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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas

CAPITAL PCR ACTION

APPEAL FROM PICKENS COUNTY
Honorable Alexander S. Macaulay, Circuit Court Judge

Jerry Buck Inman, #5256
a/k/a Jerry Buck Inmon.....Respondent-Petitioner

v.

State of South Carolina.....Petitioner-Respondent.

Appellate Case No. 2020-000881

STATE'S RETURN TO INMAN'S CROSS-PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. The PCR court did not "make specific findings of fact, and state expressly its conclusions of law," as required by S.C. Code Ann. § 17-27-80, regarding Jerry Inmon's PCR allegation that his trial counsel rendered constitutionally deficient assistance of counsel, under the Sixth Amendment to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, for failing to investigate, develop, and present mitigation evidence that was available at the time of the sentencing hearing regarding Mr. Inmon's life history, adaptability to incarceration, and extremely rare medical condition that is treatable and controllable with a common, inexpensive medication, when that very mitigation evidence explained Mr. Inmon's conduct at the time of the crimes, explained the State's aggravating evidence, precluded a finding that Mr. Inmon is an "animal" who "cannot be rehabilitated," and would have led to a sentence of life imprisonment without the possibility of parole.

II. The PCR court did not "make specific findings of fact, and state expressly its conclusions of law," as required by S.C. Code Ann. § 17-27-80, regarding Jerry Inmon's PCR allegation that his appellate counsel rendered constitutionally deficient assistance of counsel, under the Sixth Amendment to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, for not appealing Mr. Inmon's motion to continue his sentencing hearing so that he would have sufficient time to obtain another mitigation investigator after Dr. Loring refused to participate in Mr. Inmon's case because the prosecutor intimidated her by threatening to arrest her if she testified.

III. The PCR court did not "make specific findings of fact, and state expressly its conclusions of law," as required by S.C. Code Ann. § 17-27-80, regarding Jerry Inmon's PCR allegation that his appellate counsel rendered constitutionally deficient assistance of counsel, under the Sixth Amendment to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, for not appealing the trial court's order denying his request to plead guilty and have his sentence determined by the jury when that right is protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution after trial counsel preserved that issue for appellate review.

IV. The PCR court did not "make specific findings of fact, and state expressly its conclusions of law," as required by S.C. Code Ann. § 17-27-80, regarding Jerry Inmon's PCR allegation that his trial counsel rendered constitutionally deficient assistance of counsel, under the Sixth Amendment to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, for advising him to plead guilty and appeal the trial judge denying his request for jury sentencing when existing state law did not allow jury sentencing following a guilty plea in a capital case.

V. The PCR court did not "make specific findings of fact, and state expressly its conclusions of law," as required by S.C. Code Ann. § 17-27-80, regarding Jerry Inmon's PCR allegation that his trial counsel rendered constitutionally deficient assistance of counsel, under the Sixth Amendment to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, for failing to object to the judicial rush to judgment, including the foregone conclusion that the sentence would be death.

STATE'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether trial counsel's strategic decision not to develop and present additional mitigation evidence was reasonable when that evidence would have opened the door to the introduction of aggravating information unknown to the State, would have weakened one of Inman's appellate issues, and was largely cumulative to other expert testimony.

II. Whether appellate counsel's strategic decision not to challenge the denial of Inman's motion to continue was reasonable where Dr. Loring's subsequent testimony made a continuance unnecessary, the trial court had already given counsel seven months to find and prepare a replacement, and trial counsel failed notify the court that the replacement would be unavailable for a year.

III. Whether appellate counsel's strategic decision not to raise a constitutional challenge to S.C. Code Ann. § 16-23-20 was reasonable where this Court had repeatedly rejected similar challenges and counsel had stronger claims to raise on appeal.

IV. Whether trial counsel's advice to challenge the constitutionality of S.C. Code Ann. § 16-23-20 constituted ineffective assistance of counsel where that advice did not induce Inman to plead guilty but simply raised another potential issue for appeal.

V. Whether trial counsel should have objected to a "judicial rush to judgment" where there was no evidence that the trial judge was predisposed to rule a certain way, but instead continued the case for seven months so that counsel could obtain a replacement expert witness.

STATEMENT OF THE CASE[1]

In November 2006, the Pickens County Grand Jury returned indictments against Inman for murder, kidnapping, criminal sexual conduct in the first degree[2], and burglary in the first degree. (App. 2588-95). The State subsequently notified Inman of its intent to seek the death penalty. (App. 2596). This Court assigned the case to the Honorable Edward W. Miller. Attorneys James Bannister, Symmes Culbertson, and John DeJong were appointed to represent Inman. Thirteenth

[1] The State additionally relies upon its Statement of the Case and Statement of Facts in its Petition for Writ of Certiorari to this Court.

[2] The indictment for criminal sexual conduct was subsequently amended in August 2008. (App. 2590-91).

Circuit Solicitor Robert Arial prosecuted the case along with his deputy, Betty Strom. (App. 3002, 3440, 3921).

Inman pleaded guilty in August 2008. As part of the guilty plea, the court received testimony from Dr. Donna Schwartz-Watts regarding Inman's competency to stand trial. (App. 3924-34). Dr. Schwartz-Watts assessed there was "no question" that Inman was competent. (App. 3934). After a lengthy colloquy, the trial court accepted Inman's guilty plea and deferred sentencing until the following month. The court specifically ensured that Inman understood that by pleading guilty, South Carolina Code Ann. § 16-23-20 required sentencing by the judge, not a jury. (App. 3942-44, 3972-73).

Sentencing began on September 8, 2008. (App. 3002). The State called eleven witnesses, who testified about the nature of the crime, the impact on surviving victims, and the character of the accused. See e.g. State v. Shuler, 577 S.E.2d 438, 442 (2003); State v. Humphries, 479 S.E.2d 52, 56 (1996). For example, in 1987 Inman broke into a woman's house in Florida, tied her up, and raped her at gunpoint. (App. 3101-3112). He would be sentenced to thirty years for armed burglary, two counts of kidnapping, sexual battery, aggravated assault, and theft of a motor vehicle. (App. 3113-14). While serving prison time, he was also convicted of second degree sexual assault and escape. (App. 3114). His sentence for those crimes ran concurrently with his charges from Florida. (App. 3114).

After being released from prison, Inman returned to his home in Tennessee. (App. 3061). On May 22, 2006, he broke into a woman's home in Sevierville, Tennessee after her husband had left for work. The woman woke up to find Inman holding a knife to her throat. Inman tied her up and raped her as her two year old daughter watched. (App. 3195-99). The following day, he drove to Rainsville, Alabama and broke into another woman's house. When the woman returned home for lunch, Inman creeped up from behind, covered her mouth, and put a knife to her throat. Inman

only decided not to rape this woman after learning she was on her period. Instead, he took her purse, money, and car. (App. 3121-38). From there, Inman would drive to Clemson University. (App. 3164-65).

In the early morning hours of May 26, 2006, Inman broke into an apartment shared by several female students at Clemson. (App. 3948-49). Only one was inside at the time, Tiffany Souers. (App. 3948). Inman woke her up, bound her hands, and raped her. (App. 3950). Afterwards, he choked her to death with a bikini top. (App. 3950). The forensic pathologist testified that although the victim would have quickly lost consciousness, Inman needed to maintain the stranglehold for several minutes to kill her. (App. 3232-35). The pathologist also testified that the bikini top was twisted so tightly that the circumference of the victim's neck collapsed by three inches. (App. 3230). In fact, the "ligature was completely embedded into the neck." (App. 3231). Once the victim was dead, Inman took her ATM card and fled the scene. He tried to take money from the victim's bank account, but could not remember the pin number. (App. 3950-51).

The defense called several witnesses in mitigation. During voir dire of a clinical social worker, Dr. Marti Loring, the solicitor pointed out that she was unlicensed to practice in South Carolina. (App. 3329). Additionally, the solicitor informed the court that practicing without a license in South Carolina carries civil and criminal penalties. (App. 3329). The defense objected on the grounds of witness intimidation. (App. 3331). After the trial court allowed Dr. Loring to consult with an attorney, she invoked her right to remain silent. (App 3432). The trial court subsequently continued the case so that the defense to obtain a replacement for Dr. Loring. (App. 3435).

The proceedings reconvened on April 20, 2009. The court noted that although the solicitor's comments were inappropriate, Dr. Loring lacked grounds to invoke her right to remain silent. (App. 3467-68). Nevertheless, the defense declined to call Dr. Loring in mitigation. (App.

3668). Instead, Inman moved for a continuance in order to provide Dr. Loring's replacement additional time to prepare. (App. 3659). According to the defense, that expert would be unavailable for a year. (App. 3664). The trial court denied the motion to continue and called Dr. Loring as a court's witness. (App. 3668-3719). Once the court heard all the evidence and closing arguments from both sides, it retired to deliberate. (App. 3752). In a written order announced from the bench, the court sentenced Inman to death. (App. 2577-85, 3752-65). This Court affirmed on direct appeal. State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011).

Inman subsequently applied for post-conviction relief (PCR) in June 2012. (App. 488-95). In addition to the five claims of ineffective assistance of counsel raised here, Inman alleged that S.C. Code Ann. § 16-23-20 "as written by the General Assembly and construed by the South Carolina Supreme Court, denied [him] his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed." (App. 794-95). The Honorable Alexander S. Macaulay presided over an evidentiary hearing in August 2018. (App. 837).

The PCR court granted relief on Inman's challenge to the constitutionality of 16-23-20. (App. 2, 60). The court ordered "the matter remanded to the Court of General Sessions of Pickens County for a new trial by an impartial jury." (App. 60). As for Inman's remaining claims, including these allegations of ineffective assistance of trial and appellate counsel, the court held:

> [the claims] are not addressed as the further proceedings upon remand shall be consistent with the proper conduct of the trial had [sic] pursuant to this judgment of the Court. Moreover, ***the record of the proceedings, and the testimony received at the PCR hearing support and confirm that trial counsel diligently prepared, assiduously and aggressively represented Inman throughout the representation***. Further, ***both trial and appellate counsel made reasoned and careful decisions to raise and present the particular issues involved at the time***.

(App. 4)(emphasis added). Each party filed Rule 59(e) Motions to Alter or Amend Judgment. (App. 92-100, 226-39). The PCR court denied them both. (App. 69-74).

Both parties now seek certiorari from this Court. The State filed a Petition for Writ of Certiorari regarding the PCR court's grant of relief. Inman has also filed a cross-petition seeking review of these five claims of ineffective assistance of trial and appellate counsel. The State now submits this return to the cross-petition.

ARGUMENT

I. TRIAL COUNSEL'S STRATEGIC DECISION NOT TO DEVELOP AND PRESENT ADDITIONAL MITIGATION EVIDENCE WAS REASONABLE BECAUSE IT WOULD HAVE OPENED THE DOOR TO ADDITIONAL AGGRAVATING EVIDENCE, WEAKENED INMAN'S CLAIM OF PROSECUTORIAL MISCONDUCT, AND WAS LARGELY CUMULATIVE TO OTHER EXPERT TESTIMONY.

Inman alleges ineffective assistance of counsel in failing to investigate, develop, and present mitigation evidence at sentencing. Specifically, he claims trial counsel failed to offer two categories of evidence. First, trial counsel allegedly should have instructed Dr. Schwartz-Watts to further investigate biastophilia, a rare sexual paraphilia in which individuals rape not to dominate or control, but because "it is their only sexual outlet." (Cross Pet. 18). Second, Inman claims that trial counsel should have called Dr. Loring as a defense witness at sentencing. According to Inman, Dr. Loring left out critical details when she testified as a court's witness. (Cross Pet. 26). Alternatively, Inman believes trial counsel failed to timely prepare a replacement witness for Dr. Loring.

Neither of these claims have merit. As the Court is aware, in order to prove ineffective assistance of counsel, Inman must establish deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984). Under Strickland, trial counsel is "strongly presumed" to have rendered effective assistance, and the burden rests with the post-conviction applicant to prove otherwise. Id. at 690. Trial counsel "has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary." Id. at 691. Reviewing courts "evaluate counsel's performance in the realistic context of representing a capital defendant…which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time. Stone v. State, 419 S.C. 370, 401, 798 S.E.2d 561, 578 (2017)(quoting Wiggins v. Smith, 539 U.S. 510, 523 (2003)(internal citations omitted). When assessing a decision not to pursue additional investigation, courts must apply "a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691.

Mitigation From Dr. Schwartz-Watts

Trial counsel's decision to limit the investigation of Dr. Schwartz-Watts was reasonable for several reasons. First, he made the decision in the context of having already lined up testimony from Dr. David Price, a forensic neuropsychologist. At sentencing, Dr. Price testified at length regarding Inman's history of mental illness and sexual paraphilia. (App. 3256-3315). According to Dr. Price, Inman's capacity to conform his conduct was "substantially impaired" due to "a compulsive drive to rape." (App. 3259, 3310). Dr. Price also recounted a history of abuse in which Inman's biological father would tie up the children and sexually abuse them. (App. 3276). That history was noteworthy because Inman's crimes follow a similar pattern. Dr. Price believed that "it's almost like that pattern is being repeated. And it's maybe like a repetition compulsion. He is acting out something that's happened to him…that's a part of his compulsive rape." (App. 3276). Dr. Price further assessed that Inman was not "at risk to rape in prison." (App. 3311). In short, the testimony largely overlapped with what Dr. Schwartz-Watts later provided at PCR. Both experts raised mitigation themes addressing Inman's mental illness and sexual paraphilia, traumatic upbringing, and impairment in conforming his conduct.

Second, had trial counsel called Dr. Schwartz-Watts to the stand, he would have opened the door to evidence of additional, *unreported* rapes committed by his client. Dr. Schwartz-Watts

made clear that unlike many other experts, she would document her findings in writing. (App. 1285). In her preliminary report from September 2008, she noted that Inman described forcibly raping at least *thirteen* women. (App. 1875). The sentencing judge only heard evidence that Inman raped three: Suzanne Clavel (App. 3100-12), Jessica Gann (App. 3194-3205), and Tiffany Souers (App. 3235, 3947-62). Trial counsel knew that if he called Dr. Schwartz-Watts as a witness, he would have to disclose this report to the solicitor. (App. 1119); See also Rule 5(b)(1)(B), SCRCrimP. In other words, the sentencing judge would have learned there were ten other rape victims whose stories he did not hear. Understandably, trial counsel said, "No, thank you." (App. 1326).

Third, Dr. Schwartz-Watts diagnosed antisocial personality disorder, which presented additional problems for the defense. Trial counsel had personally observed the solicitor effectively cross-examine witnesses about antisocial personality disorder. (App. 1119). As such, he did not believe the diagnosis was helpful. (App. 1120). In contrast, trial counsel assessed that Dr. Price's diagnosis of dissociative personality disorder had greater mitigation value. (App. 1119). Dr. Price's diagnosis connected the crimes to Inman's traumatic upbringing without the baggage associated with antisocial personality disorder. (App. 1119-20); See also Fulks v. United States, 875 F.Supp. 535, 560 n. 21 (D.S.C. 2010)(noting that antisocial personality disorder has been described as "the kiss of death, because to many people, and most judges, this means that the defendant is little more than a remorseless sociopath.")(quoting John H. Blume & David P. Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, 24 Champion 69 (Apr. 2000)).

Given the problems already baked into the evaluation, trial counsel was in position to reasonably conclude additional investigation from Dr. Schwartz-Watts would be detrimental to the case. See Strickland, 466 U.S. at 691. Once he learned of that her testimony would open the door

to ten unreported rapes and a psychological diagnosis the solicitor was prepared to discredit, "counsel understandably decided 'not to spend valuable time pursuing what appeared to be an unfruitful line of investigation.'" Wilson v. Greene, 155 F.3d 396, 403 (4th Cir. 1998) (quoting Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991). Dr. Price could raise the same mitigation themes without inviting these problems.

Dr. Loring's Additional Testimony

At the PCR hearing, trial counsel testified that aside from the constitutional challenge to § 16-23-20, "[t]here weren't a lot of issues in the case." (App. 1035). As such, "a lot of what we were doing was, I guess, playing for the fumble, if you will." (App. 1935). Prior to trial, he researched mistakes the solicitor had made on other capital cases that could have potentially caused a mistrial. (App. 1035). One such mistake was suggesting that an out of state expert faced criminal penalties for testifying in South Carolina without a license. (App. 1035). When the solicitor went down the same path at Inman's sentencing, trial counsel was ready for the fumble. (App. 1039). According to counsel, "at that point, it became an issue that just grew legs as we continued into it." (App. 1035-36).

When the sentencing proceedings reconvened, trial counsel strategically chose not to call Dr. Loring as a witness. To do so would potentially jeopardize the prosecutorial misconduct issue on appeal. (App. 1131-32). At the time of trial, the law recognized that governmental intimidation of a witness could be deemed harmless if the witness nonetheless testifies. See State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); see also Inman, 395 S.C. at 566, 720 S.E.2d at 45 (noting the same). Trial counsel specifically cited Williams when initially raising his objection at sentencing. (App. 3333). At the PCR hearing, counsel testified that he believed the trial court and the solicitor were attempting to "fix" the error by bringing Dr. Loring back after the months' long

continuance. (App. 1054-55). As a "zealous advocate," he could not "participate in what was the attempt to cure the solicitor's error." (App. 1131).

The same rationale applies to trial counsel's attempts to find a replacement for Dr. Loring. Any testimony from the replacement would weaken the argument that prejudice arose from the solicitor's error. See Williams, 326 S.C. at 135, 485 S.E.2d at 102. When trial counsel advised the court that Dr. Loring's replacement would be unavailable for a year, the court recognized counsel's strategy. According to the court, it was readily apparent that trial counsel was "more interested in pursuing the misconduct issue" than in presenting additional mitigation evidence. (App. 3672). Given that the trial court had already heard mitigation evidence from Dr. Price (App. 3256-87), Dr. Tournay (App. 3352-64), James Aiken (App. 3365-85), Inman's sister (App. 3386-3402), Inman's pastor (App. 3402-07), and ultimately Dr. Loring herself (App. 3673-3721), counsel's decision was reasonable. As this Court previously observed, any additional testimony in this case was "arguably cumulative" to what the sentencing judge already heard. Inman, 395 S.C. at 566, 720 S.E.2d at 45.

In short, trial counsel reasonably assessed that additional investigation was not in his client's best interest. See Strickland, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). To the contrary, the additional information would have only hurt his client's case. Not only would it have exposed evidence of ten other forcible rapes, but it would have weakened his ability to pursue the claim of prosecutorial misconduct. As such, he PCR court correctly found that:

> the record of the proceedings, and the testimony received at the PCR hearing support and confirm that trial counsel diligently prepared, assiduously and aggressively represented Inman throughout the representation. Further both trial and appellate counsel made reasoned and careful decisions to raise and present the particular issues involved at the time.

(App. 4).

The PCR court's order complies with the directive in Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019). Although the order notes the denied claims "are not addressed," the court meant the claims would not be addressed in an in-depth fashion like its handling of the constitutional challenge to § 16-23-20. (App. 4). In the same paragraph, the court addresses the claims. Although the order addresses the remaining issues summarily, it complies with Fishburne because the court made findings of fact and conclusions of law on each issue. Fishburne, 427 S.C. at 512, 587. Unlike Fishburne, the PCR court did not overlook any claims. Certiorari should be denied on these issues because the record supports the PCR court's conclusion.

II. APPELLATE COUNSEL'S STRATEGIC DECISION NOT TO CHALLENGE THE DENIAL OF INMAN'S MOTION TO CONTINUE WAS REASONABLE BECAUSE DR. LORING'S SUBSEQUENT TESTIMONY MADE A CONTINUANCE UNNECESSARY, THE TRIAL COURT HAD ALREADY GIVEN COUNSEL SEVEN MONTHS TO FIND AND PREPARE A REPLACEMENT, AND TRIAL COUNSEL FAILED TO NOTIFY THE COURT THAT THE REPLACEMENT WOULD BE UNAVAILABLE FOR A YEAR.

Appellate counsel need not raise every colorable claim on appeal. Jones v. Barnes, 463 U.S. 745, 751-54 (1983). Indeed, "winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986)(quoting Barnes, 463 U.S. at 751-52). As such, failing to raise an issue on appeal "is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." Davila v. Davis, 137 S.Ct. 2058, 2067 (2017). Additionally, even if appellate counsel was deficient, Inman must establish prejudice. Smith v. Robbins, 528 U.S. 259, 285 (2000). Doing so requires a showing that there was a reasonable probability that he would have prevailed on appeal had counsel raised the issue. Id.

Inman failed to establish ineffective assistance of counsel on either of these claims, which the PCR court correctly found. Although Inman believes the PCR court's order does not comply with Fishburne, as noted above the court made sufficient findings of fact and conclusions of law on each issue. Fishburne, 427 S.C. at 512, 587. With respect to these two allegations of ineffective assistance of appellate counsel, the court found "appellate counsel made reasoned and careful decisions to raise and present the particular issues involved at the time." (App. 4). Certiorari should be denied on these issues because the record supports the PCR court's conclusion.

Motion To Continue
(Claim II)

A trial court's ruling on a motion to continue will not be disturbed on appeal "unless there is an abuse of discretion that resulted in prejudice." State v. Smith, 387 S.C. 619, 622, 693 S.E.2d 415, 417 (Ct. App. 2010). As such, overturning a conviction on this ground is "about as rare as the proverbial hens' teeth." State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996)(quoting State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). Given the long odds, appellate counsel wisely chose to focus the Court's attention on other issues that were plainly stronger than this one. Had he raised this issue on direct appeal, it would have almost certainly failed.

The claim had little, if any, merit because the trial court acted within its discretion in denying the motion to continue. When the trial court reconvened in April 2009, there was no need to call a replacement mitigation expert. Dr. Loring appeared and testified as a court's witness. Inman, 395 S.C. at 566, 720 S.E.2d at 45. As this Court later recognized on direct appeal, "the [trial] judge properly called and questioned her as a court's witness." Id. Trial counsel had the opportunity to elicit additional mitigation from Dr. Loring, but chose not to do so. Id. In fact, he objected to portions of Dr. Loring's testimony on grounds of attorney-work product. (App. 3701). The objections led the trial court "to the conclusion that counsel for [Inman] is more interested in

pursuing the misconduct issue than in presenting a full defense. And as a result -- the assertion that due process is violated is disingenuous." (App. 3672).

Additionally, the trial court had already given counsel seven months to obtain a replacement witness. The court initially continued the case in September 2008 to provide an opportunity to find a replacement for Dr. Loring. (App. 3436). As the court adjourned, it directed trial counsel to "[s]tay in touch with me and let me know when I need to set aside more time to resolve the rest of the case." (App. 3436). Trial counsel subsequently obtained an ex parte funding order for the replacement expert on January 2, 2009. (App. 3662). The parties then agreed to resume sentencing on April 20, 2009. (App. 4053).

Nevertheless, trial counsel sought another continuance immediately before the proceedings reconvened. (App 3659). Apparently, the replacement expert would be unavailable for *another year* due to her caseload. (App. 3664, 3672). Trial counsel informed the court that he thought the case was moving forward only on his motion for a mistrial, not the remaining mitigation witnesses. (App. 3663). The court's skepticism is readily apparent from the transcript. It reads:

> THE COURT: Are you telling me you understood that we were just going to come today – or this week and do half of it?
>
> [Trial Counsel]: Judge, when I – if you look at the transcript, what it says is –
>
> THE COURT: [Trial counsel], outside of the transcript, we've had discussions. There's no question that this was going – we were going to proceed with this case today.

(App. 3663). The court further noted that it "was never informed" of any scheduling problems arising from the replacement's caseload. (App 3672).

The trial court acted within its discretion in denying the motion to continue. Trial counsel should have raised the problem in obtaining a replacement witness when the issue became known, not on the eve of proceedings. State v. Nelson, 431 S.C. 287, 304, 847 S.E.2d 480, 489 (Ct. App.

2020)("Generally, a motion for a continuance should be made at the time the underlying reason for such becomes known."). Furthermore, the replacement became unnecessary when Dr. Loring testified. Because the trial court had sufficient grounds to deny the motion to continue, appellate counsel wisely focused on stronger issues. See Robbins, 528 U.S. at 288. Accordingly, this claim of ineffective assistance of counsel falls short. Certiorari should be denied.

III. APPELLATE COUNSEL'S STRATEGIC DECISION NOT TO RAISE A CONSTITUTIONAL CHALLENGE TO S.C. CODE ANN. § 16-23-20 WAS REASONABLE BECAUSE THIS COURT HAD REPEATEDLY REJECTED SIMILAR CHALLENGES AND COUNSEL HAD STRONGER CLAIMS TO RAISE.

Inman also claims that appellate counsel lacked a strategic reason for not pursuing the constitutional challenge to § 16-23-20 on appeal. (Cross Pet. 36). Specifically, he cites appellate counsel's testimony in which he could not recall the holding in Blakely v. Washington[3] or various cases from other jurisdictions. (Cross Pet. 36). This argument is smoke and mirrors. Appellate counsel retired from the practice of law before oral argument on the direct appeal. (App. 1355). By the time he testified at PCR, ten years had passed since he wrote the brief. (App. 1352). At the hearing, appellate counsel explained that due to the passage of time, "[a] lot of these cases I just don't remember." (App. 1359).

But appellate counsel could recall that the constitutional issue was settled in the eyes of this Court. (App. 1354). Although he could not "remember the names of the cases," he knew "there were at least two" in which this Court rejected the argument that jury sentencing is constitutionally required following a guilty plea. (App. 1359). Because the issue was settled, appellate counsel tried to turn that into his advantage. He argued that trial counsel's insistence on preserving the issue for appeal rendered the guilty plea conditional. (App. 1354). In other words,

[3] 542 U.S. 296 (2004).

contrary to Inman's argument, appellate counsel's testimony reveals a strategic reason for not attempting to reopen a settled issue.

The Court's opinion on the direct appeal confirms this was a wise decision. In noting that appellate counsel did not raise the constitutional challenge to § 16-3-20, the Court observed "he *correctly recognized* that this issue has been decided against his position." Inman, 395 S.C. at 556, 720 S.E.2d at 40 (emphasis added). Additionally, the Court cited four cases in which it rejected the argument. Id. See State v. Allen, 386 S.C. 93, 687 S.E.2d 21 (2009); State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004); State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004). An appellate attorney "does not perform deficiently by failing to raise novel arguments that are unsupported by then-existing precedent or by failing to anticipate changes in the law, or to argue for an extension of precedent." United States v. Palacios, 982 F.3d 920, 924 (4th Cir. 2020)(quoting United States v. Morris, 917 F.3d 818 (4th Cir. 2019)(internal quotations omitted). Inman cannot establish ineffective assistance of appellate counsel on this claim. Certiorari should be denied.

IV. NOT ONLY WAS TRIAL COUNSEL'S RECOMMENDATION TO CHALLENGE § 16-23-20 REASONABLE, BUT INMAN ALSO FAILED TO ESTABLISH HIS DECISION TO PLEAD GUILTY WAS CONTINGENT UPON THAT CHALLENGE.

Inman argues that if the law was settled regarding a capital defendant's right to jury sentencing following a guilty plea, then trial counsel must have rendered ineffective assistance of counsel in advising him to plead guilty. (Cross Pet. 41). Inman also believes the PCR court erred in failing to make specific findings on this issue in accordance with § 17-27-80 and Fishburne. (Cross Pet. 39-43). There is no merit to either of these claims. As noted above, the PCR court made specific findings regarding each claim raised in accordance with Fishburne. (App. 3-4). Furthermore, Inman offered no evidence to support the claim that his guilty plea arose from

deficient legal advice or was conditioned upon his ability to challenge § 16-23-20. Accordingly, certiorari should be denied.

Trial counsel testified that Inman was "adamant" on pleading guilty from the start. (App. 958). Inman's insistence on pleading guilty even prompted trial counsel to research whether his client "had the right to do that with or without my consent or with or without my advice." (App. 958). After researching the issue, trial counsel concluded that Inman could "enter a guilty plea and there would be nothing I could do to stop it."[4] (App. 958). Co-counsel corroborated that account. He testified that "Inman always expressed a desire to enter a guilty plea, and I think that was because he saw that as a way to alleviate whatever grief the [victim's] family was under." (App. 1465-66). Eventually, trial counsel was able to convince Inman to at least let the defense team argue that he had a constitutional right to jury sentencing following a guilty plea. (App. 962).

Although Inman permitted the defense team to pursue a constitutional challenge to § 16-23-20, his decision to plead guilty was not conditioned on that challenge. See Inman, 395 S.C. at 555, 720 S.E.2d at 40 (noting Inman's appellate challenge to § 16-23-20 "did not affect the entry or validity of his plea."). In addition to his lawyers' testimony at the PCR hearing discussed above, the plea colloquy confirms Inman's decision was independent from his constitutional challenge. The judge made a point to ensure that Inman wanted to plead guilty regardless of his ability to challenge § 16-23-20. (App. 3942-43, 3972-73).

Moreover, Inman never established how his attorneys provided deficient legal advice. If anything, their testimony at the PCR hearing suggests they recommended that he *not* plead guilty. (App. 958). Their recommendation to additionally mount a challenge to settled law, standing

[4] See also McCoy v. Louisiana, 1338 S.Ct. 1500, 1508 (2018)("Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo and appeal.").

alone, does not constitute deficient performance. Such advice was objectively reasonable because it was cost free. See Strickland, 466 U.S. at 688 ("[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness."). Inman gave up nothing to mount that challenge because he already wanted to plead guilty, even if it meant having a judge decide his fate.[5] Raising the challenge to § 16-23-20 only gave Inman more options to pursue on direct appeal and post-conviction relief.

As Inman correctly notes, to establish a claim of ineffective assistance of counsel, he must show that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988)(quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Unfortunately for Inman, he cannot prove either of these two elements. There is no evidence of attorney error. And there is no connection between the legal advice he received and his decision to plead guilty. Certiorari should be denied.

V. THERE WAS NO EVIDENCE OF A "JUDICIAL RUSH TO JUDGMENT" BECAUSE THE SENTENCING JUDGE NEVER SUGGESTED ANY PREDISPOSITION AND HAD INDEPENDENT GROUNDS TO DENY INMAN'S SECOND MOTION TO CONTINUE.

In his final claim, Inman alleges ineffective assistance of counsel in failing to object to a "judicial rush to judgment, including the foregone conclusion that the sentence would be death." (Cross Pet. 42). He cites a portion of the solicitor's deposition testimony indicating the trial judge "had an agenda…And that was: Let's get through this case. You know, I know what the decision – I know what the verdict is going to be." (App. 1930). Inman argues the trial judge's denial of his motion to continue supports the solicitor's statement. (Cross Pet. 42). Like the other claims

[5] At the PCR hearing, Inman informed the court, "I understand that there's a question of when I pled guilty, that I was asking for a jury trial. That's false. When I pled guilty, it was with the understanding that I wanted a judge sentencing and not a jury sentencing. And I understood that, and, again, that's what I wish for." (App. 1029).

raised in his cross-petition, Inman also believes the PCR court's order failed to address the claim as required under § 17-27-80 and Fishburne.

This claim lacks merit for two reasons. First, Inman has taken the solicitor's testimony out of context. Later during his deposition, the following question was posed to the solicitor:

> Q: Did Judge Miller ever indicate to you or were you aware of anyone suggesting that Judge Miller was predisposed to any sort of sentence while this case was proceeding?
>
> A: **No**. In fact – and when I say agenda, I don't mean that it was a hidden agenda. Judge Miller had an obvious agenda that any trial judge has in any case in which there is a -- an incident occurs: Let's get through this and finish the case.

(App. 1931)(emphasis added). The solicitor further explained that the word "agenda" can have a negative connotation, which was not his intent. (App. 1931). Contrary to Inman's claim, the solicitor believed that the trial judge might be reluctant to impose a death sentence. (App. 1932). After all, the trial judge had been a longtime assistant public defender and was "a very staunch believer" in ensuring a defendant's constitutional rights were protected. (App. 1932).

Second, as discussed in the response to Claim II above, the trial judge had independent grounds to deny Inman's motion to continue. When Dr. Loring appeared and testified as a court's witness, the reason for the continuance ceased to exist. As this Court previously recognized, "the [trial] judge properly called and questioned her as a court's witness." Inman, 395 S.C. at 566, 720 S.E.2d at 45. Furthermore, the court had already given trial counsel seven months to obtain a replacement. During that time, trial counsel never informed the court that the replacement would be unavailable to appear in court for another year. (App. 3672). Trial counsel had a duty to inform the court of any scheduling problems when they first arose, not at the start of the proceedings. Nelson, 431 S.C. at 304, 847 S.E.2d at 489.

Therefore, the PCR court correctly denied this claim. Its findings that trial counsel "diligently … represented Inman throughout the representation" and "made reasoned and careful decisions to raise and present the particular issues involved at the time" are supported by the record and satisfy Fishburne's requirement to address every issue raised. Accordingly, certiorari should be denied.

CONCLUSION

For the reasons stated herein, Inman's Cross-Petition for Writ of Certiorari should be denied.

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