCLUSION

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

Respectfully submitted,

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By:   
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March 23, 2017

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**CERTIFICATE OF SERVICE**

I, DeShawn H. Mitchell, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Wanda H. Carter, Esquire  
Deputy Chief Appellate Defender  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, South Carolina 29211-1589**

I further certify that all parties required by Rule to be served have been served.  
This 23<sup>rd</sup> day of March, 2017.



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