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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Charleston County
G. Thomas Cooper, Jr., Post-Conviction Relief Judge
Deadra L. Jefferson, Trial Court Judge

Appellate Case No. 2018-000193

JOSEPH RICHARD GRADDICK,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF ISSUES ON CERTIORARI

- I. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of trial or appellate counsel regarding the trial court's jury instruction on S.C. Code Ann. § 16-3-657 where it was a proper jury instruction at the time of Petitioner's trial and appeal.
- II. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of trial counsel for failing to object to the trial court's preliminary remarks to the jury and final charge on the law regarding "truth" in the jury's verdict where these brief comments did not render the court's instructions to the jury improper.
- III. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of trial counsel for failing to object to testimony regarding Petitioner's pre-trial detention.
- IV. Petitioner failed to establish any constitutional ineffectiveness of appellate counsel for failing brief whether the testimony of Officer George Van Tine about statements made by Petitioner's girlfriend was inadmissible hearsay or violated the Confrontation Clause where appellate counsel testified as to valid reasons for not raising the issue under either ground.
- V. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of trial counsel for failing to present his brother as a witness where Petitioner never told counsel his brother was a potential witness, his brother's testimony lacked credibility, and would not have changed the outcome of the trial.
- VI. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of appellate counsel for filing an Anders brief addressing the propriety of the trial court sustaining the State' objection during his closing argument.
- VII. The post-conviction relief court properly declined to apply a cumulative error analysis where it determined Petitioner failed to establish any deficiency of counsel.

STATEMENT OF THE CASE

Petitioner Joseph Richard Graddick is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its April 2010 and May 2011 terms, the Charleston County Grand Jury indicted Petitioner for kidnapping (2011-GS-10-2295), first-degree burglary (2011-GS-10-3096), and first-degree criminal sexual conduct (2011-GS-10-3100). The charges stemmed from an incident on June 15-16, 2008, wherein Petitioner entered the home of LaVanda Joyner without her consent, physically restrained and threatened her, and sexually assaulted her before absconding. Assistant Public Defender Beattie Butler of the Charleston County Public Defender's Office represented Petitioner. Assistant Solicitors Deborah Herring-Lash and Timothy Finch of the Ninth Circuit Solicitor's office prosecuted the case.

On July 11-13, 2011, Petitioner proceeded to a jury trial before the Honorable Deadra L. Jefferson. During his trial, Petitioner took the stand in his own defense and claimed he had consensual sexual intercourse with the victim, who had fabricated the rape claims after he attempted to break-off their casual sexual relationship. At the conclusion of trial, the jury convicted Petitioner as indicted. Judge Jefferson sentenced Petitioner to confinement for a period of seventeen years on all charges, with the sentences to be served concurrently.

Petitioner filed a timely notice of appeal. His appeal was perfected by Appellate Defender Susan Hackett of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. Appellate counsel filed an Anders¹ Brief of Appellant requesting leave to be relieved as counsel for Petitioner and asserted as the sole arguable ground, "By sustaining the prosecutor's objection and ordering the jury to disregard a portion of Appellant's closing argument, did the

¹ Anders v. California, 386 U.S. 738 (1967).

trial judge violate Appellant's right to due process when Appellant properly argued the high burden of proof to the jury and the facts in evidence?" Following review pursuant to Anders, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences on May 29, 2013. State v. Graddick, Op. No. 2013-UP-228 (S.C. Ct. App. filed May 29, 2013). The Remittitur was issued on June 20, 2013.

Thereafter, Petitioner, through retained counsel E. Charles Grose, Jr., filed an application for post-conviction relief, asserting he was entitled to a new trial on the following grounds:

1. Ineffective assistance of counsel.
 - a. Failure to investigate.
 - b. Failure to object to improper character evidence.
 - c. Failure to object to inadmissible hearsay.
 - d. Failure to present available evidence and witnesses.
 - e. Failure to object to improper jury instruction.
2. Ineffective assistance of appellate counsel.
 - a. Failed to brief improper admission of testimony by Officer Van Tine.
 - b. Should not have filed an Anders brief.

The State (Respondent) served its return on April 22, 2015, requesting an evidentiary hearing.

An evidentiary hearing was held on December 5, 2016, before the Honorable G. Thomas Cooper, Jr. Applicant was present and represented by counsel Grose. Respondent was represented by Assistant Attorney General Alicia Olive of the South Carolina Attorney General's Office. At the hearing, Petitioner proceeded forward on the following allegations:

1. Ineffective Assistance of Counsel:
 - a. Trial counsel was ineffective in failing to adequately object to the trial court's instruction pursuant to S.C. Code § 16-3-657, which provides, "The testimony of the victim need not be corroborated in prosecutions" for criminal sexual conduct when counsel did not renew his initial objection after the charge was given.
 - b. Trial counsel failed to object to the comments which suggested the role of the jury to "seek the truth":
 - c. Trial counsel was ineffective in failing to object to testimony by Fulvia Kandie Dunham and Detective Forsythe about Petitioner's pre-trial incarceration as implying guilt and improper character evidence.

- d. Trial counsel was ineffective in failing to object to testimony of Officer Van Tine as hearsay and a violation of the Confrontation Clause about Ms. Dunham.
 - e. Trial counsel was ineffective in failing to interview and present as a witness Petitioner's brother, Leroy Graddick, concerning whether Petitioner knew the victim prior to the incident to corroborate Petitioner's testimony.
2. Ineffective Assistance of Appellate Counsel
 - a. in failing to brief as a merit ground in the appeal the initial objection to the intent to instruct the jury on § 16-3-657 which was preserved;
 - b. in failing to brief the propriety of Officer Van Tine's testimony
 - c. In failing to brief a merit argument on the propriety of the defense closing rather than as an Anders issue.
 3. Cumulative Errors Warrant a new Trial

Petitioner testified on his own behalf and presented testimony from trial counsel, appellate counsel, and his brother Leroy Anthony Graddick. Petitioner also submitted a memorandum in support of his application. Judge Cooper requested proposed orders from both parties.

Following receipt of proposed orders, Judge Cooper denied and dismissed the application with prejudice by written forty-two page order signed on November 7, 2017, and filed on November 15, 2017, finding Petitioner had failed to establish any constitutional ineffectiveness of trial counsel or appellate counsel and declining Petitioner's invitation to conduct a cumulative prejudice analysis. Petitioner then moved for Judge Cooper to alter or amend his order to grant relief pursuant to Rule 59(e), SCRCP. By order signed January 3, 2018, and filed on January 8, 2018, Judge Cooper denied Petitioner's motion and reaffirmed his order of dismissal.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). Appellate courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, appellate courts review pure questions of law *de novo* without deference to the post-conviction relief court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRPC. When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Post-conviction relief courts are required to employ a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the court must find the applicant has established his or her 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, the court must find that counsel's deficient performance 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

While the post-conviction relief court must analysis both deficiency and prejudice, there are no mechanical rules requiring the court to analyze deficiency of counsel first then undertake a prejudice analysis. Rather, the ultimate focus of the post-conviction relief court's inquiry must be on the fundamental fairness of the proceeding that is being challenged. The post-conviction relief court need not first determine whether counsel's performance was deficient before examining the whether there is any prejudice suffered by the applicant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Just as a criminal defendant is entitled to competent trial counsel, he or she is also entitled to competent appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). "However, [appellate] counsel is not required to raise every non-frivolous claim, but may select among them in order to maximize the likelihood of a favorable outcome." Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009) (citing Smith v. Robbins, 528 U.S. 259, 288 (2000)). When an applicant asserts appellate counsel rendered constitutionally ineffective performance, the post-conviction relief court employs the same two-pronged standard as set forth above, even when

appellate counsel filed an Anders brief as opposed to a brief on the merits. Bennett v. State, 383 S.C. 303, 309 n. 4, 680 S.E.2d 273, 276 n.4 (2009) (citing Smith v. Robbins, 528 U.S. 259, 284 (2000) (finding that even where appellate counsel believes his client's appeal is without merit and thus files an Anders brief, the appellant may have been entitled to a merits brief and the challenge of appellate counsel's performance should be reviewed under Strickland)).

ARGUMENT

- I. **The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of trial or appellate counsel regarding the trial court's jury instruction on S.C. Code Ann. § 16-3-657 where it was a proper jury instruction at the time of Petitioner's trial and appeal.**

Petitioner asserts (1) trial counsel was ineffective for failing to properly object to the trial court's non-corroboration jury instruction pursuant to S.C. Code Ann. § 16-3-657, thereby failing to preserve it for appellate review, or, in the alternative, (2) appellate counsel was ineffective for failing to raise the issue on appeal in the event trial counsel properly preserved the issue. While acknowledging the charge was a correct statement of law at the time of trial, Petitioner nevertheless argues the particular charge given by the trial court here was erroneous because it did not immediately follow with a statement that the jury must determine the credibility of all witnesses who testified similar to the charge given in State v. Hill, 394 S.C. 280, 299, 715 S.E.2d 368, 379 (Ct. App. 2011), overruled by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).² The post-conviction relief court properly rejected both of these arguments, finding neither trial counsel nor appellate counsel were ineffective in their perspective handling of the non-corroboration jury charge, which remains a proper statement of law and was a proper jury instruction at the time of Petitioner's trial in 2011. This Court should deny certiorari.

S.C. Code Ann. § 16-3-657 provides the testimony of the victim need not be corroborated in criminal sexual conduct prosecutions. Instructing the jury on this statute was first found acceptable in State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). At the time of Petitioner's trial, this particular jury instruction had been deemed an appropriate charge consistent with the legislature's remedial intent pursuant to the Supreme Court's decision in State v. Rayfield, 369 S.C. 106, 117-18, 631 S.E.2d 244, 250 (2006).

² Petitioner acknowledges in his petition that Hill was decided after his trial.

Five years after Petitioner's trial, this Court determined the statutory non-corroboration charge was confusing and unconstitutional in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). This Court concluded the non-corroboration charge was "confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case." Id. at 493, 787 S.E.2d at 483 (citing S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.")). The Court further instructed:

[I]t is not within the province of the court to express an opinion to the jury on its view of the facts. By addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak.

Id.

During Petitioner's trial, held in 2011 five years prior to this Court's decision in Stukes, the State requested "the standard charges on the statute of sexual assault does not have to be corroborated." The trial court responded, "yeah, that's the standard part of my charge." Trial counsel then objected to the non-corroboration charge, "And I will object to the, I know it's the standard charge, but the victim's testimony in a CSC case may not be corroborated." The trial court responded, "Actually it's statutory. Take it up with the legislature. It's required to be instructed. But it isn't required to be corroborated. The legislature has spoken and I merely do what they direct." Trial counsel asked that his objection be noted for the record and the trial court replied, "It's noted." (App. 252). During a subsequent charge conference, trial counsel made no objection to the court's proposed jury instruction. (App. 286-288).

During the actual jury instructions, the trial court charged the following:

I instruct you, ladies and gentlemen, that South Carolina code section 16-3-657 provides that the testimony of the victim in a criminal sexual conduct prosecution need not be corroborated, pursuant to 16-3-652 through 16-3-658.

(App. 350). Trial counsel made no objection to this instruction. (App. 357). The trial court subsequently gave additional instructions after a jury note was received and trial counsel again did not object to this jury instruction. (App. 365-376).

Petitioner now argues the post-conviction relief court erred in failing to find either trial counsel ineffective for failing to properly object to the charge or appellate counsel ineffective for failing to brief the issue on appeal. Neither of these arguments have merit.

A. The post-conviction relief court properly found trial counsel was not constitutionally ineffective for failing to renew his objection to the trial court's non-corroboration instruction where the jury instruction was a proper statement of law and an acceptable jury instruction at the time of Petitioner's trial in 2011.

In its order of dismissal, the post-conviction relief court found Petitioner failed to establish any constitutional ineffectiveness of trial counsel for failing to object to the non-corroboration charge, as “no applicable precedent supported making an objection” at the time of Petitioner’s trial and “[a]n attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.” (App. 546-547). These findings are correct statements of law, as courts have consistently held constitutionally effective counsel is under no duty to be clairvoyant or anticipate changes in the law not in existence at the time of an applicant’s trial. See Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (holding “the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se. This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law.”); Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law . . .”); Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993),

overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.”). The non-corroboration charge given by the trial court remains a proper statement of law and was a proper jury instruction at the time of Petitioner’s trial in 2011. Moreover, this particular charge remained a proper jury instruction for nearly five years after Petitioner’s trial until this Court’s 2016 Stukes decision. Despite the propriety of the charge at the time of Petitioner’s trial, trial counsel still placed an objection to the proposed jury instruction on the record during the charge conference although he was under no duty to do so and did not know the Stukes opinion would reverse then-current case law approving the charge. The post-conviction relief court properly found trial counsel was not constitutionally ineffective.

B. The post-conviction relief court properly found appellate counsel was not constitutionally ineffective for electing not to raise an appellate challenge to the trial court’s non-corroboration jury charge where the jury instruction was a proper statement of law and an acceptable jury instruction at the time of Petitioner’s trial in 2011 and during the pendency of Petitioner’s appeal

The post-conviction relief court found similarly found Petitioner failed to establish any constitutional ineffectiveness of appellate counsel for failing to brief the propriety of the non-corroboration charge, as “reasonable counsel in 2012 was not required to anticipate that the Supreme Court would overrule its precedent in Rayfield based upon the adoption of the rejected dissent and the mere fact that some other lawyers were raising the issue based upon the dissent.” (App. 551). When questioned as to why she did not raise this issue on appeal, appellate counsel responded,

I did not think that Rayfield would get reversed. I did not foresee Stukes happening. While I’m certainly glad of it, I did not see how we would convince the court that charging that statute wouldn’t be improper.

(App. 509). The post-conviction relief specifically found appellate counsel's testimony that she did not brief this issue based on existing precedent to be credible. (App. 550).

As discussed above in reference to trial counsel's performance, appellate counsel was similarly not required to anticipate future changes in the law not in existence when she represented Petitioner. See Teamer, 416 S.C. at 183, 786 S.E.2d at 115 (holding reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law); Gilmore, 314 S.C. at 457, 445 S.E.2d at 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law . . ."); Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). The post-conviction relief court's finding appellate counsel was not ineffective is legally correct.

Additionally, the post-conviction relief court's credibility finding as to appellate counsel's reasoning for not raising this issue on appeal should be afforded great weight by this Court. See Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433, 435 (2018) ("[W]e afford great deference to a PCR court's credibility findings."). The post-conviction relief court properly found appellate counsel was not constitutionally ineffective.

II. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of trial counsel for failing to object to the trial court's preliminary remarks to the jury and final charge on the law regarding "truth" in the jury's verdict where these brief comments did not render the court's instructions to the jury improper.

Petitioner asserts he is entitled to a new trial based on trial counsel's failure to object to the trial court's jury charge instructing the jury "to seek the truth regardless of its source" and "to determine what the true facts are, and to apply the law to those facts, and the[n] render a true and just verdict in this case." Petitioner argues these comments, at the start and end of his trial, were

improper because “[r]easonable jurors could have concluded they had to determine which account [between Petitioner and the victim] was the ‘truth,’ rather than applying the burden of proof.” The post-conviction relief court properly rejected this argument and determined trial counsel was not constitutionally ineffective for failing to object because neither brief remark impermissibly shifted the burden of proof or rendered the court’s instructions invalid when the jury instructions were viewed as a whole. This Court should deny certiorari.

At the beginning of the Petitioner’s trial, the trial court addressed the jurors with preliminary remarks including the following:

So that at the end of the testimony, after the arguments of the attorneys and the charge or instruction on the law as given by the Court, you will then be in a position to determine what the true facts are, and to apply the law to those facts, and the render a true and just verdict in this case.

(App. 41). Trial counsel did not object to these comments. (App. 43). During the final charge on the law, the trial court instructed the jury, “You have but one objective, ladies and gentlemen, to seek the truth regardless of its source.” (App. 338). Again, trial counsel did not object.

When analyzing the propriety of jury instructions for error on appeal or on collateral review to determine whether counsel should have objected to a purportedly impermissible charge, the reviewing court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) (“[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant’s due process rights have been violated.”); see also Cupp v. Naughten, 414 U.S. 141, 146-147 (1973) (“[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.”). The appropriate test for reviewing a jury charge involves determining whether there is a reasonable likelihood the jury applied the charge in an

unconstitutional manner. Estelle v. McGuire, 502 U.S. 62, 71 (1991). “In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution.” Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (citing Todd, 355 S.C. at 399, 585 S.E.2d at 306).

One of the fundamental functions of the trial process in both criminal and civil cases is to discover the truth. See State v. Wren, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) (“A trial is a search for the truth[.]”); see also Portuondo v. Agard, 529 U.S. 61, 73 (2000) (stating “the central function of [a] trial . . . is to discover the truth”); see generally Carella v. California, 491 U.S. 263, 265 (1989) (explaining burden-relieving jury instructions “subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases”); Gardner v. Florida, 403 U.S. 349, 360 (1977) (“[T]he debate between adversaries is often essential to the truth-seeking function of trials[.]”).

As part of this truth-seeking process, the State is constitutionally required to prove a criminal defendant’s guilt for every element of a criminal offense beyond a reasonable doubt while a defendant is ordinarily not required to prove anything at all. In re Winship, 397 U.S. 358, 364 (1970); see Burr v. Florida, 474 U.S. 879, 880 (1985) (“[T]he beacon of the truth-seeking process in criminal cases is not absolute certainty, but the ‘reasonable doubt’ standard[.]”); see also State v. Brewer, 411 S.C. 401, 408, 768 S.E.2d 656, 659 (2015) (reiterating a criminal defendant has no duty to prove his or her own innocence); see generally State v. Attardo, 263 S.C. 546, 552, 211 S.E.2d 868, 871 (1975) (recognizing the burden may be on the defendant to establish a defense to a criminal charge only in limited circumstances).

This Court has repeatedly cautioned trial courts to avoid using language that instructs the jury to “seek the truth” due to the risk such language could **potentially** shift the burden of proof to the defendant in an unconstitutional manner.³ See Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (citing State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998) (“Trial courts should avoid using ‘seek’ language in instructing the jury because such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof.”); State v. Aleksey, 343 S.C. 20, 27-28, 538 S.E.2d 248, 251 (2000) (quotations omitted) (noting jury instructions on reasonable doubt that charge the jury to “seek the truth” are disfavored because they the risk of unconstitutionally shifting the burden of proof to a defendant.).

However, this Court has specifically declined to hold any mention of “the truth” to a jury automatically constitutes reversible error or is per se unconstitutional. See Aleksey, 343 S.C. at 28, n. 2, 538 S.E.2d at 252 (“Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of ‘the truth’ in jury charges is unconstitutional.”); see also State v. Hoffman, 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994) (holding a reasonable doubt jury charge that included

³ Recently, in State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018), decided nearly seven years **after** Petitioner’s trial, this Court again stated “trial judge[s] should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict” because “[t]hese phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice.” This Court stated, “We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant’s guilt beyond a reasonable doubt.” Id. Notably, although finding the trial court’s instruction was improper, this Court found the error harmless, “Although there was error here, our review of the entirety of the judge’s opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal.” Id.

“seeking the truth” language constituted a correct definition of reasonable doubt when read as a whole and did not shift the burden of proof to the defendant).

In denying relief, the post-conviction relief court determined neither the trial court’s opening comment regarding “true facts” and a “true and just verdict” nor the trial court’s jury charge regarding “seek the truth” shifted the burden of proof when viewed in conjunction with the jury instructions as a whole. The post-conviction relief court concluded, “because the trial judge’s opening remarks and jury instructions thoroughly explained the State’s burden of proof and Petitioner’s presumed innocence, the jury charge was a whole was not erroneous and does not warrant a new trial.” These findings are legally correct and supported by the record. The trial court properly advised the jury to assess the credibility of witnesses, the burden of proof rested firmly with the State, and the defendant was presumed innocent. (App. 336-375). The post-conviction relief court properly denied relief. Certiorari should be denied.

III. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of trial counsel for failing to object to testimony regarding Petitioner’s pre-trial detention.

Petitioner asserts he is entitled to a new trial based on trial counsel’s failure to object to questioning of two witnesses pertaining to Petitioner’s pre-trial detention. Petitioner argues these references implied guilt and “long-term incarceration rather than short-term incarceration, rather than short term incarceration until bond could be posted.” (PWC 21). Petitioner also avers these references were improper character evidence pursuant to Rule 404(a), SCRE. The post-conviction relief court properly rejected these arguments and determined trial counsel was not constitutionally ineffective for failing to object to these “passing comments” because they did not indicate he was detained on another charge, were not improper propensity of character

evidence, and any potential impact was negated by the limiting instruction given by the trial court. These findings are correct and supported by the record. Certiorari should be denied.

During trial, two brief references were made to Petitioner's pre-trial detention. The first occurred on re-direct examination of State's witness Fulvia Kandie Dunham, Petitioner's girlfriend and the mother of his children, when Dunham was asked if the children had seen Petitioner since an incident at Subway, and Dunham replied that the children had seen him "at the jailhouse." (App. 128-129). The second incident occurred when Detective Jason Fosythe with the North Charleston Police Department testified he took a DNA sample from Petitioner at the Charleston County Detention Center. (App. 218-219). Crucially, neither instance indicated that Petitioner was incarcerated on additional charges other than those for which he was currently standing trial. Cf. State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."). When Petitioner took the stand in his own defense, he testified he had been arrested in Georgia and extradited back to South Carolina unwillingly, information which can only logically indicate that Petitioner was detained pre-trial on these charges. (App. 278). Crucially, when Petitioner testified in his own defense, the jury was not advised of any prior detentions or convictions. Additionally, the information was not used as propensity evidence to establish Petitioner had committed these crimes against this victim because he was a habitual felon or had otherwise been previously detained. The post-conviction relief court properly concluded trial counsel was not deficient for failing to object to these two passing references to Petitioner's incarceration.

Moreover, Petitioner failed to establish any resulting prejudice, as there is no way these two fleeting references impacted the outcome of his trial. Additionally, during the jury charge, the trial court instructed the jury that any reference to Petitioner being arrested, charged, or indicted was not evidence of guilt and could not be considered. (App. 341). The post-conviction relief court properly denied relief. Certiorari should be denied.

IV. Petitioner failed to establish any constitutional ineffectiveness of appellate counsel for failing brief whether the testimony of Officer George Van Tine about statements made by Petitioner's girlfriend were inadmissible hearsay or violated the Confrontation Clause where appellate counsel testified as to valid reasons for not raising the issue under either ground.

Petitioner asserts he is entitled to a new trial based on appellate counsel's failure to brief whether the testimony of Officer George Van Tine about statements made by Petitioner's girlfriend were inadmissible hearsay or violated the Confrontation Clause.⁴ However, appellate counsel was not constitutionally ineffective for failing to brief the issue on either ground because she articulated a reasonable, valid basis for why she did not address either on appeal.

Appellate counsel, just like trial counsel, must have the freedom to decide how to approach a case and what issues to raise. "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting Jones, 463 U.S. at 754). When appellate counsel reviewed an issue and made a professionally reasonable decision not to raise an issue on appeal, appellate counsel has not performed in a constitutionally ineffective manner. See Thrift

⁴ Although the post-conviction relief court did not rule on this issue, Petitioner raised this issue in his application, questioned appellate counsel on this issue at the evidentiary hearing, addressed this issue in his memorandum, and filed a motion to alter or amend pursuant to Rule 59(e), SCRPC asking the court to rule on this issue. Respondent is not asserting that this issue is not preserved for appellate review.

v. State, 302 S.C. 535, 539-40, 397 S.E.2d 523, 526 (1990) (holding the post-conviction relief court properly found appellate counsel was not ineffective where appellate counsel testified at the PCR hearing that she reviewed the requested charge and the charge as given and consciously decided not to brief the issue because she did not believe it had merit).

When questioned about Officer Van Tine's testimony at the evidentiary hearing, appellate counsel testified she did not brief the confrontation clause argument because after reviewing the entire record, she did not believe it was sufficiently preserved for appellate review. Additionally, she testified she did not believe it rose to the level of reversible error because Petitioner's defense was consent. (App. 502). She similarly testified why she did not brief the hearsay objection issue:

Because the defense was consent. And there really wasn't any type of identification problem as far as the defense saw it. And it appeared to me that both of those areas of hearsay went more to identification than whether or not the contact was consensual.

(App. 502). After thoroughly reviewing the record, appellate counsel determined the issues that had been preserved for appellate review "did not have merit in terms of reversible error and determined the best course of action would be an Anders brief." (App. 512).

Appellate counsel made an objectively reasonable decision to file an Anders brief after reviewing the record in its entirety, noting objections and how issues were raised below, and considering the standards for reversal on appeal. Appellate counsel performed reasonably and certiorari should be denied.

V. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of trial counsel for failing to present his brother as a witness where Petitioner never told counsel his brother was a potential witness, his brother's testimony lacked credibility, and would not have changed the outcome of the trial.

Petitioner argues he is entitled to a new trial based on trial counsel's failure to present his brother, Leroy Anthony Graddick, as a witness to corroborate Petitioner's recent assertions that he was involved in a physical altercation with the victim approximately one month before the sexual assault. In support of this allegation, Petitioner presented his brother as a witness at the evidentiary hearing. During his testimony, Leroy claimed he saw "a woman"—notably whom he never identified as the victim—come to the apartment complex and engage in a physical altercation with his brother. (App. 493-494). Leroy and Petitioner both acknowledged that neither ever provided trial counsel with this information or otherwise suggested Leroy be called as a witness on Petitioner's behalf. (App. 490, 495-496). Importantly, the record reveals Leroy Graddick was present during Petitioner's trial, and therefore presumably available to take the stand had Petitioner or Leroy informed trial counsel of this information. (App. 255).

In its order of dismissal, the post-conviction relief court specifically found Petitioner and Leroy's story of the purported physical altercation between Petitioner and the victim lacked credibility. In support of these credibility findings, the court noted Petitioner testified at trial and never mentioned this purported altercation. These findings are supported by the record, which establishes Petitioner never testified to this alleged altercation when he took the stand during trial. (App. 254-278). This finding is entitled to great deference on appellate review. See Frierson, 423 S.C. at 262, 815 S.E.2d at 435 ("[W]e afford great deference to a PCR court's credibility findings.").

Further, the post-conviction relief court found trial counsel had no reasonable basis to believe Leroy could be a potential witness to assist in his brother's defense. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (citing Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986) ("Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.' ")) Because Petitioner failed to inform trial counsel that Leroy was a potential witness (even though Leroy appears to have been physically present during Petitioner's trial) and failed to show that counsel should have otherwise had a reasonable basis to believe an investigation into using Leroy as a potential witness would have been fruitful, Petitioner failed to establish any constitutional ineffectiveness as to this allegation. The post-conviction relief court properly denied relief. Certiorari should be denied.

VI. The post-conviction relief court properly determined Petitioner failed to establish any constitutional ineffectiveness of appellate counsel for filing an Anders brief addressing the propriety of the trial court sustaining the State' objection during his closing argument.

Petitioner argues he is entitled to a new trial based on appellate counsel's decision to file an Anders brief addressing the propriety of the trial court sustaining the State's objection to his closing argument. Petitioner appears to be advocating for a standard that appellate counsel should be deemed *per se* constitutionally ineffective whenever he or she elects to file an Anders brief based on his or her professional judgment of the issue's merit if the issue is preserved for appellate review. The post-conviction relief court properly rejected this argument, finding appellate counsel was not ineffective because trial court properly sustained the State's objection to Petitioner's closing argument, and therefore, the issue lacked merit. Certiorari should be denied.

When questioned about her decision to file an Anders brief, appellate counsel testified she did not think the issue was "necessarily reversible error" and that is why she decided to file

an Anders brief. (App. 514). Appellate counsel's performance was objectionably reasonable in electing to file an Anders brief after thoroughly reviewing the record, as the trial court properly sustained the State's objection. The only logical inference to draw from trial counsel's closing argument is that he was arguing the jury should not convict Petitioner based on punishment—specifically various experiences he would miss if he was incarcerated. This was an improper argument because it asked the jury to consider Petitioner's potential incarceration if the jury convicted him. See Shannon v. United States, 512 U.S. 573, 579 (1994) (“The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.”). Because Petitioner's closing argument was improper, the trial court did not abuse its discretion in sustaining the State's objection and the issue would not have been successful on appeal. Appellate counsel properly determined the issue lacked reversible error and therefore, was not constitutionally ineffective for filing an Anders brief. Certiorari should be denied.

VII. The post-conviction relief court properly declined to apply a cumulative error analysis where it determined Petitioner failed to establish any deficiency of counsel.

Petitioner argues the post-conviction relief court erred when it failed to apply the cumulative error doctrine. However, the post-conviction relief court determined Petitioner failed to establish deficiency as to any of the litany of issues he raised against trial counsel or appellate

counsel, and therefore, the court properly declined to undertake a cumulative error analysis citing a lack of any deficiency of counsel. Certiorari should be denied.

Traditionally, an applicant must show both deficient performance and prejudice to establish his or her trial counsel was constitutionally ineffective. Strickland, 466 U.S. 668. However, “[w]hen counsel’s deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice.” Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). “Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina.” Id. (citing Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002)).

Recently, in Smalls v. State, this Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls, 422 S.C. at 194, 810 S.E.2d at 864 (“As we have explained, the strength of the evidence must be considered along with the specific impact of counsel’s errors.”). “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” Id. at 188, 810 S.C. at 844 (internal citations omitted).

Here, since the post-conviction relief court did not find any instances of counsel error, the court properly declined to conduct a cumulative error analysis. See Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (recognizing “the threshold to asking the cumulative prejudicial question is to first find multiple errors”). See also Lorenzen v. State, 376 S.C. 521, 535 n. 3, 657

S.E.2d 771, 779 n. 3 (2008) (internal citations omitted) (noting whether several errors, which are independently found not be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina). The post-conviction relief court properly declined to apply a cumulative error analysis. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Respondent submits the post-conviction relief court properly denied relief as to all grounds and asks this Court to deny certiorari.

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR RESPONDENT

October 8, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Charleston County
G. Thomas Cooper, Jr., Post-Conviction Relief Judge
Deadra L. Jefferson, Trial Court Judge

Appellate Case No. 2018-000193

JOSEPH RICHARD GRADDICK,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

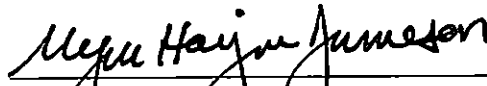
Respondent.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Return to the Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the U.S. Mail to be delivered to the address below on today's date:

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served.
This 8th day of October, 2018.



MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

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RECEIVED
OCT 08 2018
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 8, 2018

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

Re: Joseph Richard Graddick v. State – Appellate Case No. 2018-000193

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to the Petition for a Writ of Certiorari, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

MHJ/
Enclosures

cc: E. Charles Grose, Jr.
Victim Advocacy Division