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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2019-00069

Nathaniel Mitchell, # 284407,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

I. Did the PCR court correctly find Petitioner was not prejudiced by trial counsels' failure to object to the testimony of the forensic interviewer, Dr. Allison DeFelice, when her testimony related only to N.G.'s statements at trial that Petitioner spanked P.G. on the morning of her death, as Petitioner himself admitted to the spanking in his testimony?

II. Did the PCR court correctly find trial counsel were not deficient nor was Petitioner prejudiced by counsels' failure to ask for excusal of a juror and a mistrial after the juror informed the trial court he was concerned about being presented with "gory" evidence?

III. Did the PCR court correctly find trial counsel were not deficient to object to the solicitor's closing argument regarding what Petitioner's wife knew as being unsupported by the record or reasonable inferences to be drawn from it

STATEMENT OF THE CASE

Nathaniel Mitchell (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. In June 2000, the Richland County Grand Jury indicted Petitioner for homicide by child abuse (2000-GS-40-5066). Douglas Strickler, Esquire (Strikler), and Lee Coggiola, Esquire (Coggiola), represented Petitioner. On May 17, 2002, Petitioner proceeded to trial before the Honorable Henry F. Floyd and a jury. Petitioner was found guilty as indicted. Judge Floyd sentenced Petitioner to imprisonment for twenty-five years.

Petitioner filed a timely notice of appeal. Robert Dudek, Esquire, (Appellate Counsel) perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction on in a published opinion on January 10, 2005. State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140 (Ct. App. 2005). The remittitur was returned to the circuit court on October 24, 2006.

Petitioner filed an application for post-conviction relief on October 8, 2007. Respondent filed its Return and Motion to Dismiss on March 4, 2008. On January 23, 2012, Petitioner, through counsel, Tricia Blanchette, filed a Motion for Abeyance and/or Dismissal Without Prejudice. The State filed its return to the motion on February 29, 2012. Based on the information in Petitioner's motion, by order dated April 4, 2012, the Court appointed the Richland County Public Defender's Office for the limited purpose of filing a Motion for a New Trial Based on After-Discovered Evidence, pursuant to Rule 29(b), SCRimP. On April 3, 2015, a hearing was conducted on Petitioner's motion to stay the PCR at the Richland County Courthouse before the Honorable Brooks P. Goldsmith. Petitioner was present and represented by Tricia Blanchette, Esquire. Respondent was represented by J. Clayton Mitchell, Esquire. Upon conclusion of the hearing, the Court ordered Petitioner's PCR application be held in abeyance until a final resolution be reached on Petitioner's motion for a new trial. On February 9, 2015, Petitioner appeared before the

Honorable Robert E. Hood to argue a motion for a new trial based on after-discovered evidence. By order dated July 29, 2015, Judge Hood denied the motion for a new trial.

On February 17, 2016, Petitioner through PCR counsel, filed an amendment to his original PCR application alleging ineffective assistance of trial counsel. Applicant filed a subsequent amendment to his PCR application on June 2, 2016, alleging further claims of ineffective assistance of trial counsel. The PCR court convened an evidentiary hearing into the matter on July 12, 2016, at the Richland County Courthouse. Petitioner was present at the hearing and represented by Tricia Blanchette, Esquire. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Petitioner testified on his own behalf. Also testifying at the evidentiary hearing were Petitioner's sister, Patricia Brockington; and Petitioner's trial counsel, Douglas Strickler (Strickler) and Lesley Coggiola (Coggiola). By written order dated December 14, 2018, the PCR court denied Petitioner's claims and dismissed his application for relief with prejudice.

Petitioner filed a timely notice of appeal of the denial of post-conviction relief. On July 1, 2019, Petitioner, through counsel, filed a petition for writ of certiorari in this Court.

STATEMENT OF THE FACTS

The victim child in this case, P.G., was two years old when she died of head injuries sustained as a result of child abuse.[1] App. p. 173. At the time, P.G. and two of her older siblings, H.G. and N.G., were living with their foster parents, Petitioner and his wife. App. p. 472.

Dr. Robert Hubbird, the attending physician in the intensive care unit (ICU) at Palmetto Children's hospital, was qualified as an expert in pediatric intensive care. App. pp. 139-42. Dr. Hubbird testified he was called to the emergency room at Richland Palmetto Memorial Hospital on March 28, 2000, when P.G. came in. App. p. 144. Hubbird recalled "the child was being intubated in the emergency room... because the child was not breathing properly. . . . The child was in shock, and I needed to be down there to help with the care and resuscitation of this child." App. p. 143. Hubbird testified he performed an initial neurological assessment of the child, which showed she was "not responsive to pain in any meaningful way, not moving around, [her] pupils were not responding as they should..." and there were hemorrhages in her retinas. App. pp. 148, 152. Dr. Hubbird testified the doctors ordered a CT scan, which showed a subdural hematoma and swelling of the brain with a "midline shift."[2] App. pp. 150, 153-54. Hubbird explained the midline shift meant the right side of the brain was pushed over again the left side, indicating "massive, massive swelling and... massive damage." App. p. 154.

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[1] Prior to the start of testimony, one juror sent a note to the judge notifying him he was bothered by "gore" and had a history of passing out. App. p. 135. The judge explained there would likely be photographs of bruising introduced during trial, and the juror specifically stated that would not bother him. App. pp. 135-36. The judge determined the jury was qualified to serve, but informed the jury he should notify the judge if he was bothered during trial. App. p. 136. The records reflects the juror never raised the issue again.

[2] On cross-examination, Hubbird conceded the CT scan showed two hematomas – one "acute," or new, and one "chronic," or older. App. p. 190. Dr. Hubbird agreed he did not know the circumstances under which the initial hematoma occurred. App. p. 202. However, Hubbird testified he did not believe P.G.'s injuries were caused by the older hematoma re-bleeding into itself. App. p. 212.

Hubbird testified all of these findings indicated child abuse as the cause of her injuries. App. p. 155. According to Hubbird, the evidence of retinal hemorrhaging, the subdural hematoma, and the brain swelling, taken together, are "virtually diagnostic" of "shaken baby syndrome." App. p. 175. Dr. Hubbird explained shaken baby syndrome is "violent, whiplash-like shaking of an infant or small toddler." App. p. 175. Hubbird further testified these types of injuries do not result from a normal fall or a quick, one-time trauma to the head, and instead they only result from violent injuries such as an automobile accident or fall from a multi-story building. App. pp. 175-76. However, Hubbird noted, in those instances, you expect to see other injuries, such as broken bones, which were not present on P.G. App. p. 176.

Hubbird testified he spoke with Petitioner and Petitioner's wife to obtain the child's history for diagnostic purposes. App. p. 158. Petitioner told Hubbird P.G. had been alert and in good health earlier in the morning, and then had a "jerky seizure." App. p. 158. Dr. Hubbird specifically inquired of Petitioner about any history of trauma such as a car accident, a substantial blow to the head, or ingestion of a foreign object, but Petitioner denied any such history. App. pp. 158-60. Hubbird stated "the history of the child that was related to me did not fit" the child's condition, which was a "red flag." App. p. 159. Dr. Hubbird testified he brought in two other doctors, Dr. Linda Christmann and Dr. Anne Abel, to confirm the diagnosis. App. pp. 165-66.

Dr. Christmann, who was qualified as an expert in pediatric ophthalmology, testified she consults on cases where child abuse is suspected. App. pp. 230, 232. Christmann testified she is often called to determine the presence or absence of retinal hemorrhaging in a child-patient because "retinal hemorrhages occur much more frequently in babies who are shaken or intentionally injured as compared to those who are injured accidentally." App. p. 234.

Dr. Christmann testified she first examined P.G. shortly after P.G.'s birth, because she was premature, which can lead to a specific eye problem called renitopathy prematurity, but P.G.'s exam was negative. App. p. 239. Christmann examined P.G. again approximately one month later and diagnosed P.G. as farsighted, with a recommendation for follow up in one year. App. pp. 239-40. Christmann examined P.G. again at the follow-up appointment in December 1999, by which time P.G.'s farsightedness had resolved, and she had no other eye issues. App. p. 240. Christmann specifically testified P.G. did not have any retinal hemorrhages at the December 1999 exam. App. p. 240.

Christmann examined P.G. again in March 2000 when she presented to the emergency room after this incident, and at that time, Christmann noted multiple retinal hemorrhages in both of P.G.'s eyes. App. pp. 241-43. Christmann stated the hemorrhages "were not the kind of hemorrhages that occur when there is pressure on the brain only..." and instead they were the kind "very characteristically seen in shaken baby syndrome." App. p. 244. Dr. Christmann further testified the hemorrhages had occurred "very recently" – not more than twenty-four to forty-eight hours prior. App. pp. 244-45. Dr. Christmann confirmed Hubbird's testimony that the retinal hemorrhaging she observed in P.G. could not be caused by a normal fall or accidental shaking, or inflicted by a child, and instead they could only be caused by a fall from several stories or a "very violent shaking." App. p. 246.

Next, Dr. Abel, the director of the Child and Adolescent Protection Center at the Children's National Medical Center in Washington, D. C., testified about her involvement in P.G.'s case as an expert in forensic pediatrics. App. pp. 281, 284. Abel testified she is often called in on cases to given an opinion on whether child abuse is present. App. p. 285. Abel examined P.G. on March 29, 2000, at Dr. Hubbird's request. Abel explained she reviewed P.G.'s medical chart, including

lab reports and imaging studies; spoke with other physicians involved in P.G.'s case; reviewed the history given by Petitioner and his wife, as well as by DSS; and conducted her own physical examination of P.G. App. pp. 286-88. Abel testified P.G. had "brown bruises... on both of her buttocks and the upper arm" which were at least eighteen hours old, and possibly as old as two weeks. App. pp. 290, 292. Abel testified the bruising resulted from blunt force trauma such as a beating, being thrown into a wall, or a car wreck. App. pp. 295-96.

Abel concluded P.G. "had evidence of inflicted held trauma, which is a form of physical child abuse. . . . Putting it all together she looked the victim of multiple forms of physical abuse." App. p. 297. Abel testified P.G.'s injuries "told me that she had signs and symptoms of shaken baby syndrome, as well as a battered child." App. p. 297. Abel further confirmed the testimony of Doctors Hubbird and Christmann, stating P.G.'s condition was caused by "acute subdural hematoma related to shaking, because the eye findings were fresh and they could not be attributed to shaking three weeks ago." App. p. 298. Dr. Abel also confirmed P.G.'s injuries could not have been accidental, caused by a fall, or inflicted by a child. App. p. 299. Finally, Abel testified P.G.'s injuries could not be caused by a "rebleed" of the earlier hematoma because P.G. also had brain swelling, which does not occur with rebleeding. App. pp. 302-04. Dr. Abel testified P.G.'s injuries were caused by a recent, violent head injury. App. p. 304.

Dr. Timothy Close, a radiologist at Palmetto Richland Memorial Hospital was qualified as an expert in that field, testified he reviewed P.G.'s CT scan. App. pp.325-26, 328, 330. Dr. Close testified "there was blood inside the skull...pushing the right side of the brain..." which "looked like it was probably very new." App. pp. 330-31. Close also noted "a very small amount of old blood that was on the same side." App. p. 331. Close opined the older subdural hematoma was at least a month old, and the new blood was "within a few days old. . . . [or] may only be a few hours

old – as in twelve or less." App. pp. 334, 344, 350. Because of the rate of bleeding and the swelling of P.G.'s brain, Close testified he believed the new blood to be less than twelve hours old at the time of the CT. App. pp. 373-74, 379-80.

Close testified a spontaneous rebleed of an old subdural hematoma does not occur in healthy children.[3] App. pp. 352-53. Close explained the old hematoma was small, and the new hematoma was "a large bleed.... a significant bleed." App. p. 353. Close opined the new bleed had to occur because of new trauma, and not "just because there was an old bleed. . . ."[4] App. p. 353. Close explained although the two hematomas were on the same side, they were not in the same area as he would expect to see if the acute hematoma was caused by rebleeding. App. p. 354. He concluded the two hematomas were caused by separate traumatic events. App. p. 354.

Close testified, "I believe this baby was shaken and then some." App. p. 360. Close explained, based on the characteristics of the new blood seen on the CT scan, "while that could happen from a shaken baby, that would take much more immense pressure than I would ever assume from a shaken baby." App. p. 359. Close noted he had only seen similar bleeding in children who had been in car wrecks or fallen from a three-story building. Close testified the bleeding P.G.'s case could be from "a very hard blow from the cuff, from the heel of the hand, and the rest of the injuries are more likely from shaken baby than anything else." App. pp. 361-62. Close agreed P.G.'s injuries were not accident and could not have been caused by a fall from the height of a toddler or another child pushing P.G. down. App. pp. 362-63, 387.

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[3] Close testified he reviewed P.G.'s medical records from birth, which included an ultrasound of the brain. Close noted the ultrasound indicated possible small bleeds in a different part of the brain, but he testified the CT scan indicated those had resolved and were not involved in the acute hematoma in any way. App. pp. 355-57.

[4] Close testified, "You can get re-bleed from shaken baby..." but given the extent of the new bleeding, he believed P.G.'s injuries were caused by "shaken baby and a blow." App. p. 382.

Dr. Robert Burns, a pathologist at Richland Memorial Hospital, conducted P.G.'s autopsy and testified as an expert in pathology. App. p. 393. Dr. Burns noted bruising in several spots on P.G.'s body, including her buttocks. App. p. 399. Burns testified he examined P.G.'s internal organs and opined she was a normal, healthy child. App. p. 407. Burns testified the condition of P.G.'s brain was consistent with brain death, and the examination of her eyes revealed the presence of retinal hemorrhages, as well hemorrhaging around the optic nerve of the left eye. App. pp. 408-09. Burns stated his autopsy findings were "consistent with a baby that had been shaken violently." App. p. 411. He also stated his examination of the bruises on P.G.'s buttocks showed fresh and old bleeding. App. p. 430.

Dr. Bryan Rabon testified he worked in the Pediatric ICU when P.G. came into the unit. App. p. 434. Rabon stated Hubbird tasked him with speaking to Petitioner to obtain P.G.'s history – specifically to inquire if she had suffered any falls, blows, or accidents, or if Petitioner could provide any other information to explain P.G.'s condition. App. p. 435. According to Rabon, Petitioner told him, P.G. "was in the bathroom that morning and subsequently went to the bathroom and fell out and was unresponsive." App. p. 436.

Similarly, the DSS worker, Cookie Grant, testified she responded to the hospital to speak with Petitioner and his wife about what happened to P.G., and Petitioner told her "he took her to the bathroom just like he did every morning, and when he took her to put her Pamper on, that she had a seizure." App. pp. 468-69, 476. Petitioner told Grant he was the only adult present in the home at the time. App. p. 477.

P.G's older sister, N.G., was four when P.G. died; six at the time of trial. App. pp. 115, 494. N.G. testified[5] she witnessed Petitioner spanking P.G., hitting her on the back, on the morning P.G. died. N.G. explained, "[Petitioner] was spanking her hard and harder and she died." App. p. 121. N.G. testified her sister was laying on the bed in Petitioner's room while the spanking occurred. App. p. 122. N.G. stated Petitioner spanked P.G. because she had wet the bed the night before and kept turning the lights on in their room, waking up N.G. App. p. 123. N.G. further testified the whole family took P.G. to the hospital, and P.G. died. App. pp. 123-24. However, on cross-examination, N.G. agreed the spanking had nothing to do with turning the light on and off, and she previously told the forensic interviewer Petitioner spanked P.G. because P.G. would not pull up her diaper. App. pp. 127-29. N.G. also testified she called her foster mother at work and told her to come home. The foster mother then told her to call the police, who came and arrested Petitioner.[6] App. pp. 127-28, 130-31.

Dr. Allison DeFelice, of the children's advocacy center Assessment Resource Center (ARC), was qualified as an expert in child psychology and forensic interviewing and testified regarding her interaction with N.G. after P.G.'s death. App. pp. 486-88. DeFelice testified she was trained to look for evidence of fabrication or storytelling in children, but the primary issue with younger children is "how we ask the questions to elicit the correct, the true, information." App. p. 489. DeFelice also testified she looks for evidence of coaching or suggestion made to the child. App. p. 489. Dr. DeFelice further testified she did not see any signs of coaching in her initial

[5] N.G.'s testimony was taken by videotaped deposition and presented to the jury at trial. App. p. 485.

[6] The record reflects the police were not notified of the incident nor responded to the residence until after P.G. was taken to the emergency room. App. pp. 498-501, 671.

interview with N.G., and N.G.'s account was "consistent from what she had said at the outset." App. pp. 491-92.

DeFelice then testified she interviewed N.G. again about a month prior to trial to assess competency and whether N.G. could tell the truth from a lie; whether N.G. had memories surrounding her sister's death; and N.G.'s emotional wellbeing and the impact on her of testifying in front of Petitioner at trial. App. p. 493. Dr. DeFelice confirmed N.G. had independent memories of the events surrounding P.G.'s death, and opined, generally, four-year-old children are capable of remembering something that happened two years previously. App. pp. 493-95. DeFelice also testified it could be difficult for a six-year-old child to testify in front of a room full of strangers. App. p. 495.

In his initial signed statement to law enforcement, Petitioner denied he spanked the children beyond a "pop" on the hand, and he specifically denied ever hitting them on the buttocks.[7] App. pp. 514-518, 526. Petitioner stated he did not see any bruises on P.G.'s bottom on the morning of the incident and did not know how she could have gotten any. App. p. 521. Petitioner claimed he was putting a diaper on P.G. in his bedroom when she "stiffened up." App. pp. 522-23. Petitioner stated he called his wife, while holding P.G. and continuing to try to get a response from her. App. p. 523. Petitioner claimed his wife arrived home about five minutes, and he drove the family to the hospital at Richland. App. pp. 523-24. According to Petitioner, P.G. was not moving during the car ride, but she did respond to his wife a few times, saying, "Mama." App. p. 525. Petitioner claimed P.G. was still breathing when they arrived at the hospital. App. p. 525.

[7] Petitioner testified he told investigators about the spanking in his first statement, but that the officer "didn't put that in there on that one." App. p. 821.

After being served with the arrest warrant, Petitioner gave a second statement. In that statement, Petitioner admitted he spanked P.G. "with [his] belt. Then her brother, H.G., knocked her down from behind. When [he] got to P.G., she was gagging for air and her eyes were rolling. [He] shook her back and forth, side to side, trying to get her to breathe."[8] App. pp. 532, 534. When asked how long he shook P.G., Petitioner claimed "it didn't seem like but a couple of seconds. It may have been longer." App. pp. 534-35.

However, at trial, Petitioner admitted to spanking the children and testified he used a belt when an offense went beyond warranting a "time out," or a "pop on the hand." App. pp. 803-04. Petitioner testified he "popped" both H.G. and P.G. on the buttocks with his belt on the morning of the incident for playing in the toilet. App. pp. 807-08. According to Petitioner, both children left the bathroom, then H.G. came back into the doorway and said, "Papa, look." App. p. 808. R. 625, 1. 3 -626, 1. 23. Petitioner testified P.G. was "laying down in the hallway... not moving or crying,"[9] so he carried P.G. into his bedroom, and as he was pulling on her diaper, "she just stiffened up on me." App. pp. 808-10. Petitioner testified he then called his wife at work and told her only that "[P.G.] stiffened up." App. pp. 810-11. Based on this information, Petitioner's wife responded she would come home right away and told Petitioner "to put [P.G.] in a blanket and have her ready to go." App. pp. 811, 870. When his wife returned approximately five minutes later, she "grabbed the baby and said 'get the other two kids and let's go.'" App. p. 873. Petitioner claimed they took P.G. to Richland Memorial because that is where all of the children's doctors' appointments were. App. p. 812. Petitioner did not call 911. App. p. 872.

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[8] In his trial testimony, Petitioner denied he ever admitted shaking P.G. to law enforcement. App. p. 822.

[9] On cross-examination, Petitioner admitted P.G. was not "awake" at this point but claimed she was also not unconscious and did not go limp in his arms when he picked her up, although she was not responsive to him calling her name. App. pp. 865-66.

The defense also presented an expert witness. Dr. Wayne Ross, a forensic pathologist working at multiple coroners' offices in Pennsylvania, was qualified as an expert in forensic pathologist and biomechanics. App. pp. 548, 551, 553. Ross reviewed P.G.'s birth records, as well the autopsy, CT scan, and other medical records from the incident. App. p. 557-58. Dr. Ross acknowledged this case raised suspicions of child abuse and warranted investigation. App. p. 558. Dr. Ross testified diagnosing child abuse based on the subdural hematoma, brain edema, and retinal hemorrhaging was "too simplistic" in this case because "you've got to figure out where that chronic bleed comes from." App. p. 560.

Dr. Ross opined P.G.'s brain bleed was caused by "a bleeding problem. It's probably originating from the brain, but clearly the child has a bleeding problem."[10] App. pp. 562-63. Ross further testified rebleeds of chronic subdural hematomas can occur spontaneously, even in children. App. p. 561. Ross also stated retinal hemorrhaging can occur from increased intracranial pressure alone, and it does not always indicate child abuse. App. pp. 562-64. Ross testified, "So once you get a bleeding disorder, all bets are off. If you want to try to say it's clearly due to shaking, you can't say that because once you get a bleeding disorder, you can bleed from anywhere around those eyes and it just makes it worse." App. p. 566. Dr. Ross opined P.G.'s medical records indicated she "had a major clotting problem." App. pp. 566-67. According to Ross, a rebleed of the chronic hematoma could be sufficient to cause the other issues with brain edema and retinal hemorrhaging, leading to death. App. pp. 583-84.

Dr. Ross further stated he did not believe merely shaking a child was sufficient to cause a subdural hematoma and some impact is also required. App. p. 567. Ross testified it appeared "the

[10] Petitioner admitted on cross-examination he took P.G. to the doctor on a regular basis, and to his knowledge, she did not suffer from any kind of blood clotting disease or related ailment requiring treatment while she was in their home. App. p. 830.

new bleed is due to a rebleed from the chronic bleed." App. p. 572. Dr. Ross stated a rebleed could occur spontaneously or from a simple fall. App. p. 573. While Ross agreed P.G.'s death was caused by complications from subdural bleeding and swelling of the brain, he opined he could not say a manner of death because the investigation was not complete as to the source of the chronic subdural hematoma. App. p. 579. Dr. Ross testified subdural hematomas are not caused solely by child abuse and could occur after other head trauma or from natural causes. App. p. 581. Ross stated, in this case, he could not rule out accidental trauma as the cause of the acute hematoma. App. p. 584.

Dr. Clay Nichols testified in reply for the State and noted P.G.'s autopsy and lab reports did not identify that she had any other diseases. He testified the clotting issue in P.G.'s brain was caused by the hematoma, not the other way around. App. pp. 899-900. Dr. Nichols also concurred with the State's previous experts that spontaneous rebleeds to do not occur in children. App. 898-99. Nichols further agreed the two hematomas resulted from separate incidents, and he characterized the older one as "somewhat insignificant." App. p. 901. Dr. Nichols concluded P.G.'s injuries "clearly" resulted from child abuse. App. p. 903.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. The PCR court correctly found Petitioner was not prejudiced by trial counsels' failure to object to the testimony of the forensic interviewer, Dr. Allison DeFelice, when her testimony related only to N.G.'s statements at trial that Petitioner spanked P.G. on the morning of her death, as Petitioner himself admitted to the spanking in his testimony.

The PCR court found Petitioner's trial counsel deficient for failing to object to the testimony of Dr. Allison DeFelice, a forensic interviewer with the ARC, as improper bolstering. App. p. 1513. After N.G.'s video testimony was played for the jury, DeFelice testified she was trained to look for evidence of fabrication or storytelling in children, but the primary issue with younger children is "how we ask the questions to elicit the correct, the true, information." App. p. 489. DeFelice also testified she looks for evidence of coaching or suggestion made to the child. App. p. 489. Dr. DeFelice further testified she did not see any signs of coaching in her initial interview with N.G., and N.G.'s account was "consistent from what she had said at the outset." App. pp. 491-92.

"[A] forensic interviewer may not be permitted to give testimony that improperly bolsters the credibility of the victim." Briggs v. State, 421 S.C. 316, 323, 806 S.E.2d 713, 717 (2017). "[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." Id. at 324, 806 S.E.2d at 717; see also State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) (finding the law "clear that no witness may give an opinion as to whether the victim is telling the truth"). Thus, the PCR court correctly found counsel was deficient for failing to object on basis of bolstering.

However, Petitioner's claim fails on this issue because the fact Petitioner spanked P.G. on the morning of the incident was not a contested fact at trial, and therefore, Petitioner cannot prove he was prejudiced by trial counsels' deficiency. To establish prejudice, Petitioner is required to

show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Here, two facts were undisputed at trial: (1) Petitioner spanked P.G. on the morning of her collapse; and (2) the spanking did not cause the subdural hematoma that ultimately led to P.G.'s death.

N.G. never testified she saw Petitioner shake P.G. or even mentioned the word. N.G. testified only that she witnessed Petitioner "spanking" P.G. on her back the morning P.G. died. N.G. testified her sister was laying on the bed in Petitioner's room while the spanking occurred. App. p. 122. Although Petitioner claimed the spanking occurred in the bathroom, not the bedroom, Petitioner himself admitted to spanking P.G. He testified on direct examination he "popped" both H.G. and P.G. on the buttocks with his belt on the morning of the incident for playing in the toilet. App. pp. 807-08.

However, both the defense expert, Dr. Ross, and the State's experts, Drs. Burns and Abel, agreed the spanking or bruising from the spanking was a separate injury than the head trauma which led to the subdural hematoma. App. pp. 297, 411, 624-25. Moreover, the State argued it only wanted N.G.'s testimony in evidence to prove the spanking, presumably because Petitioner originally denied it in his first statement to law enforcement, and the State never argued the spanking caused or contributed to P.G.'s death. App. pp. 134, 997. In fact, in closing, the solicitor specifically told the jury, "no dispute, ladies and gentlemen.... these injuries were not caused by a spanking. . . ." App. p. 997. The only manner of injury the State ever advanced was shaken baby syndrome. None of the State's experts testified a "spanking" caused the injuries. All of the doctors specifically testified P.G.'s injuries were the result of violent shaking. App. pp. 175, 244, 298, 360,

411. As the solicitor told the jury, "there is no explanation for [P.G.'s] injuries other than that child was violently shaken." App. p. 1001.

Further, the PCR court correctly found the State offered overwhelming scientific evidence indicating the cause of death in this case was shaken baby syndrome, despite the fact that no witness could testify to seeing Petitioner actually shake P.G. App. p. 1513. Petitioner characterized the trial as a "battle of the experts" because the defense presented its own expert who testified the acute, new bleeding was a rebleed from the older hematoma. PWC p. 8. Although the defense expert opined the child had a clotting disorder, this finding was contradicted by the autopsy. App. p. 407, 566-67, 899. The defense expert also testified he could not determine the exact cause of the initial hematoma, only that it was "either natural or traumatic." App. p. 584. Moreover, numerous State experts testified P.G.'s injuries could only have occurred through a significant automobile accident, a multi-story fall, or violent shaking. App. pp. 175-76, 298-99, 360, 362-63, 387, 411. However, the history provided by Petitioner eliminated any possibility of accidental trauma or disease. App. pp. 158-60, 436, 830.

As a result, the PCR court correctly found Dr. Defelice's testimony, even if it was impermissible bolstering which should have been objected to by trial counsel, did not prejudice Petitioner such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. App. p. 1514. Given Petitioner's own admission to spanking P.G. and the overwhelming scientific evidence of shaken baby syndrome, Petitioner has failed to meet his burden of proving he was prejudiced by counsels' failure to object to DeFelice's testimony, and this Court should deny certiorari as to this issue.

II. The PCR court correctly found trial counsel were not deficient nor was Petitioner prejudiced by counsels' failure to ask for excusal of a juror and a mistrial after the juror informed the trial court he was concerned about being presented with "gory" evidence.

Petitioner argues his counsel should have moved to remove a juror or moved for a mistrial because of the juror's note which indicated he may not be able to handle "gory" testimony. App. p. 135. When questioned, the juror could not specifically define what he meant by "gory" and stated only, "sometimes it affects me and sometimes it doesn't." App. p. 135. However, the juror specifically stated photographs of bruises would not bother him. App. p. 135. The juror promised to do his best to get through the evidence and testimony, and the trial court instructed him to notify the court if he had a problem. App. p. 136. The record reflects the juror never notified the trial court he was having a problem after testimony began. Thus, the PCR court correctly found counsel was not deficient because counsel had no legal basis for making such motions, and Petitioner was not prejudiced because he presented no evidence, other than trial counsel's hindsight speculation, the juror failed to do his job properly. App. pp. 1514-15.

"The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. A mistrial should be granted only when absolutely necessary. Further, before a defendant may receive a mistrial, he or she must show both error and resulting prejudice." State v. McEachern, 399 S.C. 125, 145-46, 731 S.E.2d 604, 614 (Ct. App. 2012) (internal citations omitted). "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." State v. Kirby, 269 S.C. 25, 28-29, 236 S.E.2d 33, 34-35 (1977). Further, a "PCR applicant's mere speculation is insufficient to establish prejudice and, accordingly, the applicant must put forth

further evidence to support his claim." Glover v. State, 318 S.C. 496, 501, 458 S.E.2d 538, 541 (1995) (Waller, J., dissenting).

In this case, the juror notified the trial court of his concern about gory testimony only as a precaution, and once the testimony began, the juror never indicated he could not handle the presentation or could not perform his duties properly. App. p. 1504. Despite Petitioner's contention in his petition, nothing in the juror's note indicated he could not be impartial. PWC p. 14, App. p. 1504. Petitioner concedes there was no basis for moving for a mistrial. PWC p. 14. Likewise, the PCR court correctly found counsel had no meritorious basis for moving to remove the juror, and Petitioner presented only speculative testimony as to whether removing the juror would have had any effect on the outcome of his trial. The PCR court correctly found this insufficient to meet his burden of proving prejudice. This Court should therefore deny certiorari as to this issue.

III. The PCR court correctly found trial counsel were not deficient to object to the solicitor's closing argument regarding what Petitioner's wife knew as being unsupported by the record or reasonable inferences to be drawn from it.

Petitioner testified after he spanked P.G. in the bathroom, he found her laying unresponsive in the hallway. App. pp. 807-08. Petitioner claimed he then called his wife at work and told her only that "[P.G.] stiffened up." App. pp. 810-11. Based on this information alone, Petitioner's wife responded she would come home right away and told Petitioner "to put [P.G.] in a blanket and have her ready to go." App. pp. 811, 870. Petitioner testified they had no other conversation. App. p. 870. When his wife returned approximately five minutes later, she "grabbed the baby and said 'get the other two kids and let's go.'" App. p. 873.

In closing argument, the solicitor noted the strangeness of Petitioner's wife's reported reaction. She argued:

> 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.*

App. p. 1019 (emphasis added). The PCR court correctly found these statements by the solicitor were inferences which could be drawn from the record presented. App. p. 1516.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. "If a solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). Additionally, "[t]he closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture . . . because to shear him of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice." United States v. Isaacs, 493 F.2d 1124, 1164 (7th Cir. 1974) (citations and internal quotations omitted).

Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "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." Id. In making this determination, appellate courts will review the alleged impropriety in the context of the entire record. State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003).

Here, Petitioner's own testimony was that he called his wife and told her only "P.G. stiffened up," which was enough to convince her, without any further details or conversation, to leave work and immediately return home. According to Petitioner himself, her only response was to tell him to wrap the child up in a blanket and wait for her to arrive. When she did, according to Petitioner, she immediately took the child from him and went to the hospital. As the PCR court correctly noted, the solicitor used Petitioner's own words to draw a reasonable inference that Petitioner's wife knew the situation was likely serious, and she did not trust Petitioner 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.

Thus, the PCR court correctly found trial counsel was not deficient because the argument was proper, and therefore, not objectionable. Because trial counsel was not deficient by not objecting to this argument, this Court should deny certiorari as to this issue.

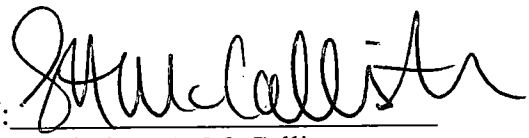
CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari and affirm the PCR court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

December 16, 2019

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
DEC 16 2019
S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
The Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2019-00069

NATHANITL MITCHELL,

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 the applicant by placing one copy in the United States Mail, addressed to:

Ms. Kathrine H. Hudgins
S.C. Commission on Indigent Defense
1330 Lady St., Ste.401
Columbia, SC 29201

This 16th day of December, 2019.

Erik Marcusson
Legal Assistant for Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 16 2019
S.C. SUPREME COURT

December 16, 2019

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

RE: Nathaniel Mitchell v. State of South Carolina
Appellate Case No.: 2019-00069

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
S.C. Bar # 79054

LAM/em
Enclosures

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division