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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-001971

LEONARD EUGENE JENKINS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE ISSUES

Did the post-conviction relief court properly determine trial counsel was not constitutionally ineffective for failing to introduce the videotaped interview of the victim at trial?

STATEMENT OF THE CASE

Petitioner is presently in the South Carolina Department of Corrections pursuant to orders of commitment from the York County Clerk of Court. During the June 2013 term, the York County Grand Jury indicted Petitioner for lewd act on a child (2017-GS-46-2101). Petitioner was represented by Daniel Hall, Esquire (hereinafter trial counsel). Deputy Solicitor Jennifer Desch of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On August 13, 2013, Petitioner proceeded to a jury trial before the Honorable Donald J. Hocker. The jury found Petitioner guilty as indicted. Judge Hocker sentenced Petitioner to imprisonment for ten years, provided upon service of three years the balance would be suspended with probation for three years.

Petitioner filed a timely notice of appeal to the South Carolina Court of Appeals. Appellate Defender Susan B. Hackett with the South Carolina Commission on Indigent Defense. On August 19, 2015, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Jenkins, 2015-UP-429 (S.C. Ct. App. filed August 19, 2015). On September 3, 2015, Petitioner filed a petition for rehearing, which was denied by the Court of Appeals on October 23, 2015.

Petitioner filed his application for post-conviction relief on February 1, 2017. Respondent made its Return on June 8, 2017. On August 2, 2017, an evidentiary hearing was held before the Honorable R. Lawton McIntosh. Petitioner was represented by Leah Moody, Esquire. Respondent was represented by Assistant Attorney General Justin Hunter. At the evidentiary hearing, Petitioner testified on his own behalf. Daniel Hall, Esquire testified for the State. By order filed September 15, 2017, Judge McIntosh denied Petitioner's application in its entirety. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

In the summer of 2011, the victim lived across the street from Petitioner and was friends with his step-daughter. (Appx. 58-59.) On the date of the incident, the victim was outside playing with Petitioner's step-daughter all day and then they went inside Petitioner's house to cool off. (Appx. 68.) The victim went into Petitioner's residence, sat on a couch, and waited for his step-daughter to get out of the restroom. (Appx. 69.) At that time, Petitioner was inside washing dishes. (Appx. 71.) Petitioner, holding his toddler, sat down beside the victim and placed the toddler on the victim's knee. (Appx. 72.) Petitioner then reached over and put three fingers down the victim's shorts. (Appx. 73.) The victim then placed the toddler back on Petitioner's lap and got up from the couch. (Appx. 74.) Petitioner's step-daughter came out of the restroom at the same time and she and the victim went back outside to play. (Appx. 74.) The victim did not tell anyone about the incident because she was afraid to lose one of her neighborhood friends. (Appx. 79.) The victim ended up telling her mother in February 2012 because they saw a new story on a similar case and the victim's mother told her if anything of that nature happens to her that she should tell. (Appx. 81.) The victim at that time told her mother who then called police. (Appx. 81.) Petitioner was subsequently arrested and indicted for lewd act upon a minor.

At the call of the case, trial counsel made a motion in limine raising seven evidentiary issues, the last of which concerned a video recording of a police detective's interview of the victim. Trial counsel said: "I state at this point, there was a video-recorded interview from the detective with the 13-year old child. We certainly don't have any objections if the state intends or wishes to introduce that. So if we get to that point and they want to introduce that video of the interview then it would be without objection from the defense." (Appx. 9.) After the jury was selected and sworn, the trial court gave preliminary instructions and asked the parties to proceed with opening

statements. (Appx. 58.) Trial counsel noted the victim would be the only witness to the alleged incident and asked the jury to focus on how her story changed over time in assessing her credibility and whether the State would be able to meet its overall burden of proof. (Appx. 61-62.)

The State then called the victim to the stand. She gave specific testimony about the lewd act committed by Petitioner in the summer of 2011. On cross-examination, trial counsel asked the victim if she remembered being interviewed by Detective Neely after her mother reported the incident to the police. She testified she remembered being interviewed and acknowledged the interview was video recorded. Trial counsel proceeded to question the victim about particular statements she made during that interview in an apparent attempt to show inconsistencies between those statements and her testimony at trial. Trial counsel focused on several alleged “inconsistencies” including whether Petitioner’s hand had actually touched the victim. (Appx. 92.)

Trial counsel addressed the victim’s testimony at trial that Petitioner had touched her with his hand. He asked if she remembered telling Detective Neely “I think” that his hand was touching me. The victim testified she did not remember making that particular comment, but did not deny it. (Appx. 92.) Trial counsel concluded his cross-examination without making a motion or any other attempt to introduce all or part of the video recording into evidence. (Appx. 94.)

On re-direct, the victim repeated her testimony that she had never seen the video recording of her interview with Detective Neely, and she testified she had never even talked about the video with the solicitor before trial. The victim testified that during cross-examination she was trusting trial counsel’s version of what happened during the interview as being accurate. She testified she couldn’t remember exactly what she said during the interview with Detective Neely, only that it was about the general incident, what happened, and where on her body she was touched. (Appx.

97-98.) The victim never claimed she did not remember making a statement to Detective Neely. Indeed, throughout her testimony she unequivocally admitted being interviewed after Petitioner's arrest. (Appx. 103.)

Following a break and outside the presence of the jury, the solicitor advised the judge she had concerns about any attempt to introduce the video recording of what was essentially a "forensic interview" with Detective Neely. She explained she believed the State could not simply introduce the video into evidence because it was inadmissible hearsay, except possibly the specific portions of the video that might qualify for admission under Rule 801(d) as prior consistent statements being offered to rebut an allegation of recent fabrication, and that even then those statements would likely be limited to the time and place of the incident. Trial counsel responded: "I am not objecting to the whole video coming in." He contended there was "exculpatory information" on the video and repeatedly stated he wanted it to come in to evidence. The solicitor commented that trial counsel could put the video recording into evidence as a defense exhibit if he wanted. Trial counsel however complained that the State was trying to "stand behind a rule that it is inadmissible when my client is willing to waive and give up that and determine whether it is admissible. He wants it in." (Appx. 117-118.)

The parties continued to argue about whether all or parts of the video would be admissible and on what basis. After hearing the arguments, the trial court found the State would be allowed to introduce evidence of the victim's prior consistent statements as to time and place because trial counsel's cross-examination implied recent fabrication. The court also found that at the appropriate time, if trial counsel wanted to move to introduce the entire video, the court would address the issue at that time. Trial counsel stated: "I certainly agree with that analysis and the way to handle it." He then argued that pursuant to Rule 613(b), SCRE, the video recording should

be admissible as extrinsic evidence of a prior inconsistent statement of a witness because the victim did not admit she made the prior inconsistent statements during his cross-examination. (Appx. 124-125.) Trial counsel said:

I understand I may have the burden of trying to figure out whether or not I want to put it in or not, but however, I am at a little bit of a quandary of how to introduce this extrinsic evidence of a prior inconsistent statement. I disagree with the solicitor in that there are consistent statements in the video, that there are a number of inconsistent statements that are exculpatory. And certainly, I did try to do those without showing the video with the child to impeach her.

(Appx. 125.) Trial counsel proposed that he be allowed to show pertinent parts of the video during his cross-examination of Detective Neely as proof of the alleged inconsistent statements without introducing them into evidence. The trial judge noted that typically a party would impeach a witness with evidence of prior inconsistent statements through that witness herself, but asked the State's opinion. The solicitor disputed the claim that the victim failed to admit her prior inconsistent statements, and argued that in any event trial counsel had already effectively brought out the alleged inconsistencies during cross without actually showing the video. Ultimately, the trial court ruled it would proceed as previously discussed, with the State being allowed to use Detective Neely to present evidence of prior consistent statements from the victim, and trial counsel being allowed to cross-examine Detective Neely on the interview, and possibly use the video to do so. (Appx. 130.)

The State then called Detective Neely of the York County Sheriff's Office to the stand. He testified he had worked in law enforcement since 1998 and had been a detective since 2005. Detective Neely was assigned to the Violent Crime Unit, which investigated any crime against a person, including sexual conduct or assault against an adult or a child. He had special training in interviewing techniques, including classes in "finding words" and the RATA method of forensic

interviewing. Detective Neely testified he interviewed the victim on February 14, 2012, in a conference room at the Sheriff's Office. At that interview, the victim was able to identify who had assaulted her. She initially said the incident happened two or three months prior, but later explained it happened in the summertime, between two school years. The victim told Detective Neely the incident took place in the living room at Petitioner's house. (Appx. 133-142.)

On cross-examination, trial counsel asked several questions about Detective Neely's interview of the victim. He acknowledged it was recorded and that his written report referenced a DVD recording of the interview. Detective Neely testified the only time he watched the full video recording was once trial started. He admitted the video "cut off" towards the end so that the final portion of the interview was not recorded. (Appx. 153.) After brief re-direct examination and re-cross, trial counsel asked to take up a matter outside the presence of the jury. He said he was not yet finished with the witness. (Appx. 156-157.)

The jury was excused and the video recording was marked for identification as Defendant's Exhibit #2. Trial counsel said: "I would like to try to introduce the video through Carson Neely on his part of cross. I would like to proffer it through him. I would let the Court look at it. I believe it is admissible." (Appx. 158.) He argued that portions of the video were not hearsay and admissible because they included prior inconsistent statements, and that under the rule of completeness the entire video should be admissible. Trial counsel asked to proffer the video through Detective Neely and for the trial court to make a ruling on its admissibility. The solicitor took the position the video was inadmissible except for any specific portions which could come in under Rule 801 and/or Rule 613. The video recording was then played outside the presence of the jury. Detective Neely testified it was fair and accurate representation of the interview with the exception of one to five minutes at the end when the recording cut off. (Appx. 162.)

After the proffer, trial counsel asked that the entire video recording be “presented to the jury.” He argued it was not hearsay under Rule 801(d) because the victim testified at trial and was subject to cross-examination concerning the statement, and because the statement was inconsistent in certain respects to her trial testimony. Appellant further argued it was not hearsay because the State sought to admit the victim’s prior consistent statements to rebut an allegation of recent fabrication, and that since both parties identified prior statements that are not hearsay, the entire video recording where those statements were made should be admissible under the “rule of completeness.” (Appx. 163-164.)

The trial judge asked trial counsel to point out specifically which statements from the interview he believed were inconsistent with the victim’s trial testimony. Trial counsel alleged there were inconsistencies involving the timing of the incident, the position of the victim’s legs, and the reason the victim gave for the delay in her disclosure. The solicitor opposed introduction of the entire video recording arguing it was a “back door attempt to get it in with the rule of completeness.” She reiterated her concerns with admitting portions of the video recording which could run afoul of recent appellate court decisions regarding forensic interviews and vouching, and then argued trial counsel should not be allowed to now introduce the video recording as a prior inconsistent statement because it was too late. The solicitor argued trial counsel has missed his opportunity because the proper time to try to impeach the victim would have been during cross-examination. She also said she was not conceding the statements were in fact inconsistent. (Appx. 169.)

The trial judge agreed that Rule 613 seems to contemplate addressing prior inconsistent statements of a witness by examining that particular witness and introducing extrinsic evidence of a prior inconsistent statement through that witness if the proper foundation has been laid. Trial

counsel argued Rule 613 was not limited in this regard and that once the proper foundation was laid with the witness he should be allowed to introduce the extrinsic evidence at any point during trial. (Appx. 171.) The solicitor ultimately agreed there were some inconsistencies between the trial testimony and the victim's statements from the interview, but argued they had been "handled on cross-examination and for the most part admitted." She then appeared to concede trial counsel could bring in portions of the video through Detective Neely if the proper foundation was laid under Rule 613(b) and the victim actually denied making the statement. (Appx. 171-175.)

Next, Petitioner argued an alternative theory for admission of the video recording, contending he should be able to use it to impeach Detective Neely by showing he did not strictly follow the protocol for conducting a forensic interview as described in his trial testimony. The solicitor continued to object to trial counsel's request to admit the entire video recording under the "rule of completeness" and argued the trial court would have to decide whether each statement was admitted or denied by the victim before allowing it in under Rule 613(b). The trial court took the matter under advisement overnight and recessed for the evening. (Appx. 183.)

The following morning, the trial judge announced he had obtained a transcript of the victim's testimony for review in light of trial counsel's motion. He noted the victim acknowledged being interviewed by Detective Neely and that the interview was being videotaped. The judge then conducted a detailed examination and consideration of her testimony in regard to each of the inconsistencies trial counsel raised before ruling: "So based upon what was listed during cross-examination, I do not believe the video would be admissible for impeachment. So based upon what she admitted to in cross-examination, I think under the rules the video would not come in for impeachment purposes." (Appx. 191.) The trial judge then allowed the parties to look at the transcript together and said: "If you disagree with my summary of the testimony, then I will be

glad to hear from you.” After reviewing the transcript, trial counsel did not challenge the trial court’s factual finding that the victim admitted making the prior statement as a whole. Trial counsel also did not offer any argument or challenge to trial court’s conclusion that the victim neither admitted nor denied telling Detective Neely that Petitioner’s hand was touching her. (Appx. 191.) Instead trial counsel stated: “Your Honor, I respect the Court going through the testimony and pointing out the things of what the record accurately reflects. I don’t need to do that. I respect the court’s ruling on that. I have registered my objection. Based on what it appears the Court is going to rule, I have no further rationale to get the video in for the purpose of impeaching [the victim] through this witness.” (Appx. 194.) Trial counsel stated: “I respect the Court’s opinion, but for the record, I do object to the Court’s ruling.” (Appx. 195.)

Next, Petitioner resumed his re-cross-examination of Detective Neely. Trial counsel asked to use the video to refresh Detective Neely’s memory of his interview with the victim, which led to a discussion outside the jury’s presence about whether the video could be played in front of the jury to refresh Detective Neely’s memory. (Appx. 197.) Trial counsel then advised the trial court that when Detective Neely resumed testifying he intended to lay the foundation for the video, move it into evidence, and show the video to the jury. (Appx. 207.) He repeated his desire that the entire video be admitted into evidence. The trial judge re-stated his previously ruling in regard to the use of the video recording for impeachment purposes. He noted he had deemed the victim as having admitted everything she was asked in regard to what she stated on the video, and that therefore was no need to impeach her with the video itself. (Appx. 209.)

Trial counsel then continued his re-cross-examination of Detective Neely, followed by additional re-direct examination from the State, and more re-cross-examination by trial counsel. Trial counsel did not move to introduce the video recording of the interview either time he

addressed additional questions to Detective Neely. (Appx. 211.) When Detective Neely finally stepped down, the State rested. (Appx. 214.) Trial counsel moved for a directed verdict and the motion was denied. Trial counsel then called the victim's mother, Katrina Babb, as a witness before resting its case. (Appx. 220.)

After a brief charge conference, the parties agreed to the trial judge's proposed jury charges and made closing arguments. (Appx. 233 – 257.) Trial counsel explained the judge would be charging the law of inconsistent statements and asked the jury to consider the victim's testimony in light of any inconsistencies and her admission that she had never watched the video recording of her interview before trial. The trial court then charged the jury on the burden of proof, the presumption of innocence, reasonable doubt, the respective and exclusive roles of the judge and jury, direct and circumstantial evidence, the credibility of witnesses, and the elements of the offense. (Appx. 257-271). In regard to credibility the court charged:

There has been evidence presented that witnesses have made prior statements which are not consistent with witnesses' present testimony. You may use this evidence to decide whether to believe the witness. You may also use evidence of the earlier contradictory statements to determine the truth of those statements. It is up to you to decide whether to believe the earlier statements or the testimony given at trial.

(Appx. 266.) The jury deliberated for less than an hour before finding Petitioner guilty as indicted. The trial court sentenced him to ten years imprisonment suspended upon the service of three years imprisonment and three years probation. (Appx. 284.)

RELEVANT TESTIMONY FROM THE POST-CONVICTION RELIEF HEARING

Trial counsel testified he spoke to Petitioner about the video prior to trial. (Appx. 453.) Trial counsel testified there was information on the video that was helpful to Petitioner's case and, on the other hand, there was information on the video that would have hurt Petitioner's case. Trial counsel explained during his testimony that he weighed whether the video would be more helpful or hurtful for Petitioner's case, and he believed the bulk of the video would have been more hurtful. (Appx. 453.) Trial counsel testified his cross-examination of the victim was effective. (Appx. 454.)

On cross-examination, trial counsel testified at one point during the trial he told the court he would not object to the entire video being introduced. However, trial counsel testified that later in the trial he made a strategic decision not to introduce the video as he believed it would be harmful to Petitioner. (Appx. 460.)

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 (2018). On appellate review, courts give great deference 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. Smalls, 422 S.C. at 179, 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); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. 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. Rule 71.1(e), SCRPC; 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). 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 [proceeding] 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).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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., 300 S.C. at 117-18, 386 S.E.2d at 625. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant 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.

ARGUMENT

The post-conviction relief court properly determined Petitioner failed to establish trial counsel was constitutionally ineffective for failing to introduce the videotaped interview of the victim at trial.

Petitioner asserts trial counsel was ineffective for failing to impeach the victim with her prior inconsistent statement that she only “thought” Petitioner touched her. The victim’s inconsistent statement was made during a videotaped forensic interview (hereinafter “the interview”) with Detective Neely. During cross-examination, trial counsel questioned the victim about numerous statements she made to Detective Neely during the interview. When trial counsel asked the victim if she remembered telling Detective Neely, “I think his had was touching [me]”, the victim waived on her answer. Later, when trial counsel attempted to admit the interview into evidence, the trial court analyzed the victim’s testimony and determined she never denied making the prior inconsistent statement, which prevented extrinsic evidence from being admissible under Rule 613(b), SCRE. Trial counsel attempted numerous times throughout the proceedings to admit the interview, which was opposed by the State and denied by the trial court. As the trial progressed, trial counsel made a strategic decision not to seek any further opportunities to introduce the interview as he determined it would be harmful Petitioner’s case, and he believed he had effectively cross-examined the victim. (Appx. 454, 460) The lower court properly found trial counsel was not ineffective in his representation of Petitioner because trial counsel conducted an effective and thorough cross-examination of the victim regarding her inconsistent statements and expressed a valid trial strategy in not admitting the interview into evidence. Therefore, this Court should deny certiorari.

Petitioner’s allegation that trial counsel was ineffective for failing to impeach the victim on her prior inconsistent statements is meritless and clearly refuted by the record. Petitioner fails

to show how he was not afforded the guarantees provide to him under the Sixth Amendment or how trial counsel's performance fell below the reasonableness standard set forth in Strickland. Petitioner has also failed to show how he was prejudiced by such representation.

In State v. Starnes, this Court held,

The Sixth Amendment also guarantees a criminal defendant the right to meaningful cross-examination of adverse witnesses. “[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby ‘to expose the jury to the facts from which jurors ... could appropriately draw inferences relating to reliability of the witness.’” Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986), quoting Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 1111, 39 L.Ed.2d 347, 355 (1974).

State v. Starnes, 340 S.C. 312,325, 531, S.E.2d 907, 914 (2000).

Here, trial counsel was provided an opportunity to fully cross-examine the victim regarding the inconsistent statements she made during the interview with Detective Neely. Trial counsel confronted the victim on numerous statements including her statement that she “thought” Petitioner touched her. (Appx. 82-93.) After hearing arguments regarding the admissibility of the interview as extrinsic evidence to address the prior inconsistent statement, the trial court obtained a transcript of the victim's testimony. Based on the trial court's analysis of the victim's testimony, the trial court found the victim, “neither admits or denies telling Detective Neely that the [Petitioner's] hand was touching her. She said she did not remember.” (Appx. 193.) Because of the court's analysis, trial counsel was not able to introduce extrinsic evidence of the prior inconsistent statement pursuant to Rule 613(b), SCRE¹.

¹¹ Rule 613(b) states in pertinent part: Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic

In State v. Stokes, this Court stated:

...[A]s to the cross-examination specifically, the Confrontation Clause “guarantees only an **opportunity** for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” United States v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) (internal quotation marks and citations omitted; emphasis in original). Indeed, the opponent’s opportunity for cross-examination has been deemed the “main and essential purpose of confrontation.” Delaware v. Fensterer, 474 U.S. 15, 19–20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (internal quotation marks and citation omitted); see also Kentucky v. Stincer, 482 U.S. 730, 739, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (describing the Confrontation Clause’s “functional purpose” as “ensuring a defendant an opportunity for cross-examination”).

State v. Stokes, 381 S.C. 390, 401–02, 673 S.E.2d 434, 439–40 (2009). The trial court did not place any limits on trial counsel’s ability to cross-examine the victim in this case. Trial counsel even testified during the post-conviction relief hearing that he believed his cross-examination was effective. (Appx. 454.) Petitioner was afforded the full protection provided to him by the Confrontation Clause of the Sixth Amendment and has failed to show how trial counsel’s representation has fallen below the standard of professional norms as required by Strickland.

It is clear from trial counsel’s opening statement that the theory of the defense is that the victim was not telling the truth. Trial counsel put the jury on notice during his opening statement that the victim in this case had provided inconsistent statements and that they should “listen carefully,” and “weigh the testimony” they will hear. (Appx. 62.) Trial counsel was given the opportunity to fully cross-examination the victim, and he appropriately confronted the victim on each of her inconsistent statements. Trial counsel also highlighted the inconsistent statements in his closing argument. The jury received numerous charges prior to deliberations including charges

evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

on witness credibility and inconsistent statements. Although trial counsel was unable to get the interview admitted, he testified during the post-conviction relief hearing that he ultimately came to the conclusion that the interview with Detective Neely would have been more harmful than helpful to Petitioner.

Petitioner has failed to overcome the presumption afforded to trial counsel in Strickland. It is Petitioner's burden to show how trial counsel was ineffective in his impeachment of the victim in this case. Additionally, trial counsel is given latitude to make strategic decisions on how to present Petitioner's case. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. 668, 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

Here, the record clearly establishes trial counsel extensively cross-examined the victim and confronted her on numerous inconsistent statements. Trial counsel also made numerous and creative arguments to admit the interview of the victim with Detective Neely, however, the trial court's finding that the victim did not deny her prior inconsistent statement barred admission of such extrinsic evidence. Ultimately, trial counsel decided the interview would have been more harmful than helpful to Petitioner's case, which is a valid trial strategy. Trial counsel's eventual evaluation that the interview would be more harmful only strengthens the notion that trial counsel's representation was not affected by the exclusion of the interview. Petitioner being found guilty does not prove trial counsel was deficient in his representation or that Petitioner was prejudiced by trial counsel's representation, it simply means the jury believed Petitioner was guilty of the

charge against him despite trial counsel's diligent efforts. Petitioner has failed to meet his burden and therefore, this Court should deny certiorari.

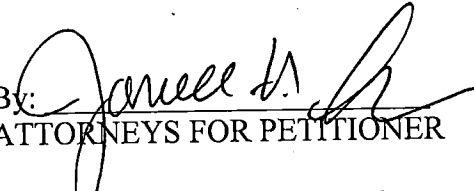
CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari 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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10/19, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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OCT 19 2018

S.C. SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

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LEONARD EUGENE JENKINS,

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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 via interagency mail:

Joanna K. Delany, Esquire
SC Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 19th day of October, 2018



CAROLINE COLLINS
Administrative Coordinator



RECEIVED
OCT 19 2018
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 19, 2018

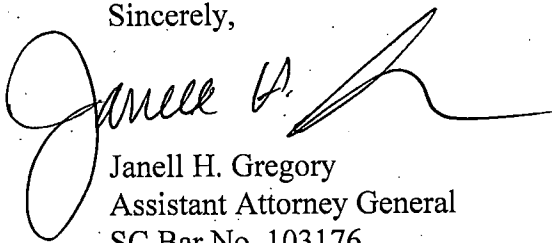
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Re: Leonard Eugene Jenkins v. State of South Carolina
Appellate Case No. 2017-001971
Lower Court Case No. 2017-CP-46-0242

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,



Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/cc
Enclosures

cc: Joanna K. Delany, Esquire (2 copies)