STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

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S.C. SUPREME COURT

Appellate Case No. 2018-000793

ANTHONY G. LINTON, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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ISSUES PRESENTED

The post-conviction relief judge properly found trial counsel was not ineffective in failing to object to the assistant solicitor's closing argument because trial counsel used the contested statement as a reasonable defense strategy. Further, any alleged error in failing to object to the statement was harmless given the overwhelming evidence of Petitioner's guilt.

STATEMENT OF THE CASE

Petitioner is presently confined by the South Carolina Department of Corrections pursuant to orders of commitment by the Beaufort County Clerk of Court. Petitioner was indicted at the January 2010 term of the Beaufort County Grand Jury for first-degree criminal sexual conduct with a minor (2010-GS-07-0013). On March 29–31, 2011, Petitioner proceeded to a jury trial before the Honorable Michael G. Nettles. Ian Deysach, Esquire, and Matthew Walker, Esquire, represented Petitioner; Assistant Solicitors Meredith Bannon, Esquire, and Carra Henderson, Esquire, represented the State.

On the night of November 28, 2009, Appellant raped a six-year old girl. (App.pp.160–162; 175–83). Appellant performed vaginal, oral, and anal penetration on the six-year old victim, who was the biological daughter of Appellant's live-in girlfriend. (App.pp.92; 175–83).

Before the trial began, Appellant's trial counsel requested that the judge inquire into whether any of the jurors, or their close relatives or friends, had been a victim of sexual abuse. (App.p.3). The State objected to that question. (App.p.4). The trial judge denied Appellant's request. (App.pp.4–9.)

At trial, the victim's brother ("Brother"), who was eight years old at that time, testified he saw Appellant "doing it" with the victim on the couch. (App.pp.160–62). Brother saw Appellant take off his own clothes and the victim's clothes. (App.p.160). Appellant got on top of the victim and started "going up and down, up and down." (App.pp.160). The victim screamed and tried to get Appellant off of her. (App.p.161). At some point, Appellant took the victim into the room he shared with the victim's mother ("Mother"). (App.p.161). Appellant continued to rape the victim. (App.p.161). After Appellant finished raping the victim, Appellant told the victim that if she told Mother, he would kill the victim and Mother. (App.p.162).

When Mother got home the next morning, the victim told Mother what Appellant did to her. After learning about the rape, Mother examined the victim's genital area and noticed a purple discoloration. (App.p.131). Thereafter, Mother contacted the police. (App.p.132).

Around 2:00 p.m. on November 30, 2009, Mother took the victim to see Kristin Dalton, a nurse practitioner for Beaufort Pediatrics and Hope Haven Children's Advocacy Center. (App.p.81). At trial, the judge qualified Dalton as a pediatric medical expert. (App.p.77). Dalton testified she examined the victim and concluded that the victim had traumatic injury to the genital area, which included abrasions on her inner lips and outer lips, abrasions in the vaginal introitus, and a cut above the urethral opening. (App.p.92). In addition, Dalton testified the victim's injuries were consistent with blunt force trauma to the genital area. (App.p.93).

Shortly after Dalton testified, the victim testified against Appellant. (App.p.167). The victim testified Appellant woke her up and "started to do nasty stuff." (App.p.176). The victim testified that Appellant touched her crotch with his mouth and "pee pee." (App.pp.177; 78–79). In addition, Appellant touched her butt with his pee pee. (App.p.178). Furthermore, the victim stated that Appellant's pee pee touched her mouth. (App.p.179). The victim testified that something came out of Appellant's pee pee and landed on her crotch. (App.p.181). Appellant wiped it off with a shirt. (App.p.181).

Amanda Webb, a S.L.E.D. DNA analyst, testified she found semen in the crotch area of the victim's panties. (App.pp. 275–77). Moreover, she concluded that the DNA found in the victim's panties matched Appellant's DNA. (App.278).

During its closing, the State argued:

> The beauty of the jury is that you get to combine your experiences, common sense and what you hear and see. . . . think about the details [Brother] was able to provide.
>
> This has been an emotional case and that's the beauty of having a jury. You'll get to use your emotions. You get to figure out with your brains and reason and your emotions – what you think happened, to help us. Think about emotions. [Victim] felt pain and abandonment when [Petitioner] was molesting her. And she felt terror yesterday as she stood in this courtroom, shaking, unable to speak above a whisper and unable to look at [Petitioner].
>
> After you go through and analyze everyone's motivations and what you heard them say, think about the evidence. . . .

(App.pp.382–85).

Trial Counsel did not object to these Statements. Instead, he used them in his own closing, stating:

> Thank you very much, Your Honor. And thank you jury for listening to it, this case. It's a difficult case. Obviously, you can tell from the delivery that you just heard from the solicitor's office that it's something everybody takes seriously. You know, I came out here in opening and tried to discourage you from using emotion. And the solicitor has just come out and asked you – appealed to your emotion. And emotion is not facts, emotion is not law, and it's not something that is an appropriate basis to make a decision on.
>
> Of course, if this were to happen, it would have been horrible. I could have appealed to your emotion, what would it be like if a man like [Petitioner] is accused of a crime he didn't commit, the wors[t] type of crime he didn't commit, and is found guilty wrongfully even when there is a reasonable possibility that something else occurred. That's the flip side.
>
> When she appeals to your emotion, she's trying to make you angry at Mr. Linton. She's trying to get you to make a decision based on that emotion as opposed to the facts and the law as you heard them. And what it does is it reduces the burden. She's trying to get you to think about that instead of the burden of proof beyond a reasonable doubt, the judge's road map to avoiding a wrongful conviction.

(App.pp.387–88).

Petitioner was found guilty as charged and the trial judge sentenced Petitioner to twenty-seven years' incarceration. Petitioner filed a timely Notice of Appeal. His appeal was perfected by Susan Hackett, Esquire, of the Office of Appellate Defense. Petitioner's convictions and sentences were affirmed by the Court of Appeals. State v. Linton, No. 2012-UP-595 (S.C. Ct. App. October 31, 2012). Petitioner filed a Petition for Rehearing which was denied on December 19, 2012. Petitioner filed a Notice of Appeal to the South Carolina Supreme Court. By Order dated March 13, 2013, the Supreme Court dismissed the appeal at the Petitioner's request. The Remittitur was issued on March 15, 2013.

On April 24, 2013, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held unlawfully for the following reasons:

Ineffective Assistance of Counsel

a. Counsel failed to object, request a mistrial, or request a curative instruction due to remarks made by the solicitor during opening and closing arguments.

b. Counsel should have objected again when the nurse said the victim told me her father did it and went into details on page 147 of the transcript.

An evidentiary hearing into the matter was convened on October 12, 2017 before the Honorable Thomas A. Russo. James K. Falk, Esquire, represented Petitioner; Assistant Attorney General Ruston Neely, Esquire, represented the State. On April 4, 2018, Judge Russo denied relief and dismissed the application. Petitioner filed a timely notice of intent to appeal on April 27, 2018. Petitioner filed his Petition for Writ of Certiorari and the Appendix on December 11, 2018. This Return on behalf of the State now follows.

STANDARD OF REVIEW

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

Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055 (1984); Butler, 286 S.C. at 442. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. at 669; Cherry, 300 S.C. at 117. First, the applicant must prove that counsel's performance was deficient. Cherry, 300 S.C. at 117. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms. "Id. (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117–18 (emphasis added). "A reasonable probability is a probability sufficient to

undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693.

"[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006). "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, 122, 417 S.E.2d 529, 531 (1992). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011).

"'[E]rror by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" Smith v. State, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010) (quoting Strickland, 466 U.S. at 691). To establish prejudice, the defendant is required 'to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id., at 565–66, 689 S.E.2d at 631 (quoting Strickland, 466 U.S. at 694). "[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." Id. at 566, 689 S.E.2d at 631 (citing Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)).

ARGUMENT

The post-conviction relief judge properly found trial counsel was not ineffective in failing to object to the assistant solicitor's closing argument because trial counsel used the contested statement as a reasonable defense strategy. Further, any alleged error in failing to object to the statement was harmless given the overwhelming evidence of Petitioner's guilt.

Petitioner argues the PCR judge erred in finding trial counsel was not ineffective in failing to object to the portions of the State's closing argument referencing the juror's emotions. The State disagrees with this allegation of error. Here, there was evidence in the record which supported the PCR judge finding Petitioner chose not to object to the challenged statements as part of his defense strategy. Further, as also noted by the PCR judge, any alleged error in the admission of the statements was harmless given the overwhelming evidence of Petitioner's guilt.

As noted by the PCR judge, the record shows trial counsel used the disputed statements in his own closing argument. Trial counsel emphasized the statements, arguing the State's case relied on emotion and not evidence and claiming the State's entire case against Petitioner should be rejected. Given that the defense did not present evidence, the PCR judge properly found the use of the State's own comments as a defense was a valid trial strategy. See Stokes, 308 S.C. 546, 419 S.E.2d 778 (1992).

Additionally, any alleged error by trial counsel is harmless given the overwhelming evidence of Petitioner's guilt. Both Victim and Brother testified to the attack. Further, Victim showed physical signs of abuse and Petitioner's semen was found in Victim's panties. Accordingly, the PCR judge correctly found Petitioner cannot prove he was prejudiced by the disputed statements. See Strickland, 466 U.S. at 670.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
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Assistant Attorney General

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ATTORNEYS FOR RESPONDENT

March 8, 2019.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-000793

ANTHONY G. LINTON, Petitioner,

v.

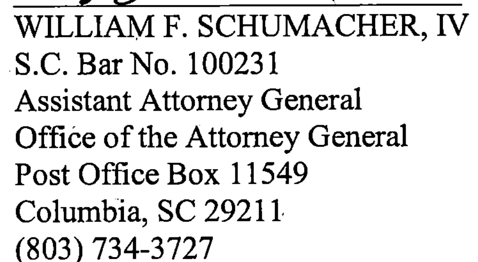
STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, William F. Schumacher, IV, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served. This 8th day of March, 2019.



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STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
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The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-000793

ANTHONY G. LINTON, #345516, Petitioner,

v.

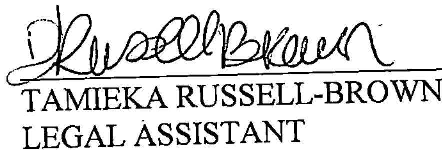
STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

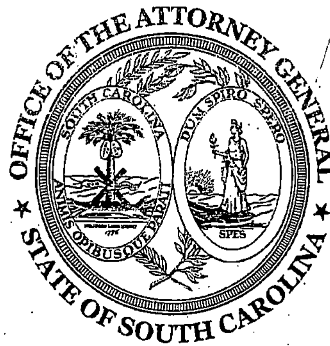
The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 8th day of March, 2019



TAMIEKA RUSSELL-BROWN
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR 08 2019
S.C. SUPREME COURT

March 8, 2019

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

Re: **Anthony G. Linton, # v. State of South Carolina**
Appellate Case No. 2018-000793
Lower Court Case No. 2014-CP-07-0359

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,

William F. Schumacher, IV
S.C. Bar No. 100231
Assistant Attorney General

WFS/trb
Enclosures

cc: Katherine H. Hudgins, Esquire (2 copies)