

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO DILLON COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2018-001898

Sammy Lee Scarborough,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

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- II. Whether the PCR court erred in denying relief, where trial counsel failed to object to the solicitor vouching for the testimony of minor children, where the comment was made during closing argument that children "don't make this stuff up" when no physical evidence was recovered in this case?
- III. Whether the PCR court erred in denying relief, where trial counsel failed to object to hearsay in a criminal sexual conduct case, where counsel conceded part of the testimony was hearsay, where allegations of misconduct against Petitioner which constituted hearsay were mentioned by minor and adult witnesses alike and were not objected to by counsel?

RESPONDENT'S ISSUES PRESENTED

- I. Did the PCR court properly deny relief where trial counsel did not object to the State's forceful and factually justified description of Petitioner as a predator, one who preys, destroys, or devours, where evidence at trial established Petitioner sexually abused four toddler boys over whom he held a position of trust and authority, and who he enticed with treats?
- II. Did the PCR court properly deny relief where trial counsel did not object to the State's valid and common closing argument in support of the minor victims' credibility?
- III. Did the PCR court properly deny relief where trial counsel, in order to preserve inconsistent statements by a minor victim, did not object to an instance of arguable hearsay testimony, and where Counsel did not object to testimony he adjudged not to be hearsay?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Dillon County Clerk of Court. Petitioner was indicted at the June 2013 term of the Dillon County Grand Jury for two counts of criminal sexual conduct with a minor (2013-GS-17-00290; -00292), and three counts of disseminating harmful material to minors (2013-GS-17-00291; -00293; -00294). Kyle M. Hobbs, Esq. represented Petitioner, and Kelly W. Hall, Esq., of the South Carolina Attorney General's Office, prosecuted the case.

On November 4, 2013, Petitioner proceeded to trial before the Honorable Paul M. Burch and a jury. The jury found Petitioner guilty as indicted above on November 6, 2013. Judge Burch sentenced Petitioner to imprisonment for concurrent terms of life for each CSC, and five years for each count of disseminating harmful material.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq., who raised the following issues:

1. Did the trial judge abuse his discretion in refusing to sever seven different indictments naming three different child victims when the State failed to demonstrate that the three groups of alleged offenses were of the same general nature, failed to prove that the offenses arose out of a single chain of circumstances and were provable by the same evidence and the [Petitioner] was prejudiced by the improper joint trial?
2. Did the trial judge err in admitting Rule 404(b) evidence when the State failed to prove that the prior act was relevant and the prior act did not meet the common scheme or plan exception to Rule 404(b)?
3. Did the trial [judge] abuse his discretion in refusing to declare a mistrial after [Victim 2] denied the allegations in one of the indictments and later in the trial the forensic interviewer and the investigator from the Attorney General's Office confirmed that [Victim 2] had denied the allegation contained in the indictment?
4. Did the trial judge err in refusing to direct a verdict of acquittal on the three [counts of] dissemination of obscene material charges when the State did not introduce in evidence any purported obscene material and relied only on the testimony of the child witnesses?

The parties proceeded to oral arguments before the South Carolina Court of Appeals on October 14, 2015. Petitioner was represented by attorney Hudgins. Jennifer Ellis Roberts, Esq., of the South Carolina Attorney General's Office, represented the State. By opinion decided February 24, 2016, the South Carolina Court of Appeals affirmed Petitioner's convictions. State v. Scarborough, Op. No. 2016-UP-074 (S.C. Ct. App. filed Feb. 24, 2016). Petitioner petitioned the Supreme Court of South Carolina for a writ of certiorari, which was denied by order dated May 30, 2017. The Remittitur was issued on June 2, 2017.

Petitioner filed his application for post-conviction relief on November 2, 2017 (2017-CP-17-00561). He alleged the following grounds for relief in his application:

1. "Denial of Effective Assistance of Counsel"
 - a. "Counsel was ineffective when failing to object to the Prosecution's attempt to introduce prior charges that were never prosecuted by introducing the testimony of Officer Jason Turner and Interviewer Sally Williamson, of which was clearly prejudice to the Applicant and should not have been allowed."
 - b. "Counsel was ineffective when failing to object to the repetitive use of questioning by the Prosecution during Direct Examinations of Valerie Williams and Gaye Allen Cook, even though the questions were asked and answered."
 - c. "Counsel was ineffective when failing to present the video containing the interviews of the victims [where] the victims admitted that the Applicant had never assaulted them. When counsel agreed to the exclusion of the audio/video, precluding him from mentioning the interviews, violating the Applicant's right to the Effective Assistance of Competent Counsel, even after the Prosecution admitted that the video/audio tapes would be 'damning' to its case."
 - d. "Counsel was ineffective for allowing the presentation of pornographic material, even after the investigation revealed no evidence of pornographic material. The allowance of this material is prejudicial to the Applicant and that allowance during Examinations that would determine guilt or innocence, was highly detrimental to the Applicant. Proper Examinations could have resulted in counsel rendering Effective Assistance in accordance with the Rules of Professional Conduct."
2. "Actual Innocence"

- a. "Applicant has maintained his innocence as there does not exist any Direct Evidence and the Circumstantial Evidence that were presented before a Jury, could be clearly refuted and contradicted, such as the audio/video interview of the alleged victims, were the victims admitted to Law Enforcement that no one had assaulted them, proving the innocence of the Applicant."

By and through PCR counsel Lance S. Boozer, Petitioner amended his application by filing on May 24, 2018, to allege the following additional grounds for relief:

1. Ineffective assistance of counsel, in that:
 - a. "Counsel improperly introduced Applicant's prior charge for CSC.
 - b. "Counsel failed to properly object to hearsay."
 - c. "Counsel failed to object to testimony that victim was abused at Applicant's home."
 - d. "Counsel failed to object to improper vouching for witnesses by the State during closing arguments and inflammatory language calling Applicant a 'predator.'"

Again by and through counsel, Petitioner further amended his application by filing on July 11, 2018, to allege the following additional grounds for relief:

1. Ineffective assistance of counsel, in that:
 - a. "Applicant believes counsel failed to discharge his duty of due diligence and investigate the facts, witnesses, and evidence in the case."
 - b. "Applicant believes counsel failed to have a proper defense for physical evidence in the case."
 - c. "Applicant believes counsel failed to have a valid strategy for trial."
 - d. "Applicant believes counsel failed to challenge or move to quash the indictments before the jury was sworn; that the indictments were insufficient and the trial court lacked subject matter jurisdiction."
 - e. "Applicant believes counsel failed to obtain and show the jury recordings of the victims that provided voluntary statements indicating Petitioner's innocence."

Respondent made its return on or about January 31, 2018, and an evidentiary hearing into the matter was convened on Tuesday, July 24, 2018, before the Honorable Larry B. Hyman, Jr.. Petitioner was present at the hearing and represented by Lance S. Boozer, Esq. Johnny Ellis

James Jr., undersigned, represented Respondent. By written order dated October 1, 2018, and filed October 9, 2018, Judge Hyman denied and dismissed the application.

Petitioner thereafter filed a timely notice of appeal. By and through PCR appellate counsel Taylor D. Gilliam, Esq., Petitioner filed a petition for writ of certiorari on May 31, 2019.

This return follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

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; 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "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, 118, 386 S.E.2d 624, 625 (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. Id. 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, 466 U.S. at 688). 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. Strickland, 466 U.S. at 696. 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. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

STATEMENT OF THE FACTS

- a. Four very minor children, at varying times and to various people, disclosed they were sexually abused by Petitioner or otherwise witnessed Petitioner sexually abusing other minor boys.**

On May 25, 2012, Queena Murphy¹ reported to the City of Dillon Police Department that her sons, Victim 1 and Victim 2, had been sexually molested. (Appx. 121-22). Detective Jason Turner conducted an initial interview of the children, and then arranged for forensic interviews, which confirmed Queena's report and further revealed a third, previously unreported minor victim: Victim 3. (Appx. 122-29).

Detective Turner interviewed each victim separately, and obtained enough information to start an investigation. (Appx. 123-26). Each victim disclosed that he was abused and where the abuse happened, and Turner was able to isolate the abuse to a range of dates based on when the family moved in beside Petitioner. (Appx. 123-25). Turner opined that it was not uncommon for children to be unable to identify an exact date for abuse. (Appx. 125, ll. 12-22). Turner arranged forensic interviews for both victims for May 29, 2012, and drove the family to the Care House in Florence for the interviews. (Appx. 127, ll. 6-15). As a result of the interviews, Turner learned of a third victim, whom he interviewed as soon as he returned to the police station. (Appx. 128, ll. 13-22). Victim 3 disclosed where the abuse happened and the date he reported it to his mother. (Appx. 129, ll. 2-12). Turner testified he signed warrants for Petitioner on June 13, 2012, based on information received from the three victims. (Appx. 129, lines 13-20). The first attempt to arrest Petitioner at his home was unsuccessful, but law enforcement was ultimately able to locate and arrest Petitioner in Virginia around February 2013. (Appx. 129-30;

¹ Queena passed away September 20, 2013, from a severe asthma attack, and was thus not available for trial. (Appx. 160, ll. 2-5).

Appx. 135-36). On cross-examination, Turner admitted he did not search Petitioner's house for obscene materials. (Appx. 145-47).

Four very minor boy victims testified to abuse at Petitioner's hands. Victim 1 testified that Petitioner "put his ding a ding in my throat and made me choke" in Petitioner's barn. (Appx. 202, ll. 10-16; Appx. 207, ll. 5-12). He also testified Petitioner showed him pictures of naked girls and boys in a magazine. (Appx. 204-05). Victim 1 denied that his cousin Stefan ever touched him, and denied Stefan ever tried to make Victim 1 touch him. (Appx. 208, ll. 1-11). He testified Petitioner gave him balloons. (Appx. 208, ll. 18-22). On cross-examination, Victim 1 described the barn as red with a white edge across it and again testified Petitioner "made me suck his ding a ding." (Appx. 213, ll. 10-22).

Victim 2 testified he had seen Petitioner's private parts when Petitioner "made [Victim 1] suck his wee wee." (Appx. 230, ll. 2-8). When the prosecution followed up for clarification, Victim 2 initially affirmed he saw Petitioner force Victim 1 to fellate Petitioner. (Appx. 230, ll. 9-10). The State asked Victim 2 to talk about it, and Victim 2 explained "[i]t was when we were living in the other house. Victim 1 came in and said that." (Appx. 230, ll. 11-13). Asked again by the State, Victim 2 nonverbally confirmed he saw as much with his own eyes. (Appx. 230, ll. 14-15). However, Victim 2 further changed his story when the State endeavored to clarify:

Q. Did you see it with your eyes? Yes. Where were you?

A. Home.

Q. You were at home. Where was [Victim 1] when that happened?

A. At his house.

Q. Whose house?

A. Sammy.

Q. So you didn't see it. Did you hear about it?

A. Um hum.

(Appx. 230, ll. 14-22). Counsel did not object and the State moved on. Victim 2 testified Petitioner showed him pictures of undressed “gay boys” humping. (Appx. 231-33). He testified he saw his cousin Stefan touch Victim 1’s penis and saw Petitioner touch Victim 1’s penis. (Appx. 233-34). Victim 2 testified Petitioner gave him candy and balloons and that he played kickball and basketball at Petitioner’s house. (Appx. 226, ll. 8-14; Appx. 234, ll. 20-25).

Hope Owens, mother to Victim 3, explained how her child would spend time with Petitioner alongside Victim 1 and Victim 2, and that Petitioner would give them candy, balloons, and on one occasion a Nerf football. (Appx. 238-41). Owens testified Victim 3 disclosed sexual abuse “[i]n the backyard at Mr. Sammy’s” occurring “about November of 2011.” (Appx. 241, ll. 10-17). Owens did not report the disclosure to law enforcement until “May or June” of 2012 after she “found out what happened to Quinae’s [sic] two kids, [Victim 2] and [Victim 1].” (Appx. 241-42). Counsel neither objected nor asked questions on cross-examination.

Victim 3 testified Petitioner tried to hump him in Petitioner’s backyard. (Appx. 253, ll. 17-21). Victim 3 reported Petitioner gave him a football and a balloon. (Appx. 254, ll. 3-4). He testified he saw Petitioner’s “turtle” when he was at the back of Petitioner’s yard. (Appx. 256, ll. 18-24). He further elaborated that Petitioner tried to put his “turtle” in Victim 3’s butt and that it hurt. (Appx. 257, ll. 4-12). Victim 3 also testified Petitioner showed him a nasty magazine with boys and girls humping with their clothes off. (Appx. 258, ll. 11-24). Victim 3 stated that when Petitioner was humping him, Petitioner touched Victim 3’s “turtle” and squeezed it, which he testified hurt. (Appx. 259, ll. 5-11). He further testified Petitioner tried to make him suck Petitioner’s “turtle,” but Victim 3 did not do so. (Appx. 261, ll. 9-19). On cross-examination, Victim 3 admitted he told the forensic interviewer that Petitioner had not touched his butt and that he had never taken his clothes off around Petitioner. (Appx. 264, ll. 1-6). However, he

agreed that he was now saying Petitioner did touch his butt. (Appx. 264, ll. 7-9). He also testified Petitioner put his head to Petitioner's "thing." (Appx. 264, ll. 10-16).

Victim 4² testified that he saw Petitioner's "private part" while they were in his truck. (Appx. 300, ll. 11-18). He stated that Petitioner had his pants unbuttoned with his "private part" sticking out of the pants, and that Petitioner made Victim 4 touch it with his lips. (Appx. 301, ll. 3-14). Victim 4 testified Petitioner's "private part" was in his mouth for a second and that it made him feel bad. (Appx. 301, ll. 17-24).

Sally Williamson, the forensic interviewer from Care House, interviewed Victims 1, 2, and 3. Neither Victim 1 nor Victim 2 disclosed sexual abuse to her. (Appx. 317, ll. 10-11; Appx. 332, ll. 10-15). Victim 3 did disclose sexual abuse. (Appx. 323, ll. 3-5).

Valerie Williams, an investigator with the South Carolina Attorney General's office, also met with each of the victims in preparation for trial. (Appx. 338-40). Victim 1 and Victim 3 disclosed sexual abuse to her, but Victim 2 did not. (Appx. 341-43).

Gaye Allen Cook, a clinical child and family therapist specializing in trauma and abuse, testified as a blind expert in child abuse assessment. (Appx. 363-66). Cook testified children do not always report sexual abuse and that disclosure is a process that develops and occurs over time, rather than a singular event. (Appx. 366-68). Cook further explained the prevalence of delayed disclosure by abused children and opined that 95-96% of children she had personally treated delayed in disclosing abuse. (Appx. 368-70).

² Petitioner was not charged for acts against Victim 4, but the child was permitted to testify under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), over Counsel's objections. (Tr. 17-41; Tr. 266-67); see also Rule 404(b), SCRE (Other wrongs admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.").

b. Other witnesses responsible for the care and custody of the children denied that the children had any access to materials or media of a pornographic or sexual nature.

Multiple witnesses denied that the children could have accessed materials or media of a sexual or pornographic nature in their respective homes. Maggie Moore, grandmother to Victim 1 and Victim 2, denied the children were exposed to any sexual programming on television in her home, and were not able to get on the internet. (Appx. 165-66). Moore further testified that Queena, her daughter and the children's mother, did not have internet at home. (Appx. 166, ll. 6-10). Moore was not aware of any pornographic material in Queena's home.

Sharon Murphy, Queena's sister and aunt to Victim 1 and Victim 2, also denied there was any access to internet in her home, or any movies or television shows of a pornographic nature. (Appx. 179, ll. 13-19). Sharon further denied the children could have been exposed to sexual acts in her home, or Moore or Queena's homes. (Appx. 179-80).

c. In opening and closing statements, the State condemned Petitioner as a sexual predator, and argued the jury should believe the children because of the improbability that they could fabricate the allegations.

The State opened its case by offering the definition of the word "neighbor," and then rhetorically questioned how to describe a neighbor who "takes advantage of trusting little children and molests them[?]" (Appx. 110, ll. 8-20). The State answered the question by asserting that "[t]he Defendant, Sammy Lee Scarborough, is just such a predator[.]" and described his *modus operandi* of luring little children with balloons and candy. (Appx. 110-11). Near the end of the opening statement, the State encouraged the jury to pay special attention to the four victims, and that they would tell them about "Mr. Sammy, their neighbor. [Victim 4]'s uncle. A predator. A predator who took advantage of little boys every chance he got." (Appx. 114-15).

The State returned to the dictionary definition of “predator” and its applicability to Petitioner at the outset of its closing:

At the beginning of this trial Ms. Hall defined the word “neighbor.” She talked about the good memories that a lot of us enjoyed having spent time with our neighbors. Well, I am going to define another word for you, and that word is “predator.”

The word predator is defined as one who preys, destroys or [devours]. For [Victim 1], [Victim 2], and [Victim 3] Sammy Scarborough wasn’t just a neighbor. He was a predator. He preyed on these little children. He destroyed their chance at a normal life, and he devoured their innocence.

The evidence, the true, tough, raw evidence that you heard from that witness stand screamed that Sammy Scarborough is a predator.

(Appx. 402-03). The State again condemned Petitioner as a predator in the midst of the closing argument:

Folks, the number one rule of being a defense lawyer in a criminal case is blame the police or the victims. That’s what they have done. Let’s talk about why the only person to blame in this case is that predator sitting right there, Sammy Scarborough. Let’s talk about that.

(Appx. 410, ll. 18-22). The State then described how the burden was upon the prosecution to establish Petitioner’s guilty beyond a reasonable doubt. (Appx. 410-11). In conclusion, the State returned to its definition of predator, firmly affixed it to Petitioner, and argued for the children’s credibility:

In order for you to find this Defendant not guilty you’ve got to ignore every last bit of that. Ladies and gentlemen, use your common sense. Strip away all the outside stuff. Don’t fall for Defense Lawyer 101. Let’s be real. Five, six, seven and eight year olds don’t make this stuff up. They just don’t. When a neighbor turns into a predator and preys on little children, destroys their chance at a normal life and devours their innocence that predator needs to be held accountable. Sammy Scarborough is a predator. Sammy Scarborough is guilty. Thank you for your attention.

(Appx. 419-20). Counsel did not object.

- d. Counsel explained he did not believe the use of the term “predator” was objectionable, did not believe the State vouched for the victims in closing, and that he did not object to certain instances of hearsay in the interest of preserving as many inconsistencies among the disclosures and non-disclosures as possible.**

Counsel testified at the evidentiary hearing to each of the issues raised in the application for post-conviction relief. Counsel acknowledged he did not object to the State’s use of the term “predator” and explained:

I did not [object]. I am not aware of any case law or any precedent regarding the word, “predator.” The word “predator” in my mind describes the nature and the circumstances of the accused’ behavior in that he was someone who was in a position of authority or an elder above these children. And that there was a predatory nature to what he was doing; that it wasn’t consensual and that these children were more vulnerable.

So I think that the word, “predator” describes the nature of their accusation about what they were saying what Mr. Scarborough did. But I didn’t think the word in and of itself is impermissible.

(Appx. 535, ll. 1-12).

As to the vouching claim, Counsel opined that while he could see Petitioner’s position, he did not view the State’s argument that young children “wouldn’t just come up with it out of thin air” as vouching. (Appx. 535-36). Counsel explained he believed the argument addressed an issue inherent to cases involving young victims. (Appx. 536, ll. 8-11).

As to Victim 2’s vacillation between testifying (a) that he saw Petitioner abusing Victim 1 and (b) merely heard from Victim 1 that as much had occurred,³ Counsel agreed the testimony was hearsay, but explained that he believed “that was a beneficial statement on him backtracking on having actually [seen] it and that he had a different source for that belief.” (Appx. 533, ll. 2-

³ A plain reading of the appendix can be confusing during the evidentiary hearing. PCR counsel Boozer utilized a copy of the Record on Appeal, rather than the full transcript, during the evidentiary hearing and accordingly cites to that record’s pagination. He also refers to “Minor Three” and “Minor Two” in lieu of Victim 2 and Victim 1, respectively. Contextually it is evident all are discussing the testimony at Appx. 230.

21). On cross-examination, Counsel confirmed that he gave leeway to arguable hearsay testimony in order to ensure that all of the denials of abuse were admitted into evidence. (Appx. 545, ll. 7-12).

As to Owens' testimony, Counsel noted that she never actually indicated what it was she found out regarding Victim 1 and Victim 2, such that he did not know if the statement constituted hearsay. (Appx. 534, ll. 15-20).

ARGUMENT

I. THE PCR COURT PROPERLY DENIED RELIEF WHERE COUNSEL DID NOT OBJECT TO THE STATE'S CHARACTERIZATION OF PETITIONER AS A PREDATOR BECAUSE THE STATE ALLEGED AND PRESETED FACTS TO SHOW HE WAS A SERIAL CHILD MOLESTER WHO DEVOURED AND DESTROYED THE INNOCENCE OF HIS VICTIMS.

The PCR court properly denied relief and the petition for writ of certiorari should be denied because Counsel had no basis to object to the State's opening and closing remarks characterizing Petitioner as a "predator" where the evidence and testimony introduced throughout the trial demonstrated that he preyed upon the trust and simple desires of little boys in order to seclude and abuse them.

The scope and ferocity of an appropriate closing prosecutorial argument is delineated by a defendant's rights under the Constitution of the United States and by the duties of prosecutors to enforce the laws and achieve justice. A prosecutor is "in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88 (1935). "He [or she] may prosecute *with earnestness and vigor*—indeed, he [or she] *should* do so. But while he [or she] may strike hard blows, he is not at liberty to strike foul ones. It is as much his [or her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. (emphasis added).

With these motivations in balance, a prosecutor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury and must not be calculated to arouse the jurors' passions or prejudices. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990). The content of a closing argument "must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)).

However, a solicitor does have “a right to state *his version* of the testimony and to comment on the weight to be given such testimony.” Id. (quoting Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004)) (emphasis added); State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999); see also United States v. Turner, 651 F.3d 743, 752 (7th Cir. 2011) (So long as the evidence supports the comments, prosecutors may speak harshly about the actions and conduct of the accused). “It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence.” United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994). “If a Solicitor’s closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs.” New, 338 S.C. at 319, 526 S.E.2d at 240. “On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury’s passions or prejudice.” Id. When reviewing the propriety of a closing argument, courts must review the argument in the context of the entire record. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

“Predator” is no doubt a word which can carry powerful negative connotations, but its use is hardly beyond the scope of permissible arguments. It is not a foul blow, but a hard, fair characterization of the monstrous acts proven to have been committed by Petitioner.

Petitioner suggests the present case and the prosecution’s use of the term “predator” is comparable to the comments at issue in Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). Vasquez, a practicing Muslim, was charged with murdering two of his co-workers at a Burger King after he had been fired earlier in the day. In closing arguments, the prosecution characterized Petitioner as a “domestic terrorist” and drew comparisons to the terrorist attacks of September 11, 2001, despite an abject lack of any indicia of terrorism or political, ideological, or

religious motivations for the killings. This Court, in a 3-2 opinion,⁴ found the comments were unsupported and prejudicial. Simply and conservatively put, a prosecutor cannot call a Muslim defendant a terrorist while making reference to the greatest American tragedy of the twenty-first century in a case that in no way, shape, or form relates to an act of terrorism. By contrast, Petitioner is a man who abused his position of trust in the community and his family to lure multiple little boys with balloons, toys, and candy, to then sexually abuse them—these being the acts of a sexual predator, it is thus fair to call him a predator.

Petitioner, taking language in Vasquez out of context and without immediate citation,⁵ argues that because the term “predator” can “only conjure negative connotations[.]” the prosecution’s use of the term was improper, Counsel was deficient in failing to object, and Petitioner was constitutionally prejudiced by that failure. (Petition for Writ of Certiorari at 7). Whether a word can “only conjure negative connotations” is not the standard for judging the appropriateness of a closing argument. As the Vasquez court noted, the reason it vacated Vasquez’ conviction was not because the prosecutor utilized unambiguously negative terminology, but because it did so (1) without any evidentiary support and (2) in a context where it could enflame the already roaring popular prejudices and passions of the public and the jury. It is not enough to argue that a word or argument is harsh to render its use objectionable. To the contrary, as acknowledged in Berger, Smith, and Randall, the State has the right and obligation to speak plainly, if not harshly, to a jury in describing reprehensible conduct.

⁴ Justice Pleicones concurred in result only.

⁵ See 388 S.C. at 459, 698 S.E.2d at 567 (“Furthermore, it is indisputable that the term ‘terrorist,’ even in the general sense, can only conjure negative connotations. Thus, the solicitor’s use of the term was clearly improper because there was no evidentiary basis to support this characterization.”)

Petitioner condemns the use of the word “predator” as inherently dehumanizing and indisputably negative, but negativity alone is inadequate to render an argument impermissible. Again, the State *should* be negative in its treatment of reprehensible criminal conduct, lest the gravity of the acts alleged be diminished. Furthermore, comparison of a defendant to beasts in closing arguments is not a basis for vacation of a conviction absent some other context to establish a prejudicial character, such as race. See State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006) (finding prosecution description of defendant as “King Kong” to be a reference to the defendant’s size and strength, and not an appeal to racial prejudices); Bennett v. Stirling, 842 F.3d 319 (4th Cir. 2016) (concluding the same descriptions of defendant as “King Kong” were “poorly disguised appeals to racial prejudice.”). No such racial connotation is borne by the word “predator.”

The solicitor was factually and legally justified in describing Petitioner as a predator. Thus, Counsel was not deficient in declining to object because no basis for objection existed. Even if the Court were to now take issue with the use of the word “predator,” such would be a new development, and Counsel’s determination at the time that it was not objectionable would still fall within the scope of Counsel’s use of reasonable judgment. For these reasons, the PCR court’s denial of relief is sound, and the petition for writ of certiorari should be denied.

II. THE PCR COURT PROPERLY DENIED RELIEF WHERE COUNSEL DID NOT OBJECT TO THE STATE’S LEGITIMATE ARGUMENT IN SUPPORT OF THE CREDIBILITY OF THE MINOR VICTIMS’ TESTIMONY.

The PCR court properly denied relief and the petition for writ of certiorari should be denied because the “vouching” insisted upon by Petitioner is not “vouching,” such that Counsel had no basis for objection.

Generally, the assessment of witness credibility is within the exclusive province of the jury. Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016). Thus, a prosecutor

may neither vouch for nor bolster the testimony of a government witness in arguments to the jury. United States v. Sanchez, 118 F.3d 192, 198 (4th Cir. 1997); Tappeiner, 416 S.C. at 250, 785 S.E.2d at 477. “Vouching occurs when the prosecutor indicates a personal belief in the credibility or honesty of a witness; bolstering is an implication by the government that the testimony of a witness is corroborated by evidence known to the government but not known to the jury.” Sanchez at 198; see also State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001) (“Improper vouching occurs when the prosecution places the government’s prestige behind a witness by making explicit personal assurances of a witness’ veracity, or where a prosecutor implicitly vouches for a witness’ veracity by indicating information not presented to the jury supports the testimony.”). A prosecutor vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused poses two dangers:

. . . such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant’s right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18-19 (1985). However, as noted in the prior section, a solicitor does have “a right to state his version of the testimony *and to comment on the weight to be given such testimony*.” Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007) (abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)) (quoting Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004)) (emphasis added); State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999).

The present case does not present an example of vouching, but rather the legitimate argument in favor of a witness’ credibility based upon evidence in the record: the victims’ ages and the absence of other explanation for their sexual knowledge. The State did not imply there

was any other evidence beyond the scope of the record. The prosecutor did not offer its personal belief in the credibility or honesty of the witnesses. The State cited to a portion of the evidence, and offered that it served to support the credibility of the witnesses. Such is exactly how credibility is supposed to be argued by the State.

Petitioner's factual comparisons to Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002) and Tappeiner are misplaced. In Matthews, the solicitor argued to the jury that he did not trust any of the witnesses until he corroborated their testimony, and only after corroborating their testimony would he put them on the stand, which "led the jury to believe the government corroborated the witness' testimony before trial and found it credible." Matthews, 350 S.C. at 275-76, 565 S.E.2d at 767-68. In Tappeiner, the solicitor repeatedly stated to the jurors he and other witnesses looked the victim "in the eye" or "eye to eye," which implied the solicitor and witnesses all believed the victim, and further did not accurately reflect the testimony introduced at trial. In each of these cases the prosecution erroneously implied its own belief in the victims and witnesses. Here, the State merely argued that "[f]ive, six, seven and eight year olds don't make this stuff up. They just don't." The argument is devoid of any stamp of approval by the solicitor, but is constrained to facts in the record.

If the prosecution's closing in the present matter constitutes vouching, it strains the imagination to figure out precisely how the State is supposed to defend and argue for the credibility of sexually abused young children at trial—the central issue in any case involving delayed disclosure and a dearth of physical evidence. That Petitioner contests the merit of the State's argument from the evidence is not a basis for objection, reversal on appeal, or vacation upon PCR, but rather is merely an argument to the contrary, which Counsel did at length at trial in his own closing argument.

There was no basis on which Counsel could object, and Counsel rightly acknowledged as much at the evidentiary hearing. Counsel's determination was not error, and was further within the scope of reasonably effective assistance of counsel. Thus, the PCR court properly denied relief, and the petition for writ of certiorari should be denied.

III. THE PCR COURT PROPERLY DENIED RELIEF WHERE COUNSEL DID NOT OBJECT TO VICTIM TWO'S ARGUABLE HEARSAY TESTIMONY BECAUSE HE ARTICULATED THE RETRACTION OF PRIOR TESTIMONY WAS OF GREATER STRATEGIC VALUE, AND WHERE COUNSEL DID NOT OBJECT TO OWENS' TESTIMONY VAGUELY STATING WHY SHE FINALLY REPORTED VICTIM THREE'S ALLEGATIONS BECAUSE HER TESTIMONY WAS NOT OBJECTIONABLE HEARSAY.

The PCR court properly denied relief and the petition for writ of certiorari should be denied because (a) Counsel articulated a reasonable and valid strategic decision to not object to arguable instances of hearsay because he wanted to keep Victim 2's retraction of his prior testimony on the record, and (b) Counsel properly concluded that Hope Owens' testimony as to why she finally reported Victim 3's disclosure of abuse was not hearsay at all.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. “A ‘statement’ is (1) an oral or written *assertion* or (2) nonverbal conduct of a person, if it is intended by the person as an *assertion*.” Rule 801(a), SCRE (emphasis added). A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony in a criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident. Rule 801(d)(1)(D), SCRE. “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.” Rule 802, SCRE.

- a. **Counsel articulated a valid trial strategy in that he wanted to keep Victim 2’s contradictory testimony in the record for the purposes of challenging his credibility in a case that lacked physical evidence.**

“A PCR court’s analysis of counsel’s strategic decisions must be ‘highly deferential’ to counsel’s judgment, and a ‘fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.’” Buckson v. State, 423 S.C. 313, 320-21, 815 S.E.2d 436, 440 (2018) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)). “A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id.

Whether Victim 2’s testimony ultimately constituted hearsay depends on which part of Victim’s 2 testimony one finds credible—he initially testified he saw the conduct described, but then described he was not present at the time of Victim 1’s abuse by Petitioner, but rather only heard about it from Victim 1. Though in the context of an adult witness, Victim 2’s second version of events would constitute hearsay regarding Victim 1’s report of abuse, in the context of a minor victim it could in reality constitute testimony as to the minor’s own abuse, as the blind expert Gaye Allen Cook explained at trial:

[T]he classic is when children will say it didn’t happen to me. It happened to my best friend. And you say, “Well, what happened to your best friend,” and the child begins to describe what happened to their best friend when really they’re telling you what happened to them.

Often it’s easier for people of all ages to explain something that happened to somebody else rather than to explain something that happened to themselves.

(Appx. 383, ll. 9-17). In this context, Victim 2’s second version of events is not clearly hearsay, but rather is a natural permutation of a child’s attempt to communicate his own trauma.

In any event, Counsel articulated his strategic reasoning at the evidentiary hearing—he felt the backtracking was valuable to his client. Petitioner feigns ignorance by describing the testimony as “somehow beneficial,” but must well enough acknowledge that if a witness

testifies, then immediately contradicts their own testimony, the contradiction diminishes the witness' credibility. Here, given the lack of physical evidence, witness credibility was of great importance to Petitioner's case, and Counsel was well within the bounds of reasonably effective assistance to decide the contradiction was more valuable to Petitioner than total exclusion of the testimony. Counsel's decision is entitled to deference, and the petition should be denied.

b. Counsel properly declined to object when he had no basis to object to Hope Owens' testimony because it did not constitute another person's statement or assertion.

As to Owens' testimony, she only testified that she did not report the disclosure to law enforcement until "May or June" of 2012 after she "found out what happened to Quinae's two kids, [Victim 2] and [Victim 1]." Owens never indicated what it was she found out, or how she found out. There is no asserted truth, nor does she make reference to Victim 1 and Victim 2 for the purpose of asserting what happened to them, but only to explain why she finally reported Victim 3's disclosure. Thus, Owens' testimony is not hearsay, as Counsel rightly noted.

Petitioner seems to argue that any account of any conversation outside of a courtroom is hearsay. (Petition for Writ of Certiorari at 11). While that may be the apparent and practical application of the rule in objections in trials,⁶ it is not actually the rule. Hearsay is as defined above, restated in short as "an out of court statement offered to prove the truth of the matter asserted." No part of the definition is here satisfied. Even if Owens' testimony were hearsay, it is so vague and fleeting as to be harmless.

Counsel's judgment of Owens' testimony is correct, or at the very least reasonable, such that no basis for objection existed. The petition should be denied.

⁶ Any attorney or judge who has reviewed a transcript or witnessed a trial can attest that if a witness begins to state that somebody else said anything, an objection is likely, irrespective of what the forthcoming testimony would have contained, followed by an admonition to the witness to not testify to anything anybody else told them.

CONCLUSION

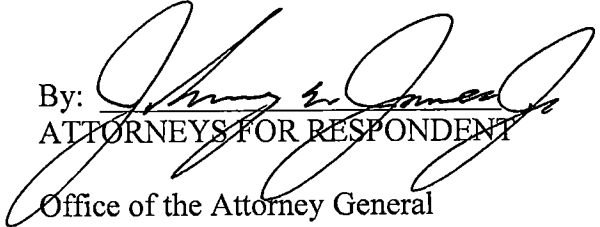
For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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15 Nov., 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dillon County
Court of Common Pleas
The Honorable Larry B. Hyman, Jr., Circuit Court Judge

2017-CP-17-0561
Appellate Case No. 2018-001898

SAMMY LEE SCARBOROUGH,

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 and Appendix** has been served upon opposing counsel by sending by courier two (2) copies:

Taylor D. Gilliam, Esquire
S.C Commission on Indigent Defense
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This 15th day of November, 2019.



EVA COOK
Legal Assistant for Respondent