STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

Honorable D. Craig Brown, Circuit Court Judge

NATHANIEL MITCHELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-000069

BRIEF OF PETITIONER

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

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

STATEMENT

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

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

Petitioner filed an application for post-conviction relief [PCR] on October 8, 2007, and November 5, 2007. (App. pp. 1056 – 1084). Additionally, on October 8, 2007, Petitioner filed a motion for disclosure of discovery and a motion for appointment of counsel. (App. pp. 1091-1108). The State filed a return and motion to dismiss on March 4, 2008. (App. pp. 1085-1090). On September 11, 2008, the Honorable J. Michelle Childs signed an order granting Petitioner's motion to appoint counsel and motion for disclosure of discovery. (App. pp. 1109-1110). On March 2, 2012, Petitioner filed an amendment to the application for post-conviction relief. (App. pp. 1111-1113). On January 16, 2012, Petitioner filed a motion for abeyance. (App. pp. 1114 - 1134). The State filed a response on February 29, 2012. (App. pp. 1135-1138). On August 16, 2012, the Honorable James R. Barber, III, signed an order appointing the Richland County Public Defender Office to represent Petitioner for the limited purpose of filing a motion for new trial

based on after discovered evidence pursuant to Rule 29(c), SCRCrimP. (App. pp. 1139-1140). On January 14, 2015, Petitioner filed a memorandum of law in support of the motion for new trial. (App. pp. 1144-1176). On April 3, 2015, a hearing was held before the Honorable Brooks P. Goldsmith on the motion for abeyance. The order holding the PCR action in abeyance until the motion for new trial was resolved was not signed until September 11, 2015. (App. pp. 1141-1143).

On February 9, 2015, a hearing was held before the Honorable Robert E. Hood on the motion for new trial. E. Fielding Pringle represented Petitioner. (App. pp. 1177-1404). Joanna A. McDuffie represented the State. In an order signed July 29, 2015, Judge Hood denied the motion for new trial based on after discovered evidence. (App. pp. 1405-1409). On February 17, 2016, Petitioner filed a second amendment to the application for post-conviction relief. (App. pp. 1410-1412). On June 2, 2016, Petitioner filed a third amendment to the application for post-conviction relief. (App. p. 1413). On July 12, 2016, an evidentiary hearing was held before the Honorable D. Craig Brown. (App. pp. 1415-1503). Tricia Blanchette represented Petition. Jessica Kinard represented the State. In an order signed December 6, 2018, Judge Brown denied relief and dismissed the application. (App. pp. 1505-1527). A timely notice of intent to appeal was served on January 16, 2019. A petition for writ of certiorari was filed on July 1, 2019. The return was filed on December 16, 2019. On January 5, 2022, this Court granted the petition for writ of certiorari as to issues one and three and denied the petition as to issue two. This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018), (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016), and Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). "We review questions of law de novo, with no deference to trial courts." Id. at 180-81, 810 S.E.2d at 839-40 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527, and Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). "[W]e will reverse the PCR court's decision when it is controlled by an error of law." Sellner, 416 S.C. at 610, 787 S.E.2d at 527.

ARGUMENTS

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

The jury found Petitioner guilty of homicide by child abuse for the death of one of his three foster children who Petitioner and his wife were in the process of adopting. The State's theory was that the two-year old child died as a result of so called "shaken baby syndrome." (App. pp. 105-107). At trial the judge granted, over objection, the State's motion to videotape the testimony of the deceased child's older sister, NG. (App. pp. 13-50). NG was four at the time of the death of her two-year old sister and six at the time of trial. When asked on the video if she remembered what Papa [Petitioner] was doing to Minor [the two-year old sister], NG testified that, "He was spanking her hard and harder and she died." (App. p. 121, lines 7-12). When asked if she remembered what he was spanking her with, NG testified, "His belt." (App. p. 125, lines 7-9).

After NG's video testimony was played for the jury (App. p. 485, lines 2-21), the State called as their next witness Dr. Allison DeFelice. (App. p. 485, lines 22-25). Dr. DeFelice conducted a forensic interview with NG. (App. p. 491, lines 5-18). The doctor was qualified, without objection, as an expert in child psychology and forensic interviewing. (App. p. 488, lines 7-11). The prosecutor asked Dr. DeFelice, in the presence of the jury, about older children fabricating allegations. (App. p. 488, line 25 – p. 489, lines 1-3). The prosecutor then asked, "And are you trained - - do you have any specialized training in looking for any evidence of fabrication or story telling?" (App. p. 489, lines 4-6). Dr. DeFelice answered, "Yes." (App. p. 489, line 7). The prosecutor then asked, "And Doctor, in younger, children, though, children under the ages of three, four, five and six, fabrication, is that a reality with children that age?" (App. p. 489, lines 8-11). The doctor testified, "Well, the issues are different with preschool children. They can't

appreciate the cause and effect relationship. In other words, if I say certain things, what - - how the grownups will react or will happen, so they're not motivated in the same way older children are. The main issue with younger children is how we ask the questions to elicit the correct, the true, information." (App. p. 489, lines 12-20). The prosecutor went further and asked, "And, of course, whenever you interview a small child where fabrication is not a real concern, you're always concerned with any kind of coaching or suggestion made to the child." (App. p. 489, lines 21-24). The doctor agreed. (App. p. 489, line 25).

The prosecutor asked Dr. DeFelice, in the presence of the jury, "But during the course of that interview, did you see any coaching or deception on the part of the child?" (App. p. 491, lines 22-24). Dr. DeFelice answered, "No, none." (App. p. 491, line 25). De DeFelice was next asked, "And was her account of what had happened as it was given to you, not what it was, consistent from what she had said from the outset?" (App. p. 492, lines 1-3). Dr. DeFelice answered, "Yes." (App. p. 492, line 4). Trial counsel failed to object to the prosecutor's questioning.

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

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

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

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

In testifying, as an expert, that she saw no deception on the part of NG and that she had an independent memory of what happened, the doctor improperly vouched for or bolstered the credibility of the witness. Although the doctor did not directly testify that NG knew the difference between the truth and a lie, it was implied. See Briggs v. State, 421 S.C. 316, 329, 806 S.E.2d 713, 720 (2017) (n. 4 omitted) ("Similarly, her testimony that she made the determination the child understood the difference between a truth and a lie before she conducted the interviews is not part of her evidentiary role. Arroyo-Staggs' testimony not only revealed to the jury that she believed the child knew the difference, but she also indirectly revealed she believed the subsequent disclosure in the interview was the truth. There was no purpose for this testimony except to bolster the victim's credibility, and thus it was improper.").

In the second amendment to the application for post-conviction relief Petitioner alleged, "Ineffective assistance of trial counsel for failure to make contemporaneous objections during the trial testimony of Dr. DeFelice regarding the forensic interview, treatment and opinions regarding the child witness, which amounted to inadmissible bolstering of the child witness." (App. p. 1410). During the PCR hearing Petitioner testified that his attorneys should have objected to the testimony

of Dr. DeFelice. (App. pp. 1426-1428). When questioned about the testimony of Dr. DeFelice at the PCR hearing trial counsel Strickler testified, "In 2002, 2003, I certainly was aware of the concept of an objection for bolstering and that being the basis to move for a mistrial in a particular case. If, indeed, the testimony appears to be such that that's what she was engaged in, we should have objected in that regard." (App. p. 1453, lines 1-5).

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

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

would have to make their own determination on that, but for the other evidence to be the witness of one child, it would make a huge impact." (App. p. 1485, lines 11-17).

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

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

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

First, while the death did not result from Petitioner beating his foster daughter with a belt, the State argued in closing that the beating, as testified by NG, was part of the shaking and actions that did cause the death. In closing argument the prosecutor told the jury:

> You saw her. She got up here and she was able to tell you what she saw that morning because as the defense brought up, she woke up and she ran in and she

> heard something. By the time she got in there, and we don't speculate and we don't have to prove the order in which he beat this child, we don't have to prove that, Ladies and Gentlemen, saw him beating her with the belt. She was naked on the bed and he was spanking her with the belt. Was he shaking her as he beat her, or had he already shaken her and continued to beat her?

(App. p. 1006, lines 2-14). According to the State, NG's testimony about the beating related to the cause of death, making the credibility of NG's testimony a critical factor for the jury in deciding guilt of homicide by child abuse. According to the State, the beating witnessed by NG was part of the sequence of events that led to the death of the child. The improper bolstering testimony from the expert was prejudicial. This is especially true in light of the fact that the prosecutor specifically argued to the jury that they either had to believe NG or they had to believe Petitioner. The prosecutor told the jury:

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

(App. p. 1006, line 21 – p. 1007, p. 1008 lines 1-3). Petitioner was prejudiced by the improper bolstering because a critical factor to be determined by the jury was whether to believe NG or believe Petitioner.

Second, although Petitioner admitted spanking Minor, Petitioner's description of the spanking and what followed was in sharp contrast to NG's description. Petitioner testified that he "popped" both Minor and her brother [HG] on the butt with a belt for playing in the potty. (App. p. 807, line 4 – p. 808, lines 1-9). Petitioner testified that after the spanking he cleaned the children and the potty and the children ran out. (App. p. 808, lines 10-19). Petitioner testified that next, "Well, at that time H.G. backed up in the door and said, 'Papa, look.'" (App. p. 808, lines 21-22). Petitioner testified that he saw Minor laying face down on the floor in the hallway and not moving. (App. p. 808, line 24 – p. 809, lines 1-13). Petitioner picked Minor up and carried her back to the bedroom where she "stiffened up." (App. p. 809, line 15 – p. 810, lines 1-18). Petitioner testified that he did not know what to do and called his wife at work. (App. p. 810, line 19 – p. 811, lines 1-11). Again, Petitioner was prejudiced by the improper bolstering because a critical factor to be determined by the jury was whether to believe NG or believe Petitioner.

NG testified that she called the police and the police came to the house and she saw them take Petitioner away. On cross examination, however, the State's Chief Investigator, Investigator Jones with the Richland County Sheriff's Department testified that he could find no record of a 911 call being made on March 28, 2000, the morning of the incident (App. p. 671, lines 33-15). The investigator also testified that Petitioner was not arrested that morning. (App. p. 671, lines - 25). At the time of Petitioner's arrest, NG and her brother had already been removed from Petitioner's home by DSS. (App. pp. 498 – 500; p. 672, lines 4-7). The attempt to challenge the

apparent inconsistencies in NG's testimony was diminished by the improper bolstering by the expert witness.

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

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong,

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

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

The PCR judge correctly found deficient performance. Since Petitioner's trial in May of 2002, there has been significant development in the caselaw involving the testimony of forensic interviewers. See Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010); State v. McKerley, 397 S.C. 461, 725 S.E.2d 139, (Ct. App. 2012); State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). As the South Carolina Supreme Court noted, however, in Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017):

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

Based on the caselaw at the time of trial, specifically State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), the PCR judge correctly found that trial counsel was ineffective in failing to object to the testimony that improperly vouched for or bolstered the credibility of the witness. Although Dr. DeFelice did not treat NG, she directly commented on NG's credibility by testifying

that that she saw no deception on the part of NG, implied that NG understood the difference between the truth and a lie and testified that she had an independent memory of what happened.

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

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

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

Counsel's error affected the jury's critical credibility finding. The credibility of NG's testimony was critical because the spanking she testified about was, as argued by the State, a part of the sequence of events that caused Minor's death. NG's testimony about the spanking and what happened afterward varied significantly from Petitioner's testimony about the spanking. NG testified that when "Papa" spanked her younger sister she died. The jury had to make a critical

decision about the credibility of this testimony. Trial counsel Coggiola discussed the prejudice of the improper bolstering in light of the scientific evidence presented and testified, "It would have had a huge impact on the case as that was the – you know, I mean to have the scientific evidence being sort of the battle of the scientists, which you're going to have in these kinds of cases, the jury would have to make their own determination on that, but for the other evidence to be the witness of one child, it would make a huge impact." (App. p. 1485, lines 11-17). The State's evidence was not overwhelming. Trial counsel's error of failing to object to the improper bolstering testimony highly impacted the outcome of the trial.

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

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

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

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

(App. p. 1019, lines 2-13). Sonya Mitchell was Petitioner's wife who died while the case was pending trial. (App. p. 1431, line 21 – p. 1432, lines 1-18; p. 1475, lines 1-21). There is no evidence in the record to support the prosecutor's assertion that Sonya Mitchell knew Petitioner

abused the child. (App. p. 1476, lines 11-20). Trial counsel failed to object to the improper statement in closing argument.

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

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

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

(App. p. 1477, lines 17-24). Finally, with regard to the improper statement in closing argument, counsel Coggiola testified, "I feel badly that I didn't object to that, and I – you know, sometimes we let things go by, particularly in closings, out of, I don't know, courtesy or whatever our reasons

are at the time, but, you know, there are some things that should be objected to and this was one of them." (App. p. 1478, lines 13-18).

In the order of dismissal the PCR judge wrote, "First, this Court finds the statements by the solicitor were inferences which could be drawn from the record presented." (App. p. 1516). The PCR judge explained in the order, "The evidence indicated Applicant called his wife, who told him to wrap the child up and she would be there shortly. When she arrived, she immediately took the child from Applicant and went to the hospital. A reasonable inference from the testimony is that she did not trust Applicant to take the child to the hospital or otherwise give the child proper care because she knew he had not been good to the child in the past." (App. p. 1516). The record, however, reflects that after Petitioner found the child laying face down on the floor in the hallway and not moving, he picked her up and carried her back to the bedroom where she "stiffened up." (App. p. 808, line 24 – p. 809, 810, lines 1-18). lines 1-13). Petitioner testified that he did not know what to do and called his wife at work. (App. p. 810, line 19 – p. 811, lines 1-11). Petitioner testified, "I always called Sonya [his wife] if the kids got up with a cough or something. I always called her." (App. p. 811, lines 10-11). The wife told Petitioner to wrap the child in a blanket and have her ready to go. (App. p. 811, lines 21-22). Once his wife got home from work Petitioner testified that he put the child in her arms and Petitioner drove the wife, the child and the other two children to Richland Memorial Hospital. (App. p. 812, lines 1-15). On cross-examination Petitioner testified that his wife grabbed the baby and said, "get the other two kids and let's go." (App. p. 873, lines 14-15). A careful review of the testimony fails to show an inference that Petitioner's wife did not trust him to take the child to the hospital or otherwise give the child proper care. There is nothing in the record from which it could be inferred that his wife knew about any alleged abuse by Petitioner.

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

> Even if the State's comments went beyond the inferences available from the record, they did not result in such prejudice as to infect the trial with unfairness as to make the resulting conviction a denial of due process. The commentary was at most a rhetorical flourish that did not impact Applicant's defense. "The 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).
>
> When viewed in light of the overall record, this Court finds the commentary by the solicitor had negligible impact on the trial, especially considering there was overwhelming evidence of Applicant's guilt. As found previously, numerous experts all testified this was a case of shaken-baby syndrome and child abuse. They all testified the injuries sustained by the child victim were not accidental in nature and could not have been caused by another child. Applicant was the only adult present, and the only person capable of causing the injuries which lead to the child victim's death. The overwhelming evidence of Applicant's guilt precludes a finding of prejudice sufficient to require a new trial.

(App. p. 1517).

The PCR judge erred in finding no prejudice based on overwhelming evidence of guilt. A review of the record as a whole reflects that the evidence of guilt was not overwhelming. While the State's experts testified that the injuries were not accidental, the defense expert testified that there was not enough information to rule out the possibility that the injuries were the result of a natural disease or an accident. (App. pp. 579-585). As discussed above, evidence that the cause of death was "shaken baby syndrome" cannot be described as overwhelming when the case involved a battle of experts as to the cause of death and so called "shaken baby syndrome."

The prosecutor's comment that Petitioner's wife, Sonya Mitchell, knew Petitioner abused the child is not supported by the record. In State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996), the South Carolina Supreme Court wrote, "A solicitor's closing argument must not

appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)." While the Court in Copeland found that the solicitor's comments did not infect the trial with unfairness such that the conviction was a denial of due process, the Court wrote, "We take this opportunity to caution counsel to confine their comments to the facts presented and reasonable inferences from such facts. In this matter, Copeland's objections to the solicitor's comments were either properly overruled, or the objectionable portion was corrected by a curative charge. Based upon our review of the record as a whole, the solicitor's comments did not infect Copeland's trial with unfairness to the extent that her conviction was a denial of due process." 321 S.C. at 326, 468 S.E.2d at 625. Importantly, Copeland was a direct appeal and curative instructions were given. In the present case trial counsel was ineffective in failing to object to the prejudicial comment made by the prosecutor in closing argument that denied Petitioner a fair trial.

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

performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to object to the improper statement by the prosecutor in closing argument. The statement was outside the record and trial counsel admitted that she should have objected. In Fortune v. State, 428 S.C. 545, 549–50, 837 S.E.2d 37, 39–40 (2019), the South Carolina Supreme Court wrote:

> The Due Process Clauses in both the Fifth and Fourteenth Amendments provide that no person may be deprived of liberty "without due process of law." U.S. CONST. amend. V; *id.* amend. XIV, § 1. To find whether the assistant solicitor's comments in closing argument violated the defendant's due process rights, we must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. See Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144, 157 (1986) ("The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431, 437 (1974))); United States v. Chorman, 910 F.2d 102, 113 (4th Cir. 1990) (stating "the test for reversible prosecutorial misconduct" in a prosecutor's closing argument is "the prosecutor's remarks or conduct must in fact have been improper, and ... such remarks or conduct must have prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial" (citation omitted)).

Fortune v. State, 428 S.C. 545, 549–50, 837 S.E.2d 37, 39–40 (2019).

While the prosecutor's comment in the present case did not directly express a personal opinion about the guilt of Petitioner in her role as prosecutor, as in Fortune, the reference to a fact outside of the record is equally problematic. As the South Carolina Supreme Court noted in Fortune:

> The Supreme Court has condemned a prosecutor's closing argument in which he suggests to the jury his "personal impression[ ]" the defendant is guilty.
>
> > [S]uch 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.
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> United States v. Young, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 1048, 84 L. Ed. 2d 1, 14-15 (1985).

Fortune, 428 S.C. at 552–53, 837 S.E.2d at 41. The prosecutor's comment that Petitioner's wife, Sonya Mitchell, knew Petitioner abused the child conveys the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against Petitioner. The comment violates Petitioner's right to a fair trial in the same way as the comments in Fortune.

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

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

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

While the prosecutor in the present case did not misstate the law, as in Simmons, her comment that Petitioner's wife knew Petitioner abused the child is wholly unsupported by the record. Given the record as a whole, the comment so infected the trial with unfairness as to make Petitioner's conviction a denial of due process. There was not overwhelming evidence of guilt. Trial counsel was deficient in failing to object. There is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

CONCLUSION

Based on the above arguments, this Court should reverse the finding of the PCR court, find prejudicial ineffective assistance of counsel, reverse the convictions and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of February, 2022.