

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County
Court of Common Pleas
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2016-001795

JOSEPH PETTIGREW SANDERS, IV,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

- I. Is there evidence of probative value to support the PCR court's finding counsel was not ineffective for failing to contact or present witnesses to assert the complainant fabricated sexual abuse allegations against him so that she could move home to Virginia from South Carolina?

- II. Is there evidence of probative value to support the PCR court's finding counsel was not ineffective for failing to call character witnesses on Petitioner's behalf?

STATEMENT OF THE CASE

Procedural History

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. During its June 2010 term, the Pickens County Grand Jury indicted Petitioner for second-degree criminal sexual conduct (CSC) with a minor (2010-GS-39-1115) and lewd act upon a child (2010-GS-39-1116). John W. DeJong, Esquire represented the Petitioner. On June 21, 2010, Petitioner proceeded to a joint trial alongside co-defendant Anita Gearhart before the Honorable G. Edward Welmaker and a jury. The jury convicted Petitioner of lewd act upon a child and acquitted him of second-degree CSC with a minor. Judge Welmaker sentenced Petitioner to fourteen years imprisonment.

Petitioner filed a timely notice of appeal and an appeal was perfected on Petitioner's behalf by Jeffrey Falkner Wilkes, Esquire. The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Sanders, Op. No. 2013-UP-054 (S.C. Ct. App. filed January 30, 2013). The Remittitur was sent on February 21, 2013.

Thereafter, on December 17, 2013, Petitioner filed a timely application for post-conviction relief (PCR). Respondent made its return on May 29, 2014, requesting an evidentiary hearing be held. An evidentiary hearing was held on April 20, 2015 at the Pickens County Courthouse before the Honorable Edward W. Miller. Petitioner was present and represented by Jeffrey Falkner Wilkes, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Office of the Attorney General represented Respondent.

Petitioner testified on his own behalf at the PCR hearing. Also testifying were: Nikki Holder, Taylor King, Jay Rowe, Justin Eades, DeAnn Wright, Brenda Cisson, Eddie Cisson, Scott D. Robinson, Esquire, and Petitioner's trial counsel, John W. DeJong, Esquire. Following

the evidentiary hearing, Judge Miller denied Petitioner's application by written order filed August 3, 2016.

Petitioner filed a timely notice of appeal. This return to petition for writ of certiorari follows.

Factual History

Petitioner molested and sexually assaulted Victim numerous times while Victim and her mother (Petitioner's co-defendant) lived with Petitioner. Victim was fourteen years old and just finished eighth grade when she testified. She testified that Gearhart met Petitioner online sometime in 2005. Gearhart married Steve Gearhart on May 21, 2005 in Virginia, where they lived. Later in 2005, Gearhart took Victim to South Carolina. She told Victim and her husband they were going to visit an aunt in Rock Hill, but after a couple of hours on the road, Gearhart told Victim they were going to meet Petitioner instead. They met Petitioner at the Marriott in Spartanburg and then they all went to the Comfort Inn in Easley. (App.I.p.209-214).

After Petitioner and Gearhart conversed, they had sex under covers in bed while Victim, nine years old at the time, watched television on the floor. She knew this because their clothes were on the floor and their bodies were moving, and she could hear them moaning. Afterwards, Gearhart picked up her clothes and told Victim to get in bed with Petitioner while Gearhart took a shower in the bathroom. Victim was in her pajamas. Petitioner was naked. While she was in bed, Petitioner touched Victim's breasts and touched Victim between the legs, both over and under her clothes. Petitioner stopped when Gearhart came out of the shower. Petitioner got up, put on his clothes; and left. He did not spend the night at the hotel. The next day, Gearhart and Victim met Petitioner for lunch before heading back to Virginia. (App.I.p.214-218).

Two or three weeks later, Gearhart again took Victim to South Carolina under the pretext of visiting the aunt, but they went to the same Comfort Inn instead. At the Comfort Inn, Petitioner and Gearhart again had sex in bed while Victim watched television. Victim at first sat on a chair, but then laid on the floor. As before, their clothes were on the floor and she heard moaning. Victim testified that she fell asleep but they woke her to get in bed with Petitioner while Gearhart went in the shower. Gearhart again fondled her breasts and touched her between her legs. At first she had on her pajamas but he took them off. He put his finger inside her. Victim testified that Petitioner stopped doing that: "After mom had been out of the bathroom for a few minutes." (App.I.p.218-223) (direct quote, p. 223, lines 1-2). Gearhart sat in a chair, then got in bed with Victim and Petitioner. Victim was in between Petitioner and Gearhart. Petitioner continued to rub Victim. He then got up, put his clothes on, and gave Gearhart a kiss goodbye. Petitioner did not stay overnight, but they all met the next day to go shopping. (App.I.p.223-224).

The next month, they went to South Carolina again, still under the pretext of visiting the aunt, but went to the Comfort Inn in Easley instead. They all went out to eat, and upon returning to the room, Petitioner and Gearhart had sex again in bed. Again, Gearhart went into the shower and Victim was in bed with Petitioner. Petitioner touched Victim, but stopped when Gearhart came out of the bathroom. He got up, put on his clothes, and left. (App.I.p.225-226).

In the beginning of 2006, Gearhart moved in with Petitioner in Liberty. Victim moved in with her grandmother in Virginia. But sometime that July or August, Victim moved into Petitioner's house with Petitioner and Gearhart. Petitioner began touching Victim on her breasts and between her legs, while Gearhart was cooking in the kitchen or doing laundry. Gearhart was

not working when Victim first started living at the house in Liberty. Victim testified that Petitioner touched her whenever he got the chance. (App.I.p.226-230).

In the beginning of 2008, Gearhart was working, creating opportunity for Victim to be left alone with Petitioner. Petitioner took advantage of this opportunity. Victim would come home and Petitioner would already be there, or he would arrive afterwards. One day, when Petitioner and Victim were home alone, he pulled Victim by the arm and sat her on the bed. He started kissing her and touching her on her breasts and between her legs. He took her clothes off and put his penis inside her. Then he started masturbating. Victim took a shower. (App.I.p.231-232).

One morning, the three were eating breakfast, and Gearhart and Victim were about to leave the house, when Gearhart told Victim to give Petitioner a hug. Victim did not want to and in the car told Gearhart that it was because Petitioner had been touching her. Victim explained as follows: "I guess she talked to him because when I got home, her stuff was like packed up, or some of it, and she said that we were leaving on Sunday." But they never left. (App.I.p.233-234). (direct quote, p. 234, lines 4-6).

Then on June 13, 2008, Detective Rita Burgess came to the house while Victim was home alone. She knew Detective Burgess was coming because she spoke to someone named Michelle and her grandparents. Victim told Detective Burgess about what happened. Victim's duffle bag was already packed and she left with Detective Burgess to the police station. (App.I.p.235-236).

Victim was sitting in Burgess's office when Gearhart came in. Victim testified Gearhart was crying: "And she asked me if what I had said about Joey was true. And I said, yes. And then she asked me if- she asked me if I had my phone, and I told her yes, and she took it."

(App.I.p.237.ll.3-14). Gearhart did not explain why she was taking the cell phone..

(App.I.p.237.ll.15-17). Victim went to live in a foster home. (App.I.p.237-238).

Victim admitted that at one time, she told the guardian ad litem, Judy Chapman, that the abuse never happened. As Victim explained, she told Chapman that because she did not want her mom to go to jail. (App.I.p.234).

Records from the Comfort Inn showed Petitioner paid for rooms at the Comfort Inn a number of times between October and December 2005.(App.I.p.296-301). Greg Davis was the father of Victim's friend. He testified that Victim went with his family to church. He also testified that Victim felt threatened around Petitioner. (App.I.p.279-281;p.289).

Victim's physical examination showed a notch in the hymen area, which was not necessarily indicative of a sexual assault. (App.I.p.370-373). However, the examining doctor discounted such explanations offered by Petitioner's attorney as improper insertion of feminine products or a sports injury. (App.I.p.383). Victim told the physician, Dr. Croswell, that she had been assaulted.(App.I.p.368-369).

Shaina Galloway Williams was qualified as an expert in forensic interviewing. She testified about the reasons for delayed disclosure of abuse by children, noting that the response to an initial disclosure will greatly impact what a victim may do next. In particular, a victim might be reluctant to disclose since they are aware that it might make a parent unhappy or adversely affect the parent's relationship to the abuser. Older victims are more likely to be aware of the ramifications of disclosure. Recantations occur in roughly twenty two percent of cases where a victim has disclosed abuse. Recantations often occur for the same reasons victims will delay or fail to disclose. Recantations may occur when their initial fears for disclosing come true, such as a change in living conditions. (App.I.p.411-417).

Detective Burgess testified that based on a referral from DSS, she went to Victim's home when Victim was home alone. Victim disclosed what happened to her and Detective Burgess took Victim into emergency custody. Burgess attempted to reach Gearhart at her cell phone number and left a message. When Gearhart arrived at the station, Burgess read her Miranda warnings and interviewed her. Gearhart admitted Victim told her Petitioner grabbed Victim's breasts, but when Gearhart confronted Petitioner, he denied it. Gearhart denied having intercourse at the hotel in 2005, although she admitted staying there and meeting Petitioner. Gearhart claimed Victim chose to go through the house naked and they had to tell her to put clothes on. Gearhart said she did not believe the allegations because Petitioner was impotent due to "numerous medical problems." Gearhart said her and Petitioner were "intimate" only three times. Gearhart accused Victim of wearing inappropriate clothing and talking to boys inappropriately by phone and text messaging. Gearhart told Burgess: "I feel like I'm damned if I do and damned if I don't." Gearhart said she can't explain why Victim was making the allegations. (App.I.p.319-323).

Gearhart then wanted to see Victim, which Burgess allowed. Burgess testified: "And when we walked into the room, [Gearhart] held her hand out to [Victim] and said, quote, give me your cell phone. I'm having it disconnected. [Victim] gave her the phone. And then she asked [Victim] you know what's going on here? They're taking you away from me." (App.I.p.323, lines 2-7). Gearhart arranged later that day for Petitioner to come to the office and speak with Burgess. Petitioner gave a statement denying the allegations. (App.I.p.324; p.327-328).

Judy Chapman, a volunteer guardian ad litem, testified for Petitioner. She testified that Victim recanted. However, she neglected to put this in reports she submitted to the Family Court judge. Further, she admitted on cross-examination that she e-mailed another guardian that she

believed something really did happen. She decided to go to the defense attorneys first with the recantation. (App.II.p.487-492; p.497-498). Victim told Chapman, she did not want to stay with her father in Virginia. She explained "if I can't stay with my mother, I'd rather stay with my foster parents." (App.II.p.495, lines 7-12).

Petitioner and his parents worked for the Miss South Carolina Pageant for years. Petitioner called two witnesses from the organization that claimed in May 2008, Petitioner and Gearhart had an argument, and as a result, Victim said within the witnesses' presence that she was going to get even with Petitioner for talking like that to her mother. (App.II.p.501-505; p.510-511). This, of course, occurred after Victim already disclosed abuse to her mother in April and was ignored.

Petitioner claimed he suffered erectile dysfunction and was incapable of having intercourse. He testified the problem started in 2000 and 2001, and never got better. On cross-examination, he said he did not have intercourse in 2004 or 2005. He claimed at the time of trial, he was completely unable to have intercourse. He testified he has never had intercourse with Gearhart. He claimed he had not had sex "in a very long time." (App.II.p.552-554;p.574-75).

Despite Petitioner's claims he suffered from erectile dysfunction, he waited until 2007 to tell his doctor about this. Dr. Barksdale testified that Petitioner started seeing him in 2002, but in March, 2007, Petitioner complained about erectile dysfunction. Petitioner also had low testosterone levels. Dr. Barksdale proscribed a cream for this in August 2007. But low testosterone and erectile dysfunction are separate issues. In November 2007, Petitioner saw Dr. Barksdale again, and did not complain any further about erectile dysfunction. The next step in treating patients that do not respond to treatment is referral to a specialist. Dr. Barksdale never referred Petitioner to a specialist. (App.II.p.467-471;p.476-480). Gearhart testified she and

Petitioner never had intercourse at all during their relationship because Petitioner suffered erectile dysfunction. When asked to explain what she meant by saying she was "intimate" with Petitioner three times during the marriage, she said she meant kissing or hugging, not intercourse. Gearhart testified that after Victim told her Petitioner was touching her, Gearhart confronted Petitioner, who denied it. Gearhart, in her own words "asked her was he actually grabbing at her breast or was he picking on her," Victim then became "hostile" and "defiant". Gearhart claimed she confiscated Victim's cell phone because of inappropriate texting. Gearhart never explained why she chose that particular moment at the police station to punish Victim. (App.II.p.602-604; p.607-608; p. 611; p.631-632; p.634-635(direct quote, App.II.p.608, lines 14-16).

The State's reply witness was Petitioner's ex-wife, Veronica Hubbard, who testified Petitioner was always capable of intercourse during their marriage, which lasted until 2005. During 2002 to 2004, they had intercourse once or twice a week. A couple of times, she walked in on Petitioner masturbating while on the phone. Even as their marriage fell apart, they still had sex about once every two weeks during 2005. They had intercourse as late as April or May, 2005. Petitioner was never incapable of having intercourse. (App.II.p.636-640). This contradicted Petitioner's testimony that his alleged impotency problems went back to 2001. (App.II.p.574.ll.15-p.575.ll.5).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, 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 that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. 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). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular

act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. 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

- I. **There is evidence of probative value to support the PCR court's finding counsel was not ineffective for failing to contact or present witnesses to assert the complainant fabricated sexual abuse allegations against him so that she could move home to Virginia from South Carolina, where these witnesses would have been cumulative to other evidence presented.**

Petitioner asserts the PCR judge erred when he ruled trial counsel was not ineffective for not investigating and presenting additional fact witnesses at trial. This argument is without merit.

In his application, Petitioner alleged trial counsel was ineffective for failing to investigate and present additional fact witnesses at trial. Additionally, Petitioner alleged trial counsel failed to investigate and present character witnesses at trial (App.II.p.834). In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner had failed to meet his burden. (App.II.p.835). Additionally, the court found that Petitioner's contention was that presenting these four witnesses at trial would have shown Victim planned to lie about Petitioner sexually abusing her because she wanted to move back to Virginia. (App.II.p.835). The court concluded that trial counsel's strategy at trial, however, was to present witnesses to explain victim lied about the sexual assault because she wanted to (1) return to Virginia and (2) punish Petitioner and trial counsel executed this strategy through the witnesses he called. (App.II.p.835). Moreover, the court found that the evidence was all presented to the jury, who weighed the evidence in their deliberations. See State v. Pipkin, 359 S.C. 322, 327, 597 S.E.2d 831, 833 (Ct. App. 2004) (noting the jury is "the finder of fact and weigher of credibility"). It is clear that, regardless of the strong defense theory set forth by trial counsel, the jury simply did not accept Petitioner's version of events. See Craven v. Cunningham, 292 S.C. 441, 443, 357 S.E.2d 23, 25 (1987) ("The credibility of witnesses is for the triers of fact."). (App.II.p.835). Furthermore, the court found that the witnesses presented by Petitioner at the PCR hearing would have been

merely cumulative to the witnesses presented in the defense case and, thus, Petitioner cannot prove he was prejudiced. (App.II.p.836).

The PCR judge did not err in his ruling Petitioner failed to meet his burden entitling him to post-conviction relief. In this case, Petitioner alleged that trial counsel failed to investigate and present additional fact witnesses at trial. During the evidentiary hearing the Petitioner called several witnesses. Nikki Holder, Taylor King, Justin Eades, and Joseph Rowe. Petitioner testified that he provided trial counsel these witnesses names so he could contact them as they were relevant to his case and could shed light on his charges. (App.II.p.750). During the evidentiary hearing these witness testified and each offered testimony that purported to show that the victim was lying about the abuse that the Petitioner committed. Nikki Holder stated she was good friends with Victim for two years. Holder stated Victim “got what she wanted” and was very mad at Petitioner’s co-defendant because she would not let her go to Virginia for the summer. Holder stated she never spoke to trial counsel. Holder stated she went to the trial because her mother said she may have to testify. (App.II.p.782-790). Taylor King stated she went to school with Victim and Petitioner was her basketball coach. King stated Victim initially said Petitioner touched her but later said she had lied because she wanted to go to Virginia. King stated she told her mother and Petitioner’s co-defendant but did not believe it was important to tell the police or Petitioner. King stated she did not tell trial counsel about Victim’s alleged recantation because “everything was busy.” (App.II.p.790-795). Justin Eades stated he was the co-defendant’s grandson. Eades stated that, in June 2008, he heard Victim say she felt that she needed to move to Virginia to take care of her grandfather and that she would lie to a counselor that Petitioner touched her. Eades stated he told his father about this. Eades stated he was told (during the trial) that he needed to appear. Eades stated he spoke to both trial counsel and co-defendant’s attorney

that day. (App.II.p.803-807). Joseph “Jay” Rowe stated he was Eades’ father and the co-defendant’s son. Rowe stated Eades said he had overheard a conversation between Victim and Megan Wilkerson that Victim’s sexual abuse allegation was a way for her to be able to move to Virginia. Rowe stated Eades told him this in June 2008 – which was two years before the trial – and he told the co-defendant after she and Petitioner were arrested. Rowe stated co-defendant’s attorney called him during the trial and wanted Eades to come to court. Rowe acknowledged he was aware Petitioner and co-defendant were facing serious charges but he did not contact the police or either defense attorney. (App.II.p.795-802).

Petitioner argues that trial counsel failure to contact these fact witnesses and investigate their potential testimony was ineffective. However, trial counsel had several witnesses testify at trial who essentially said the same thing that these facts witnesses would have potentially testified to. Judy Chapman, the guardian ad litem for the Victim along with Jacquelyn Lankford and Charles Kelley testified at trial for the Petitioner. Jacquelyn Lankford, a volunteer with the Miss South Carolina Organization whom Petitioner worked with testified she had known Petitioner and more specifically his parents for fifty years. She testified she overheard an argument between the Petitioner and his co-defendant. Lankford testified that the Victim was present in the room when the argument took place and upon approaching her and referring to the Petitioner said “he can't talk to my mother that way. I'll get him sooner or later. He's going to pay.” (App.II.p.504). Kelley, another volunteer for the Miss South Carolina Pageant, testified he was sitting at the table with Lankford and also overheard a heated discussion between the Petitioner and his co-defendant. Kelley testified he heard the Victim say “he's not going to talk to my mother that way. I'll get even with him” (App.I.p.511). Even more important, trial counsel got the Victim’s guardian ad litem to testify about her conversations with the victim. She

testified that Victim recanted. She decided to go to the defense attorneys first with the recantation. (App.II.p.487-492; p.497-498). Victim told Chapman, she did not want to stay with her father in Virginia. She explained "if I can't stay with my mother, I'd rather stay with my foster parents." (App.II.p.495, lines 7-12). Trial counsel testified that his trial strategy was to present witnesses to explain Victim lied about the sexual assault because she wanted to (1) return to Virginia and (2) punish Petitioner. The PCR court found trial counsel executed this strategy through the following witnesses: (1) Judy Chapman, (2) Jacquelyn Lankford and (3) Charles Kelley (App.II. p.835). Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). "Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'" *Huggler v. State*, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). As the PCR court correctly found any further testimony would have merely been cumulative to what had already been testified to by the witnesses. Accordingly, Petitioner cannot prove the first prong of the two prong test.

Notwithstanding that these fact witnesses were not called to testify at trial, Petitioner cannot establish he was prejudiced by trial counsel's performance. As previously discussed, 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. Here trial counsel called several witnesses who said the same thing that the witnesses at the PCR hearing said. "We previously have held where evidence

produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011). Accordingly, Petitioner cannot prove the first prong of the two prong test. As a result, Petitioner suffered no prejudice stemming from trial counsel's alleged deficiency.

II. There is evidence of probative value to support the PCR court's finding counsel was not ineffective for failing to call character witnesses on Petitioner's behalf, where Petitioner's character was not put into issue at trial.

Petitioner also asserts the PCR judge erred when he ruled trial counsel was not ineffective for failing to call numerous character witnesses at trial. This argument is also without merit.

The PCR court found that the Petitioner failed to demonstrate trial counsel was ineffective in not calling character witnesses and was not prejudiced as a result. The PCR Court found trial counsel did not call any character witnesses because Petitioner's character was not put into issue. Additionally, the court found the testimony from these three character witnesses who were called at the PCR hearing would not have changed the outcome of Petitioner's trial. Furthermore, the court found Petitioner's reputation for honesty and truthfulness were not at issue at trial rather, the issue was whether he sexually assaulted Victim over a period of time. At the evidentiary hearing trial counsel testified that he told the Petitioner that he did not think his character was going to be put in issue and therefore did not need to call any character witnesses. (App.II.p.834). Moreover, trial counsel testified that his trial strategy was to show that the victim was lying and wanted to punish the Petitioner. (App.II.p.834). A strategic or tactical decision does not have to be articulated by counsel on the record; counsel does not have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that

counsel announce that strategy on the record. Wood v. Allen, 558 U.S. 290 (2010). No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 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). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

At the evidentiary hearing, Petitioner called three witnesses to testify about his character. The PCR court found that these three character witnesses would not have changed the outcome of Petitioner's trial. Petitioner's reputation for honesty and truthfulness were not at issue at trial. Rather, the issue was whether he sexually assaulted Victim over a period of time. (App II.p.838).

Accordingly, Petitioner failed to establish 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. As Petitioner failed to meet his burden of proving ineffective assistance of plea counsel, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence."). Accordingly, the

PCR court did not error when they correctly ruled that Petitioner failed to demonstrate trial counsel was ineffective in this matter and that he was prejudiced as the result of counsel's representation.

CONCLUSION

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

Respectfully submitted,

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