STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

NATHANIEL MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000069

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find that the improper bolstering testimony by a witness qualified as an expert in child psychology and forensic interviewing was prejudicial?

2. In this homicide by child abuse case where the State introduced photos of the child, did the PCR judge err in refusing to find trial counsel ineffective for not moving to excuse a juror who wrote a note to the judge indicating that he had a phobia about gory pictures and had a habit of passing out?

3. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the prosecutor improperly argued in closing that Petitioner's wife knew he abused the child, a statement unsupported by the record or any reasonable inference that could be drawn from the record.

STATEMENT

In June of 2000 the Richland County Grand Jury indicted Petitioner, Nathaniel Mitchell, for homicide by child abuse, indictment #2000-GS-40-5066. On May 17, 2002, Petitioner proceeded to jury trial before the Honorable Henry F. Floyd. Douglas Strickler and Lee Coggiola represented Petitioner at trial. Kathryn Luck Campbell and Vanessa Cooper prosecuted the case. The jury found Petitioner guilty and Judge Floyd sentenced Petitioner to twenty-five (25) years in prison.

A timely notice of intent to appeal was filed and the direct appeal perfected. On January 10, 2005, the South Carolina Court of Appeals affirmed the conviction, State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140 (Ct. App. 2005). A petition for rehearing was filed and denied on April 22, 2005. A petition for writ of certiorari was filed with the South Carolina Supreme Court and denied on October 19, 2006.

Petitioner filed an applications for post-conviction relief [PCR] on October 8, 2007, and November 5, 2007. (App. p. 1056, p. 1066). Additionally, on October 8, 2007, Petitioner filed a motion for disclosure of discovery and a motion for appointment of counsel. (App. p. 1082, p. 1107). The State filed a return and motion to dismiss on March 4, 2008. On September 11, 2008, the Honorable J. Michelle Childs signed an order granting Petitioner's motion to appoint counsel and motion for disclosure of discovery. (App. p. 1109). On March 2, 2012, Petitioner filed an amendment to the application for post-conviction relief. (App. p. 1111). On January 16, 2012, Petitioner filed a motion for abeyance. (App. p. 1114). On August 16, 2012, the Honorable James R. Barber, III, signed an order appointing the Richland County Public Defender Office to represent Petitioner for the limited purpose of filing a motion for new trial based on after discovered evidence pursuant to Rule 29(c), SCRCrimP. (App. p. 1139). On January 14, 2015,

Petitioner filed a memorandum of law in support of the motion for new trial. (App. p. 1144). On April 3, 2015, a hearing was held before the Honorable Brooks P. Goldsmith on the motion for abeyance. The order holding the PCR action in abeyance until the motion for new trial was resolved was not signed until September 11, 2015. (App. p. 1141).

On February 9, 2015, a hearing was held before the Honorable Robert E. Hood on the motion for new trial. E. Fielding Pringle represented Petitioner. Joanna A. McDuffie represented the State. In an order signed July 29, 2015, Judge Hood denied the motion for new trial based on after discovered evidence. On February 17, 2016, Petitioner filed a second amendment to the application for post-conviction relief. (App. p. 1410). On June 2, 2016, Petitioner filed a third amendment to the application for post-conviction relief. (App. p. 1413). On July 12, 2016, an evidentiary hearing was held before the Honorable D. Craig Brown. Tricia Blanchette represented Petition. Jessica Kinard represented the State. In an order signed December 6, 2018, Judge Brown denied relief and dismissed the application. A timely notice of intent to appeal was served on January 16, 2019. This petition for writ of certiorari follows.

ARGUMENTS

1. The PCR judge erred in refusing to find that the improper bolstering testimony by a witness qualified as an expert in child psychology and forensic interviewing was prejudicial.

The jury found Petitioner guilty in the death of one of his three foster children who Petitioner and his wife were in the process of adopting. The State's theory was that the two-year old child died as a result of so called "shaken baby syndrome." (App. pp. 105-107). At trial the judge granted, over objection, the State's motion to videotape the testimony of the deceased child's older sister, NG. (App. pp. 13-50). NG was four at the time of the death of her two-year old sister and six at the time of trial. NG testified that on the day her sister died she saw Petitioner spanking her. (App. p. 44, line 24 – p. 45, lines 1-6). When asked what happened when he spanked her sister, NG testified, "She died." (App. p. 45, lines 16-17).

After NG's video testimony was played for the jury (App. p. 485, lines 2-21), the State called as their next witness Dr. Allison DeFelice. (App. p. 485, lines 22-25). The doctor was qualified, without objection, as an expert in child psychology and forensic interviewing. (App. p. 488, lines 7-11). Dr. DeFelice conducted a forensic interview with NG. (App. p. 491, lines 5-18). The State asked Dr. DeFelice, "But during the course of that interview, did you see any coaching or deception on the part of the child?" (App. p. 491, lines 22-24). Dr. DeFelice answered, "No, none." (App. p. 491, line 25). De DeFelice was next asked, "And was her account of what had happened as it was given to you, not what it was, consistent from what she had said from the outset?" (App. p. 492, lines 1-3). Dr. DeFelice answered, "Yes." (App. p. 492, line 4).

Dr. DeFelice interviewed NG again in April of 2002, at the request of the State. (App. p. 492, lines 20-25). Dr. DeFelice testified:

> You referred her back to me with three principal questions, the first being a question of competency, which has to do with whether or not a child demonstrates an understanding of the truth versus a lie and the importance of telling the truth, also whether or not, you know, two years later whether or not NH had memories about the events surrounding her sister's death, and thirdly, how emotionally she was functioning and what the potential impact would be of rendering testimony in front of the defendant.

(App. p. 493, lines 4-14). The State then asked the doctor, "And doctor, was NG – or did she independently in your expert opinion, was she able to remember the events surrounding her sister's death?" (App. p. 493, lines 21-24). The doctor answered, "Yes." (App. p. 493, line 25).

The State then asked the doctor if a four-year old was capable "of remembering as she did initially and then two years later?" (App. p. 494, lines 5-6). The doctor answered, "Certainly, yes." (App. p. 493, line 7). Dr. DeFelice discussed memory in children and the fact that they are more likely to remember traumatic events. (App. p. 494, lines 7-25). The State finally asked, "And after interviewing her in April, in your opinion, does she still have an independent memory of what happened?" (App. p. 495, lines 4-6). The doctor answered, "Oh, absolutely, yes." (App. p. 495, line 7). Trial counsel objected to the testimony of Dr. DeFelice based on hearsay but not based on improper bolstering. (App. p. 491, lines 3-14).

In the second amendment to application for post-conviction relief Petitioner alleged, "In effective assistance of trial counsel for failure to make contemporaneous objections during the trial testimony of Dr. Defelice regarding the forensic interview, treatment and opinions regarding the child witness, which amounted to inadmissible bolstering of the child witness." (App. p. 1410). During the PCR hearing Petitioner testified that his attorneys should have object4ed to the testimony of Dr. DeFelice. (App. pp. 1426-1428). When questioned about the testimony of Dr. DeFelice at the PCR hearing trial counsel Strickler testified, "In 2002, 2003, I certainly was aware of the concept of an objection for bolstering and that being the basis to move for a mistrial

in a particular case. If, indeed, the testimony appears to be such that that's what she was engaged in, we should have objected in that regard." (App. p. 1453, lines 1-5).

During the PCR hearing trial counsel Coggiola testified that she should have objected to the testimony of Dr. DeFelice based on improper bolstering. (App. p. 1481, line 9 – p. 1482, 1483, 1484, lines 1-8). When asked what part the testimony of NG played in the case trial counsel Coggiola testified, "NG was present at the house on the day of the incident for which he is charged, and I think that to have an expert in forensic interviewing with a child present to the jury that her testimony was sound, consistent, unchanging was very strong and the jury would not be able to discern the way lawyers would how her input into that could affect the testimony." (App. p. 1484, lines 11-17). When asked if the improper bolstering was prejudicial trial counsel Coggiola testified, "I would say it was prejudicial and I would say that if we had pointed it out that the jury would have heard that. You know, by objecting and saying Dr. Defelice is bolstering, we would object on the bolstering, that the jury would have heard that and that would have been input for them to make a determination as to how to assess that particular form of evidence." (App. p. 1485, lines 1-7).

Finally, PCR counsel asked, "And if you would have been successful in making an objection and essentially shutting down her testimony, how do you think that would have impacted the case?" (App. p. 1485, lines 8-10). Trial counsel Coggiola answered, ""It would have had a huge impact on the case as that was the – you know, I mean to have the scientific evidence being sort of the battle of the scientists, which you're going to have in these kinds of cases, the jury would have to make their own determination on that, but for the other evidence to be the witness of one child, it would make a huge impact." (App. p. 1485, lines 11-17).

In the order of dismissal the PCR judge found trial counsel ineffective for failing to object to the testimony of Dr. DeFelice as bolstering. The PCR judge wrote, "Based on the testimony at trial and the testimony at the hearing, this Court finds counsel's performance deficient for failing to object to Dr. Defelice's testimony on the grounds of bolstering." (App. p. 1513). The PCR judge, however, found that the deficient performance was not prejudicial writing:

> However, this Court finds the failure to object was not prejudicial in light of the overwhelming testimony in the record. Dr. Defelice's testimony bolstered the child witness who saw Applicant beating his foster daughter with a belt. The testimony of the child explained the bruising to the child's buttocks, but did not relate to her cause of death. Trial counsel correctly and thoroughly argued that this case was not one about spanking and not about the death of a child from excessive spanking. Additionally, Applicant admitted spanking the child victim with a belt on the morning of her death. As a result, the child's testimony did not contradict Applicant's testimony and any bolstering would not have been prejudicial.
>
> Further, the State offered overwhelming scientific evidence indicating the cause of death in this case was shaken baby syndrome. Numerous experts testified the injuries sustained by the child victim could only have occurred through a significant automobile accident, a multi-story fall, or violent shaking. The history provided by Applicant eliminated any possibility of the first two. The only person present at the house capable of causing the death of the victim through shaking was Applicant. As a result, Dr. Defelice's testimony, even if it was impermissible bolstering which should have been objected to by trial counsel, did not prejudice 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. Therefore, this allegation is denied and dismissed.

(App. pp. 1513-1514). The PCR judge erred.

First, while Petitioner admitted to spanking the child, there were contradictions between the testimony of Petitioner and the testimony of NG. The State capitalized on the contradictions in closing argument. (App. p. 1005, line 25 – p. 1006, 1007, 1008, lines 1-3). Specifically, the State argued:

> NG – didn't – she said this happened in the bedroom. She was very precise about that, with the belt. She was able to tell you what she could remember. She's a very brave little six year old child, but let's get one thing straight, either NG is telling you the truth, because if you believe Nathaniel Mitchell, she's making up this story.
>
> On cross-examination, she talked about how yeah, she called 911. She would have called 911 because of the viciousness of that beating. She tried to and talked about how she wanted to do her best. She even talked about the night before she had been flipping on the light switch. Look at the pictures. It's right there. She remembers details.
>
> On cross-examination she became somewhat fidgety and that was after the defense had gotten up and immediately addressed her as [Minor]. Did that bother her? You bet, but she still was able to testify anyway.
>
> Yeah, she said the police came they came and took him away. They did take him away. Remember her testimony, remember her testimony. When asked, everything she said was credible. Are the time periods similar, like who was in what room? Yeah, Minor was in the room with her.
>
> Well, Minor was beaten and she's very specific. She was beaten on the bed by that man, so either he's telling the truth or she is, but somebody is not. If they aren't telling the truth, what are they covering up?

(App. p. 1006, line 21 – p. 1007, p. 1008 lines 1-3).

Additionally, portions of NG's testimony were contradicted by the testimony of the State's Chief Investigator, Investigator Jones with the Richland County Sheriff's Department. The investigator testified that he could find no record of a 911 call being made on March 28, 2000, the morning of the incident (App. p. 671, lines 33-15). The investigator also testified that Petitioner was not arrested that morning. (App. p. 671, lines -25). At the time of Petitioner's arrest, NG and her brother had already been removed from Petitioner's home by DSS. (App. pp. 498 – 500; p. 672, lines 4-7). NG's credibility was important for the jury's determination of guilt or innocence and the improper bolstering was prejudicial.

Second, evidence that the cause of death was "shaken baby syndrome" cannot be described as overwhelming when the case involved a battle of experts as to the cause of death

and so called "shaken baby syndrome." The defense experts at trial and at the hearing on the motion for new trial both testified that the injuries that caused death were not caused by so called "shaken baby syndrome." (App. p. 582, lines 1-16; p. 1274, lines 15-24). Because of the vastly differing expert opinions, one juror had to be excused[1]. (App. p. 636, lines 4-15). The excused juror told the judge, "You see, Your Honor, I'm convinced that it's a medical decision and it's not a layman's place because I don't know no medicine." (App. p. 635, lines 12-15). The excused juror also told the judge, "There's no doubt about it. There's just no doubt about it. I'm not qualified and nobody in that jury room is qualified to say that Dr. A. is wrong and Dr. B. is right. I can't do that, I'm sorry." (App. p. 635, line 24 – p. 636, lines 1-3). The State's evidence was not overwhelming. The improper bolstering was prejudicial.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694,

[1] Upon questioning the other jurors, the judge learned that the excused juror had researched information on the internet. (App. p. 643, lines 4-13). The excused juror was cited for contempt. (App. p. 667, lines 5-25).

104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The PCR judge correctly found deficient performance. The PCR judge erred in refusing to find that Petitioner demonstrated prejudice. There is a reasonable likelihood that if the trial judge had properly excluded the improper bolstering testimony by Dr. DeFelice, the result of the trial would have been different. NG's credibility was an important factor for the jury and stressed during the prosecutor's closing argument. The State's evidence was not overwhelming. The State's expert testimony in regard to so called "shaken baby syndrome" was properly challenged making NG's credibility all the more critical.

In Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) the South Carolina Supreme Court wrote:

> 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. See Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before 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. See Strickland, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 (stating "a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

NG testified that when "Papa" spanked her younger sister she died. The jury had to make a critical decision about the credibility of this testimony. Trial counsel Coggiola discussed the prejudice of the improper bolstering in light of the scientific evidence presented and testified, "It would have had a huge impact on the case as that was the – you know, I mean to have the scientific evidence being sort of the battle of the scientists, which you're going to have in these

kinds of cases, the jury would have to make their own determination on that, but for the other evidence to be the witness of one child, it would make a huge impact." (App. p. 1485, lines 11-17). Trial counsel's specific error of failing to object to the improper bolstering testimony highly impacted the outcome of the trial.

While trial counsel in 2002, did not have the benefit of State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) or Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), as this Court noted in Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017):

> Even before Smith, however, the law was already clear that no witness may give an opinion as to whether the victim is telling the truth. In State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), the defendant made a pretrial motion "to prevent any testimony by one witness as to their opinion about the credibility of another witness." 297 S.C. at 393, 377 S.E.2d at 302. The trial judge agreed to the premise of the motion, stating he "didn't know of any provision that allows one witness to give their opinion relative to the credibility of another opinion by another witness." Id. During the trial, the solicitor asked the victim's treating psychiatrist, "Based on your examination and your observations of [the victim], are you of the impression that her symptoms are genuine?" Id. We found the question improper. 297 S.C. at 394, 377 S.E.2d at 302.

Trial counsel was ineffective in failing to object to the improper bolstering. Petitioner was prejudiced by the deficient performance. Relief should be granted in the form of a new trial.

2. In this homicide by child abuse case where the State introduced photos of the child, the PCR judge erred in refusing to find trial counsel ineffective for not moving to excuse a juror who wrote a note to the judge indicating that he had a phobia about gory pictures and had a habit of passing out.

During the trial the State introduced several photos of the child, including photos of her in the hospital, CT scans and an autopsy photo. (App. p. 8). In regard to an objection to some of the photos, trial counsel Strickler stated, "I would simply submit that the question of prejudice does not hinge on gore, and I'd submit that a young infant on a ventilator with its head swathed in bandages and tubes coming out of every place you can come out is about as prejudicial as you can get, but thank you Your Honor." (App. p. 323, lines 17-23).

Earlier in the trial a juror sent the judge a note that was marked as Court's Exhibit #3. (App. p. 134, line 25 – p. 135, lines 1-2; p. 136, lines 15-16). The note said, "I have a phobia about gory pictures and have a habit of passing out. Not trying to get out of jury duty just don't know if you would want me here." (App. p. 1504). The judge questioned the juror individually and asked, "Can you define what gory is?" (App. p. 135, lines 10-11). The juror answered, "It will just depend on how it strikes me." (App. p. 135, lines 12-13). The juror also said, "Sometimes it affects me and sometimes it doesn't." (App. p. 135, lines 15-16). The judge then said, "I don't know a lot about the evidence. I do know that there will be some evidence of some bruise marks from spanking or something like that." (App. p. 135, lines 17-20). The juror said, "That won't bother me." (App. p. 135, line 21). The judge told the juror, "If we get to a point that it bothers you, we'll just have to deal with it." (App. p. 135, lines 22-24). The juror told the judge, "I just wanted you to be aware of it just in case." (App. p. 135, line 25 – p. 136, line 1). The judge asked the juror, "You feel like you can get through it . . ." (App. p. 136, lines 2-3). The juror told the judge, "I'll do my best." (App. p. 136, line 4). The judge again told the juror, "If you have a problem – I don't want to say too much more about it because I don't know

exactly what the evidence is going to be, but I don't think you probably will see anything that really bothers you. Okay." (App. p. 136 lines 5-9). Trial counsel failed to move to excuse the juror.

In the second amendment to application for post-conviction relief Petitioner alleged, "Ineffective assistance of trial counsel for failure to move to remove the juror who wrote the court about his/her reaction to the allegations of child abuse and/or move for a mistrial." (App. p. 1410). During the PCR hearing Petitioner testified that the evidence at trial was much more shocking than bruises from a spanking and testified that his attorney should have moved to remove the juror. (App. p. 1429, lines 6-25).

In regard to this juror issue, trial counsel Coggiola testified at the PCR hearing, "I don't know why we would not have objected in as much as we were very aware that there was going to be a lot of medical evidence in the trial. Everything from discussion of autopsies to graphic description of shaken baby matters. And so we would have known that there was more than just bruising that was going to be testified to in the trial. I have no explanation for why we did not object to this juror not being excused from the jury." (App. p. 1486, line 21 – p. 1487, lines 1-3). When asked about the evidence, trial counsel Coggiola testified, "Well, I think it's very, very difficult graphic testimony. And for a layperson to say they have a phobia about gory pictures and have a habit of passing out, I think there would be enough of an inference there that they may have a difficult time looking at pictures of a brain, even graphic." (App. p. 1488, lines 1-6). Finally, trial counsel Coggiola testified, "Yes, I think there should have been an objection as soon as the note came out and a request by us to have this juror removed from the jury." (App. p. 1488, lines 13-15).

In the order of dismissal the PCR judge wrote:

> This Court finds Counsel was not deficient in failing to move to remove this juror or for failing to move for a mistrial because there was no proper legal basis to seek removal or a mistrial. The trial judge questioned the juror regarding his note and explained the nature of the photographs and testimony likely to be presented at trial. The juror indicated he could handle what was presented. The trial judge also asked the juror to let the court know if any of the material bothered him. Neither the juror's note, nor his subsequent behavior at trial, warranted the extreme remedy of a mistrial.

While there may not have been grounds for a mistrial, there were grounds to excuse this particular juror. Trial counsel admitted that they should have moved to excuse this juror based on the information revealed in the note. This was a homicide by child abuse trial where the State alleged that the child died as a result of a violent shaking causing brain injury. The photographs and testimony involved far more than bruise marks from a spanking, as explained by the judge.

If counsel had moved to excuse the juror, the judge would have erred in refusing to grant that motion. "All criminal defendants have the right to a trial by an impartial jury." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (citing U.S. Const. amends. VI and XIV). Section 14–7–1020 of the South Carolina Code (Supp.2012) provides:

> The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein ... If it appears to the court that the juror is not indifferent in the cause, he must be placed aside ... and another must be called.

The juror's note indicated that he could not be impartial. The PCR judge erred in refusing to find trial counsel ineffective for failing to move to excuse a juror.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the

applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The PCR judge also erred in finding no prejudice. (App. p. 1515). Trial counsel was ineffective for failing to move to excuse the juror. As a result of counsel's deficient performance, Petitioner was deprived the right to an impartial jury. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

3. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the prosecutor improperly argued in closing that Petitioner's wife knew he abused the child, a statement unsupported by the record or any reasonable inference that could be drawn from the record.

During the State's closing argument the prosecutor told the jury:

> What was Sonya Mitchell's reaction? Sonya Mitchell had wanted these children, think about it. In a normal relationship without an abuser in the household, if someone calls up their wife and says so and so stiffens up, your reaction is I'm coming right away, get a blanket and meet me – because Sonya Mitchell knew. She had seen those bruises and she knew where they came from. She rushed home and that part of his story alone says it all. He took her to the hospital, but unfortunately for him, he picked the wrong hospital.

(App. p. 1019, lines 2-13). Sonya Mitchell was Petitioner's wife who died while the case was pending trial. (App. p. 1431, line 21 – p. 1432, lines 1-18; p. 1475, lines 1-21). There is no evidence in the record to support the prosecutor's assertion that Sonya Mitchell knew Petitioner abused the child. (App. p. 1476, lines 11-20). Trial counsel failed to object to the improper statement in closing argument.

In the second amendment to application for post-conviction relief Petitioner alleged, "Ineffective assistance of trial counsel for failure to object to the Solicitor's comments during closing argument about what Applicant's deceased wife knew and her reasons of taking certain actions. Transcript p. 1019." (App. p. 1410). During the PCR hearing when asked why she did not object to the improper closing argument, counsel Coggiola answered, "I can't give you a reason. I know that we're all very cautious during closing arguments and try to be respectful of opposing counsel when they're getting up and making closings. It doesn't mean that we can't make an objection. Truthfully, I cannot remember. I should have objected." (App. p. 1477, lines 4-9). Counsel Coggiola agreed that the prosecutor argued facts not in the record. (App. p. 1477,lines 10-12). Counsel Coggiola testified that Sonya Mitchell "was absolutely supportive of Nathaniel from the time I met her shortly after his arrest until she died." (App. p. 1476, lines 9-10).

Counsel Coggiola testified that the improper comments in closing were prejudicial because:

> Because it's giving certainly the impression that the person closest to Nathaniel and living with him with these children was indicating that he was an abuser. And there was nothing – she couldn't be put on the stand. It was not part of the record. There was no evidence to support that. And of all the people, Sonya Mitchell would have been the one to know, and the jury could have assumed that it was therefore truthful.

(App. p. 1477, lines 17-24). Finally, with regard to the improper statement in closing argument, counsel Coggiola testified, "I feel badly that I didn't object to that, and I – you know, sometimes we let things go by, particularly in closings, out of, I don't know, courtesy or whatever our reasons are at the time, but, you know, there are some things that should be objected to and this was one of them." (App. p. 1478, lines 13-18).

In the order of dismissal the PCR judge wrote, "First, this Court finds the statements by the solicitor were inferences which could be drawn from the record presented." (App. p. 1516). The PCR judge explained in the order, "The evidence indicated Applicant called his wife, who told him to wrap the child up and she would be there shortly. When she arrived, she immediately took the child from Applicant and went to the hospital. A reasonable inference from the testimony is that she did not trust Applicant to take the child to the hospital or otherwise give the child proper care because she knew he had not been good to the child in the past." (App. p. 1516). The record reflects that Petitioner called his wife who was at work and when she got home she put the child in her arms and Petitioner drove, the wife, the child and the other two children to Richland Memorial Hospital. (App. pp. 810-812). The PCR judge erred in finding that the statement made in closing was a reasonable inference. There is nothing is the record from which it could be inferred that his wife knew he abuse the child.

The PCR judge also erred in finding no prejudice. The PCR judge wrote:

> When viewed in light of the overall record, this Court finds the commentary by the solicitor had negligible impact on the trial, especially considering there was overwhelming evidence of Applicant's guilt. As found previously, numerous experts all testified this was a case of shaken-baby syndrome and child abuse. They all testified the injuries sustained by the child victim were not accidental in nature and could not have been caused by another child. Applicant was the only adult present, and the only person capable of causing the injuries which lead to

> the child victim's death. The overwhelming evidence of Applicant's guilt precludes a finding of prejudice sufficient to require a new trial.

(App. p. 1517). There was not overwhelming evidence of guilt. While the State's experts testified that the injuries were not accidental, the defense expert testified that there was not enough information to rule out the possibility that the injuries were the result of a natural disease or an accident. (App. pp. 579-585). As discussed above, evidence that the cause of death was "shaken baby syndrome" cannot be described as overwhelming when the case involved a battle of experts as to the cause of death and so called "shaken baby syndrome."

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to object to the improper statement by the prosecutor in closing argument. The statement was outside the record and trial counsel admitted

that she should have objected. In Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998), this Court granted a new trial based on the fact that trial counsel failed to object when the prosecutor misstated the law in closing argument. In Simmons this Court discussed when improper comments made by a solicitor required a new trial writing:

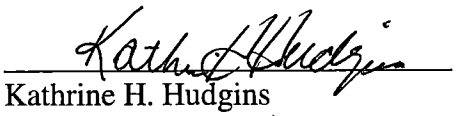
> A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Improper comments do not automatically require reversal if they are not prejudicial to the defendant. Johnson v. State, supra; 3 *Wharton's Criminal Procedure* § 353 (13th ed. 1991) (question is whether comment was sufficiently prejudicial or harmless). On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt. Johnson v. State, supra (a solicitor's improper comments may be cured by the judge's instructions to the jury); State v. Copeland, supra; United States v. Wilson, 135 F.3d 291 (4th Cir.1998). The Petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument. Johnson v. State, supra; State v. Copeland, supra. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, *cert. denied,* 522 U.S. 853, 118 S.Ct. 146, 139 L.Ed.2d 92 (1997).

331 S.C. at 338, 503 S.E.2d at 166–67.

While the prosecutor in the present case did not misstate the law, as in Simmons, she stated facts wholly unsupported by the record. The comment was improper and prejudicial. There was not overwhelming evidence of guilt. Trial counsel was deficient in failing to object. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

CONCLUSION

Based on the above arguments this Court should grant the petition for writ of certiorari to allow further briefing on all three issues.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 1st day of July, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

NATHANIEL MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Nathaniel Mitchell, #284407, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 1st day of July, 2019.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me this 1st day of July, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 26, 2019