STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Robert E. Hood, Circuit Court Judge

DAVID L. CARMICHAEL,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2015-000424

BRIEF OF RESPONDENT

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ATTORNEY FOR PETITIONER

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PETITIONER'S ISSUE PRESENTED

Whether the post-conviction judge erred in finding trial counsel ineffective for failing to move to sever the trial where trial counsel articulated the prior similar incidents would have been admissible at a bifurcated trial and a conviction on one charge would have been admissible at a second trial and where his assessment of the case was correct and reasonable under prevailing professional norms?

COUNTER-QUESTION PRESENTED

Was there any evidence to support the PCR judge's finding that defense counsel was ineffective for not moving to sever the three indictments, involving three different alleged victims during different time periods, where defense counsel assumed that if the indictments were severed that the "convictions[s] and their underlying facts could be offered" against [Respondent] in his subsequent trial[s]" since defense counsel erroneously failed to consider that respondent could be entitled to a trial on the merits of the indictment uncontaminated by the other charges pursuant to Rule 403, Rule 404 (b) and Rule 609, SCRE, and trying respondent on three different sex indictments respondent – by three separate girls during a single trial -- was going to be devastating anyway?

STATEMENT

Respondent agrees with the state's procedural history of the case contained on page four of the brief of petitioner.

ARGUMENT

There was evidence to support the PCR judge's finding that defense counsel was ineffective for not moving to sever the three indictments, involving three different alleged victims during different time periods, where defense counsel assumed that if the indictments were severed that the "convictions[s] and their underlying facts could be offered" against [Respondent] in his subsequent trial[s]" since defense counsel erroneously failed to consider that respondent could be entitled to a trial on the merits of the indictment uncontaminated by the other charges pursuant to Rule 403, Rule 404 (b) and Rule 609, SCRE, and trying respondent on three different sex indictments respondent – by three separate girls during a single trial -- was going to be devastating anyway.

There was evidence to support the PCR court's finding that:

> In proving her case, the Solicitor used the fact that the *Applicant was alleged of committing a lewd act by three separate girls in three separate unrelated instances to enhance her case and bolster the credibility of her victims. She did this by using the testimony of each victim to corroborate the testimony of the other victims and argue that any disbelief of any victim would tantamount to accusing the victims of participating in a "conspiracy."*
>
> In sum, this Court finds that trial counsel was ineffective for not requesting a severance when these three indictments were called to trial at the same time. Counsel's deficiency prejudiced the Applicant **by allowing the State to contaminate the trial by allowing unrelated allegations to be used against each other to strengthen the State's case and bolster the credibility of the victims**. As a result, this Court finds that evidence exists 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 and accordingly the Applicant's Application for Post-Conviction Relief must be granted. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984).

App. 1001 – 1002. (emphasis added).

Trial Counsel worried that the other two lewd prior bad acts or conviction(s) *could be used* against respondent at a subsequent trial or trials if these cases had been severed. Thus, counsel did not make a motion to sever either of the two other indictments underlying Respondent's convictions guaranteeing that the allegations of "the three separate girls" *would be used against Respondent during the joint trial.*

The post-conviction court noted that indictment 2007-GS-40-**3372** "involves an allegation of a one-time-only incident occurring between 1999 and 2004 when the victim was somewhere between the ages of 4 and 9 (pre-puberty)." App. 995. The PCR judge noted that "there was delayed disclosure and therefore no evidence was presented as to exactly when the alleged event occurred." App. 995. The judge also wrote:

> "The victim testified that while *she was asleep* the Applicant placed her on his lap and *put her hand on his penis and made her rub it. Id* at 175-176. The victim also testified that, although her pants were down when she woke up, she had no memory of being touched inappropriately. *Id.* At 180. The victim did not testify that any coercion or threats were made other than 'shhh don't say nothing.' *Id.* at 181."

App. 995. (emphasis added).

The judge also wrote, regarding Indictment 2007-GS-40-**3373**, that "the victim alleged that three incidents occurred between 2001 and 2005 when she was between the ages of 7 and 11 (pre-puberty). Again, there was a delayed disclosure and therefore no evidence was presented regarding exactly when the alleged event occurred. The victim knew [respondent] from church but his family was also very close with her family and he regularly visited her home." One incident involved an allegation Respondent allegedly touched her in the area of her breasts. The second allegation was that Respondent tried to rape her, penetrate her but was unsuccessful and stopped. The third

allegation was that Respondent told the victim to pull her pants down and he improperly touched her vagina.[1] App. 995-996.

Regarding the third indictment, 2012-GS-40-**4135** "the victim alleged that a one-time-only incident occurred on August 28, 2011 when the victim was 13 years old. The victim testified that the incident took place while she was in the backseat of a car while her step-father was driving," and Respondent was in the front-passenger seat. The allegation was that *Respondent was pretending to be asleep* when he reached into the "backseat and began rubbing up and down her leg and plucking at her clothing like he was trying to get into the bottom of her pants." Alleged victim three did not testify that Respondent made any coercive statements or threats at the time. App. 996-997. (emphasis added).

The PCR judge properly found that defense counsel erroneously assumed that if the other two indictments were severed that evidence from those other two indictments would probably or automatically be admitted at the trial or during a subsequent trial. The PCR Court correctly noted that defense counsel failed to account for the fact that a trial judge may have excluded evidence of the other allegations under Rule 403, SCRE. Meaning, obviously, that even if relevant the undue prejudice from two other lewd or sexual acts were unduly prejudicial, and had to be excluded. Additionally, the trial judge may well have found the other alleged incidents were not sufficiently similar to be admissible under Rule 404 (b), SCRE, and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275, 277-78 (2009). Further, even if the crimes or events were so "strikingly **similar** to the one for which the [respondent] is being tried, the danger of prejudice is enhanced," and arguments for their exclusion became much stronger. State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).

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1 Petitioner did not include the body of this 2007 indictment in the Appendix it filed with this Court desiring a reversal under the "any evidence" standard. Petitioner is aware of this omission. App. 895-898.

Finally, even if one or both of the other incidents resulted in a conviction they still had to withstand a probative versus unduly prejudicial effect analysis under Rule 609 (a), SCRE since they would not have been convictions for crime(s) of dishonesty. App. 997-1000.

The PCR court correctly noted that the solicitor in closing argument took full advantage of the other two indictments, and dwelled on the fact that there were three alleged victims and not just one. "You can't consider either and in this case it's not just one or the other, this isn't a case where you have one person come forward and make allegations about what happened to them. You can use any and all of the evidence **before you to corroborate each and every one of these victims and I would ask you to do so.**" App. 999-1001. (emphasis added).

The PCR judge emphasized that the solicitor made effective use of the fact that there were "three separate girls and three separate *unrelated incidents* to enhance her case and bolster the credibility of her victims. She did this by using the testimony of each victim to corroborate the testimony of the other victims and argue that any disbelief of any victim would be tantamount **to accusing the victims of participating in a single 'conspiracy.'"** App. 1000-1001. (emphasis added).

The standard of review on appeal to this Court is that the PCR judge's ruling must be upheld if there is "any evidence" to support his or her ruling. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1999). There was not only "any evidence" to support the PCR judge's findings here, there was ample evidence to support them. There was abundant evidence to support the PCR judge's finding that defense counsel was deficient for not moving for a severance because counsel erroneously assumed the other two incidents or convictions would probably be admissible as a matter of course during a subsequent trial despite the protections of Rule 403, SCRE, Rule 404 (b), SCRE on bad acts, and Rule 609 (a), SCRE involving prior convictions.

Even defense counsel noted at the PCR hearing the troublesome nature of the evidence: "The behavior of the girls after these things supposedly occurred were very contradictory, so they would, you know, their behavior, their parents' behavior. David is an accomplished singer and songwriter. And even after these allegations occurred, these very parents were asking him to attend -- come to church, even though he was out on bond and, of course, he refused to do so, but they were reaching out to him." App. 950, l. 21 – 951, l. 3.

Yet, defense counsel said he was "okay" with the state trying all three cases together." However, Counsel did acknowledge the differences in the facts and time periods of the cases. App. 960, l. 19 – 963, l. 25. Defense counsel was "worried" that if the cases were severed the prior conviction(s) or bad acts evidence could be admitted against respondent, but he acknowledged all of the prior incidents were "absolutely" admitted anyway since he was "ok" with all three cases being tried together." App. 968, l. 1 – 969, l. 1. PCR counsel argued at length that defense counsel was ineffective for failing to move for a severance given the extraordinary prejudice from the three cases being tried together.[2] App. 969, l. 18 - 975, l. 14.

As for Rule 609 (a)(1), SCRE, a lewd act conviction(s) was not a crime(s) of dishonesty, and therefore the trial judge would have had to weigh the probative value of the prior convictions against their unduly prejudicial effect. The unduly prejudicial effect would obviously have been great since while the lewd or sexual incidents were not sufficiently similar under Rule 404 (b), SCRE to be admissible. If such cases were "strikingly similar, then they were explosively prejudicial, and subject to State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984). There was ample evidence that defense counsel here was ineffective under the Strickland v. Washington, 466,

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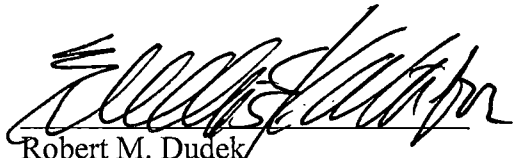
2 Respondent told the PCR judge he understood the danger of wanting another trial given his sentence and max-out date. He said he had "fought" too long to quit at that point. App. 981, l. 22 – 985, l. 3.

U.S. 668, 104 S.Ct. 2052 (1984), standard, and therefore the ruling of the PCR judge should be affirmed under the "any evidence" standard of Cherry v. State.

CONCLUSION

By reason of the foregoing argument, the order of the post-conviction court should be affirmed.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT

This 27th day of November, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon James Clayton Mitchell, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Respondent has been served on David Carmichael, at 3431 Covenant Rd., Apt. 11, Columbia, SC 29204, this 27th day of November, 2017.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 27th day of November, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.