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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari from Spartanburg County
Honorable J. Mark Hayes, II, Post-Conviction Relief Judge
Honorable R. Keith Kelly, Trial Judge

Appellate Case No. 2022-000434

DANIEL SPADE,

Respondent-Petitioner,

vs.

THE STATE,

Petitioner-Respondent.

APPENDIX
VOLUME VII OF VII

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“In most PCR cases in which the applicant seeks relief for trial counsel’s failure to call witnesses, the PCR court’s analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” Buckson v. State, 423 S.C. 313, 320–21, 815 S.E.2d 436, 440 (citing Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64–65 (2011) (deferring to trial counsel’s strategic considerations); Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770–71 (1998) (same); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same)). “A PCR court’s analysis of counsel’s strategic decisions must be ‘highly deferential’ to counsel’s judgment, and ‘a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.’ ” Buckson, 423 S.C. at 321, 815 S.E.2d at 440 (quoting Strickland, 466 U.S. at 689)). “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id.

In Applicant’s case, trial made a sound, well-reasoned strategic decision not to present any lay, character, or expert witnesses. At the evidentiary hearing, Applicant presented his brother-in-law and a close personal friend in support of this allegation. Applicant’s brother-in-law, Joshua Trumpower, testified generally about what he perceived to be the victim’s anxiety based on his two visits with her. He also testified he observed the victim’s adoptive father speak about Applicant in a derogatory manner in front of the victim. He testified the victim’s maternal grandmother questioned him regarding Applicant’s finances and home-life with his fiancée and their children. Applicant’s close personal friend, Michael Mizak, testified generally that Applicant was a good father to his other children, although admitted he had not observed Applicant with the victim. Applicant did not introduce the deposition of his former fiancée, and accordingly, such evidence is not before this Court. Applicant did not produce any other lay or character witnesses in support of this allegation, and accordingly, cannot argue others should

have been called if not presented. See Martin v. State, 427 S.C. 450, 455, 832 S.E.2d 277, 279–80 (2019), reh’g denied (Sept. 19, 2019) (reaffirming Applicant must present witnesses or evidence in accordance with the rule of evidence to establish claims for failure to call a witness); Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) (“The applicant’s mere speculation what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.”).

When asked why he did not present lay or character witnesses, trial counsel testified he wanted to preserve his right to the final closing argument and did not want to lose the final argument by presenting lay or character witnesses that he did not think would have any impact on Applicant’s case. He also testified he did not want to present character evidence based on the likelihood the State would attempt to introduce its own evidence to rebut Applicant’s good character pursuant to Rule 404(a)(1), SCRE. He testified such possible evidence would include instances of domestic violence between Applicant and his fiancée for which Applicant pled guilty in Virginia, as well as possible investigations into sexual abuse of his other children. He also testified he made a strategic decision not to call particular witnesses based on the risk that they would be questioned on cross-examination about things that would be detrimental to Applicant, such as Applicant’s father who likely would have been questioned about an incriminating jailhouse conversation of a slip-and-slide game where Applicant informed his father he would bathe with his children and let them slide down his nude body, or Applicant’s sister who would likely be questioned about text messages with Applicant discussing how to “clean” a computer. Trial counsel also testified he did not present Applicant’s former fiancée Cara as a witness because they were no longer together at the time of Applicant’s trial and he believed she would have been a harmful witness to Applicant based on their history of domestic abuse.

Just as with his decision not to present expert witnesses, trial counsel also made a sound, well-reasoned decision not to call any lay or character witnesses. Such witnesses would have likely yielded little benefit to Applicant's case and had the potential to be very harmful by subjecting the witnesses to cross-examination by the State or opening the door to rebuttal evidence of Applicant's character under Rule 404(a)(1), SCRE. Trial counsel clearly considered and discussed calling possible witness and accordingly was not deficient in his performance. This allegation is denied.

Allegation: "Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony."

Applicant alleges trial counsel was constitutionally ineffective for "failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony." In support of this allegation, Applicant introduced numerous emails between the victim's parents and Applicant discussing the victim's anxiety concerns and the testimony of Applicant's brother-in-law, who spent two occasions with the victim. Applicant asserts trial counsel should have used these emails and presented witnesses such as his brother-in-law to establish there was an innocuous reason for Applicant's panic attacks aside from any sexual abuse by Applicant.

During trial, trial counsel asked and was permitted to proffer testimony from the victim's grandmother about alternative sources of causes of the victim's panic attacks, particularly her adoptive father. (Trial Tr. 221-228). After the proffer, the State moved to exclude such questioning based on third-party guilt. Trial counsel responded,

Your Honor, the difference in this case and the cases that are cited in this brief that I have been handed this afternoon is that the evidence that the defense tried to present in those cases was actual solid evidence that they didn't commit the act in question.

This is a situation where there are allegations that the child is having panic attacks. That panic attacks in and of itself could or could not have anything to do with the fact that my client may have committed this act.

What we are trying to do is to give potentially other reasons, non-criminal reasons, why the panic attacks are occurring, not necessarily issues that she's having a panic attack to go as to what her biological father did.

We are not establishing third-party guilt. We are establishing explanation for symptoms, which the State of South Carolina is going to argue is a symptom of child sexual abuse and she's having panic attacks because of what her biological father did.

(Trial Tr. 228). The trial court ruled trial counsel would be able to question witnesses about alternative sources or reasons for the victim's panic attacks so long as he did not mention specific individuals and would permit Applicant to present an expert about the panic attacks if he so desired. (Trial Tr. 228-30).

At the evidentiary hearing, trial counsel testified he did not want to present any of his own witnesses or evidence in order to preserve the final argument before the jury because he believed the panic attack issue was ancillary and not worth losing the final word with the jury prior to deliberations. He reiterated that his theory of defense was that the victim's parents had concocted this sexual abuse and coached victim on the abuse and the panic attack issue was not central to this defense. Moreover, he testified there was nothing to support that Applicant was not at the least a major contributor to the victim's panic attacks, which got significantly worse around the 2012 visitations in the summer and fall and markedly improved once visitation ceased, as Kimberly Roseborough acknowledged during the family court trial.

This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation. The emails and witnesses presented at the evidentiary hearing do not establish the

victim's panic attacks were not caused or exacerbated by Applicant. The evidence before the Court establishes Applicant's panic attacks got significantly worse during the periods Applicant had visitation with Applicant, particularly solo visitation, and considerably improved once visitation stopped. Applicant has failed to present any evidence that would allow him to succeed on this allegation. This allegation is denied.

Allegation: "Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility."

Applicant alleges trial counsel was constitutionally ineffective for failing to object and move for a mistrial in response to various instances of vouching or bolstering by State's witnesses. First, Applicant complains the victim's counselors, Kimberly Roseborough and Meredith Thompson-Loftis, were improperly qualified as expert witnesses, thereby bolstering the victim's testimony. Next, Applicant contends although the State did not seek to qualify Tabitha Weber as an expert witness, she was allowed to testify as an expert witness because she was permitted to testify about her qualifications, education, and experience before the jury. These allegations are without merit.

"[A] witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim." Briggs v. State, 421 S.C. 316, 323, 324, 806 S.E.2d 713, 717 (2017); 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"). While experts may give opinions, they are not permitted to offer an opinion as to the credibility of others. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. Id. (quoting State v. Kromah, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013)).

As to the allegation that the victim's counselors Kimberly Roseborough or Meredith Thompson-Loftis vouched for or bolstered the victim's credibility, this Court finds there is

nothing in the record to support such an allegation. Roseborough specifically testified the victim never made a disclosure of sexual abuse to her and instead focused on the anxiety the victim suffered from and her attempts to work with the family, including Applicant, to resolve this anxiety. (Trial Tr. 208). Thompson-Loftis testified only that the victim made a report of sexual assault and to the time and place of that assault but nothing further as to the credibility of the allegations. (Trial. Tr. 270). Although Thompson-Loftis testified as an expert as to the general topics of partial disclosure, delayed disclosure, and coaching, she never tied this testimony to the victim or her report of abuse. Moreover, this Court finds Thompson-Loftis has the requisite qualifications for this type of testimony. Both counselors' testimonies were proper, and accordingly, this Court finds trial counsel was not ineffective for failing to object or move for a mistrial on these grounds.

Similarly, this Court finds Applicant's assertions the testimony of Roseborough and Thompson-Loftis violated State v. Anderson, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) are also without merit. Anderson, which came out after Applicant's trial, stated best practice is to use a blind expert but did not make such a practice mandatory. State v. Anderson, 413 S.C. 212, 218–19, 776 S.E.2d 76, 79 (2015) ("The better practice, however, is not to have the individual who examined the alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility."). This Court finds nothing in the testimony of Thompson-Loftis or Roseborough was improper and certainly did not warrant moving for a mistrial.

As to the next allegation that Weber's background testimony regarding her education and experience amounted to improper bolster, there is also no merit to the claim Weber vouched for the credibility of the victim because "the prosecution qualified [her] as an expert witness,

without actually asking the trial judge to qualify her and[sic] an expert witness.” The “qualifications” that Applicant alleges were improper where simply asking Weber to state what type of education, training, or experience she had to qualify her to work at the Children’s Advocacy Center, which she replied, “I have a Bachelors Degree in Psychology, a Masters Degree in Social Work, and I’m a licensed independent social worker through the State of South Carolina. And I have extensive training in child development, child abuse, linguistics, developmental delays, pediatric psychotherapy, play therapy. Lots of issues surrounding children, primarily.” (Trial Tr. 247-48). This Court finds that brief background testimony regarding a witness’s education and experience is proper and does not amount to the State improperly eliciting expert testimony as Applicant asserts. Courts have consistently held that such introductory questions are relevant and aid the finder of fact. See S.C. Dep’t of Highways & Pub. Transp. v. E.S.I. Investments, 332 S.C. 490, 495, 505 S.E.2d 593, 596 (1998) (“It is a routine practice in trials for an attorney to ask his witness certain preliminary questions which may not be relevant to the issues being litigated, which may go beyond mere identification and which are designed to show that the witness will be somewhat credible or not biased in favor of the side calling him. For example, the educational background or professional status or employment position of a non-expert witness may be asked, or the witness’s lack of prior contact with the side who has called him may be brought out. These questions give the jury some knowledge of the individual and a more complete perspective in considering his testimony. . . . We conclude that such questions, within reasonable limits, serve the useful purpose of informing the jury about the witness, and thus may be allowed.” (internal citations omitted)). See also State v. Jamison, 365 S.W.3d 623 (Mo. Ct. App. 2012) (noting preliminary questions directed toward aiding the jury in setting a proper estimate on the testimony of a witness may be properly asked and it is entirely proper, either by way of introduction or cross-examination, to identify a witness

and to inquire into his residence, antecedents, social connections and occupation, particularly as they reflect his credibility either for good or bad.); State v. Summerlin, 98 N.C. App. 167, 390 S.E.2d 358 (N.C. Ct. App. 1990) (holding evidence of robbery victim's scholastic achievements which was presented by prosecution during preliminary questioning was not improper; evidence was offered as means of introducing victim to court and to jury and to assist in explaining victim's background, particularly in light of fact that defendant portrayed victim as aggressor.); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (N.C. Ct. App. 1988) (noting that on prosecution of defendant for second-degree sexual offense involving his step-daughter, prosecutor's question regarding whether the victim was afraid to sleep in her own bed merely sought to establish background information, rather than elicit crucial testimony of elements of crime charged, and was not prejudicial.); State v. Sports, 41 N.C. App. 687, 255 S.E.2d 631 (N.C. Ct. App. 1979) (holding when a witness has been sworn and takes the stand, preliminary questions are properly put to him as to name, residence, knowledge of the case, et cetera, as the purpose of such questions is generally to introduce the witness to the court and the jury and to show why he is there testifying, and are thereby relevant). This Court finds the information provided by Weber amounted to entirely appropriate background questions intended to introduce the court and jury to the witness and provide context for her testimony. Applicant has failed to cite to any precedent establishing the impropriety of asking a witness basic questions about his or her background before diving into the substantive portion of the witness's testimony as occurred here. This allegation is without merit and is denied and dismissed with prejudice.

Allegation: “Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualification as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. See, e.g., S.C. Dep’t of Soc. Servs. v. Mary C., 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011).”

Applicant argues trial counsel was constitutionally ineffective for failing to object to the qualifications of Thompson-Loftis as an expert because her testimony was unreliable. In support of this allegation, Applicant cites to S.C. Dep’t of Soc. Servs. v. Mary C., 396 S.C. 15, 23, 720 S.E.2d 503, 507 (Ct. App. 2011), as case where Thompson-Loftis was the counselor working with the child who made sexual assault allegations against her father. In that case, the Court of Appeals noted that Cindy Stichnoch, an independent expert in the assessment and treatment of sexual behavior issues in children, “was highly critical of Ms. Loftis’ interviewing techniques, specifically her continuing to have therapy sessions with Anna G. about the sexual abuse allegations until a full assessment was conducted. Ms. Stichnoch stated a child of Anna G.’s age is easily influenced, and repetitive sessions and questions about the allegations could inadvertently and inappropriately reinforce those allegations with the child.” *Id.* Applicant uses this case to assert Thompson-Loftis’s methods were unreliable and her testimony should have been excluded.

This Court finds Applicant’s use of S.C. Dep’t of Soc. Servs. v. Mary C. to support this allegation is improper for several reasons. First, the Court of Appeals does not render an opinion as to the reliability of Thompson-Loftis’s methods, but rather, the Court of Appeals merely notes that an independent expert expressed concerns in that particular case to the family court. Second, unlike the minor child in S.C. Dep’t of Soc. Servs. v. Mary C., the victim in the present case did not begin therapy with Thompson-Loftis until after disclosures of sexual abuse and her forensic interviews has been completed. Here, Applicant has failed to establish that Thompson-Loftis’s methods were unreliable or that he should not have been qualified as an expert witness. Trial

counsel testified he believed Thompson-Loftis was properly qualified as an expert witnesses and this is why did not object. This Court finds these allegations are denied and dismissed.

Allegations pertaining to venue not in Spartanburg County

Applicant alleges trial counsel was ineffective for: “failing to investigate, develop, and present evidence that venue was not in Spartanburg County;” “failing to support the directed verdict motion with evidence that venue was not in Spartanburg County;” and “failing to request a jury instruction on venue.”

From a PCR perspective, venue, at best for Applicant, was speculative. This Court viewed the evidence in this record as substantial that venue was not an issue in the case. If the criminal events happened, as the jury believed they did, they happened in Spartanburg County, or they did not happen at all. Law Enforcement and/or the solicitors did not hide evidence of venue. In the present case venue was in Spartanburg County, or the events did not happen.

All the evidence presented at the evidentiary hearing clearly establishes venue was properly in Spartanburg County. As discussed previously, Investigator Cantrell testified she investigated whether the allegations occurred in Greenville County or Spartanburg County and all evidence established the sexual abuse occurred at a Holiday Inn Express in Spartanburg County. Moreover, the counseling records from Thompson-Loftis that indicate the abuse happened in “Greenville” refer to the Greenville-Spartanburg metropolitan area, as Thompson-Loftis testified, not to a specific jurisdictional area. As Applicant has failed to present any credible evidence to establish venue was not proper in Spartanburg County, this Court finds these allegations must be denied and dismissed.

Allegation: “Failing to object to the Special Prosecutor’s improper closing argument that appealed to the jurors’ emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest ‘bad people,’ he (as Special Prosecutor) tells the complaining witness’ story, and ‘the jury takes care of good people.’ Tr. 305-07.”

Applicant argues trial counsel was constitutionally ineffective for failing to object to the State’s closing argument wherein Special Prosecutor Brannon argued the jury takes care of good people. Specifically, Applicant argues Special Prosecutor Brannon’s closing argument was “emotionally charged” and asked the jury to convict based on the improper reason that the victim was a “good person.” Trial counsel testified he did not believe the closing was objectionable and accordingly, did not object.

In certain situations, this type of argument can be constitutionally improper. The rule is that a solicitor’s closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the juror’s passions or prejudices, and its content should stay within the record and reasonable inferences. 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. The argument in the present matter can be argued as wrong because it sought to have the jury view the evidence through an emotional lens rather than factual. More concerning in the present case was that private counsel acknowledged during the PCR that his motives in making the argument was to appeal to the jury’s sympathies. Nevertheless, private counsel’s argument did not rise to the constitutionally improper level as described in Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), or Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). When private counsel’s argument is viewed as a whole, it appears to be based on a proper analysis of the evidence and the burden of proof; and unlike Simmons, private counsel did not misrepresent the law to the jurors. Counsel’s argument was not the type of argument found in Tappeiner v. State, 416 S.C. 239, 250–51, 785 S.E.2d 471, 477 (2016).

In the present case, Applicant has failed to establish the prosecutor's closing argument was improper. The comments did not ask the jury to convict Applicant based on anything other than the evidence presented, which he went through piece by piece with the jury. Special Prosecutor Brannon repeatedly reminded the jury that the State had the burden of proof and that the State had met that burden with the evidence presented. The State's closing argument was proper and certainly did not "so infect the trial with unfairness" as to warrant a new trial. This Court finds this allegation must be denied and dismissed.

Allegation: "Advising Mr. Spade not to present any evidence, including but not limited to his own testimony."

Applicant alleges trial counsel was ineffective for advising him not to present any evidence, similar to his allegation above pertaining to counsel's failure to call witnesses on his behalf.

As an initial note, Applicant failed to take the stand or otherwise offer what his testimony would have been at trial, and, accordingly, cannot establish his burden for failure to present himself as a witness. Glover v. State, 318 S.C. 496, 498–99, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

As discussed previously, counsel made a strategic decision not to present any witnesses. Specifically regarding whether Applicant should testify, trial counsel testified he and co-counsel discussed whether Applicant should testify with him numerous times. He testified one major concern with having Applicant testify was the likelihood that Applicant would open the door to possible "unflattering" evidence, such as his aggressive demeanor and comments to law enforcement when interviewed in Virginia, a jailhouse phone call with his father describing the "slip and slide game" discussed previously, and emails and other electronic evidence asking for information on how to "clean" a computer. Trial counsel testified the trial court ruled none of

this evidence would be admissible unless Applicant took the stand and opened the door to such evidence, and accordingly, trial counsel and Applicant were in agreement it was in his best interest not to testify during trial to avoid any risk of opening the door to such information. Moreover, Applicant failed to testify at trial or otherwise present evidence as to what his testimony would have been at trial. This Court finds Applicant cannot meet his requisite burden of proof as to this allegation, which is denied and dismissed.

Allegation: "Excluding evidence from the forensic computer examination that was exculpatory."

Applicant alleges trial counsel was ineffective for excluding evidence from the forensic computer examination that was exculpatory. In his pre-hearing memorandum, Applicant states, "Based on questions asked during Cara Lintner's deposition, Mr. Spade is concerned the State will continue to insinuate his computer was "wiped," despite Ms. Jordan's contrary representation to the trial judge." However, Applicant has failed to set forth what particular information he believes should have been introduced at trial and how counsel was ineffective for excluding it. Moreover, when this issue was addressed during the hearing, Investigator Cantrell testified text messages were recovered between Applicant and his sister providing instructions as to how to "clean" a computer. Trial counsel testified he was concerned the State may try to introduce this information at trial and this was one of the reasons he did not think Applicant should testify. Applicant has failed to set forth with any specificity exactly what "exculpatory evidence from the forensic computer examination" should have been presented to the jury and accordingly has failed to meet his requisite burden of proof.

This Court finds allegations or issues related to the wiping of the Applicant's computer were not at issue in this PCR, there was no proof that the computer was wiped, and it was not mentioned before the jury. This Court finds this allegation is denied and dismissed.

Allegation: Failure to obtain relevant Department of Social Services Records

Applicant alleges trial counsel was ineffective for failing to obtain, either by subpoena or court order, relevant Department of Social Services (DSS) records for the victim. Prior to the hearing, Applicant was granted leave of Court to conduct discovery and subpoenaed the file from DSS. DSS failed to comply with the subpoena and did not produce the file during the hearing. Following the hearing, this Court ordered DSS to produce its file for in-camera inspection by the Court. After this Court reviewed the file, both parties reviewed the file together in chambers. Thereafter, this Court made a full and complete copy of this file part of the record in this case, under seal. As described above, this Court found the DSS records helpful and presented an unbiased view of the background information and timeline related to the case.

The DSS file caused this Court concern. The file was produced after the present PCR hearing was conducted. This Court received briefing from the attorneys. The file's contents can be read as having supported the underlying narrative offered by both sides. As stated, this Court views the DSS file as unbiased. Based on the briefing presented to this Court, the DSS file can best be characterized as cumulative of the information already known at the time of trial. The new information supported the idea that the family was uncooperative, even with DSS's effort to investigate, by adding factual details to what was presented during the PCR hearing. The file also added to issues which the applicant or his witnesses could have faced on cross examination if character became an issue at trial.

After a thorough review of the DSS file, this Court should find Applicant cannot meet his burden of proof as to this allegation as there is nothing in the DSS file that would have changed the result of his trial. The vast majority of the file contains information that was already readily available to trial counsel through other means and is cumulative. The rest of the file is simply irrelevant to the case or would not have had any impact on the proceedings. Accordingly, this

Court finds Applicant cannot prove that but for counsel's failure to procure a copy of the DSS file, there is a significant likelihood he would not have been convicted.

Allegation: "Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony."

Applicant alleges trial counsel should have moved to prohibit the victim from testifying because her testimony was "tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony." In support of this allegation, Applicant cites to the testimony of his two experts, Dr. Lamb and Dr. Bruck, to argue the forensic interview conducted by Weber and the counseling conducted by Meredith Thompson-Loftis, tainted the victim's testimony and rendered it unreliable.

In South Carolina, every person—including a minor child—is generally presumed to be competent to serve as a witness unless otherwise stated by statute or rule. Rule 601(a), SCRE; see State v. Lambert, 276 S.C. 389, 401, 279 S.E.2d 364, 365 (1981) ("[T]here is no fixed age an individual must attain in order to be a competent witness."). In fact, even a convicted perjurer is presumptively qualified to testify as a witness in our state. State v. Needs, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998). So long as an individual has the ability to perceive an event with a substantial degree of accuracy, remember it, communicate about it intelligibly, and be mindful of the duty to tell the truth under oath, that individual is considered to be competent to testify during trial regardless of his or her age or past actions. Id.; see State v. Green, 267 S.C. 599, 603, 230 S.E.2d 618, 619 (1976) ("The mere fact that Tommy was but a six year old boy at the time of trial did not in itself make him incompetent to testify."); see also State v. Karelas, 28 So. 3d 913, 914 (Fla. Dist. Ct. App. 2010) ("Testimonial competency relates to the capacity of a witness to recollect and communicate facts and appreciate the obligation to tell the truth. It is a test of intellectual capacity, *not veracity*." (emphasis added)). Critically, if a witness is competent to

testify, that witness's testimony can typically be admitted during trial, and it is solely up to the jury to resolve any issues regarding the credibility of the testimony presented. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977); see Needs, 333 S.C. at 144, 508 S.E.2d at 862 (“[T]he resolution of the credibility of the witness is within the province of the jury.”); see also United States v. Scheffer, 523 U.S. 303, 313 (1998) (“A fundamental premise of our criminal trial system is that the *jury* is the lie detector.” (internal quotations omitted)).

Applicant failed to cite to any case law that would allow the court to exclude the testimony of the minor victim based on purported concerns over the reliability of the methods used in her forensic interview or subsequent counseling sessions. If counsel had concerns regarding the reliability of the forensic interview or counseling, the proper course of action would be vigorous cross-examination, not moving for the exclusion of the testimony—which Applicant cannot establish would have been granted.

As discussed above, the methods and techniques employed by Weber and Thompson-Loftis were developmentally appropriate and based on proper training, education, and experience. While Applicant's experts were able to provide valuable testimony about their “best practices” and how they believe Weber's methods deviated from those practices, Applicant has failed to establish the techniques used by Weber and Thompson-Loftis yielded “tainted, unreliable, and inadmissible” evidence. It is also important to note the sole allegation to which the victim testified to at trial is strikingly similar to the initial report of abuse the victim made to her grandmother, which was well before Applicant interacted with Weber or Thompson-Loftis. This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation, which must be denied and dismissed with prejudice.

Allegation: “Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony.”

Applicant alleges trial counsel should have cross-examined the State’s witnesses, mainly Weber and Thompson-Loftis, to establish the testimony of the victim was “tainted and unreliable” based on their techniques. As discussed in several other allegations, Applicant has failed to establish the methods used by either Weber or Thompson-Loftis were improper or had a high likelihood of yielding “tainted and unreliable” reports of sexual abuse. Counsel testified he had handled child sexual assault cases numerous time before, particularly when he was an attorney for DSS, and had no reason to believe the methods employed by either Weber or Thompson-Loftis were improper or yielded “tainted and unreliable” as Applicant now asserts. Moreover, as discussed previously, such a cross examination would have likely required the introduction of the forensic interviews, which counsel did not want to do based on sound and well-reasoned trial strategy. This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation.

Allegation: “Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with [the victim].”

Applicant argues trial counsel was constitutionally ineffective for failing to “investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with [the victim]. Law enforcement determined these allegations by [the victim] to be unfounded. This ground is based on the deposition testimony of Cara Lintner.”

As noted previously, Applicant failed to introduce the deposition of Cara Lintner into evidence, and accordingly, it is not before this Court. Regardless of Applicant’s failure to present any evidence to substantiate this claim, this allegation is clearly refuted by the testimony

presented at the evidentiary hearing. Thompson-Loftis testified the statements the victim made pertaining to Cara deal with her attempting to comfort the victim, not sexual abuse. Investigator Cantrell testified similarly that law enforcement did not believe there were any allegations of sexual abuse by Lintner and she was never considered a suspect. Moreover, Applicant cannot establish prejudice as there is nothing to establish an exoneration of wrongdoing by Lintner would exonerate Applicant in the sexual abuse, particularly when the allegation presented at trial was that Applicant had sexually assaulted his daughter during a solo visit to South Carolina. This Court finds Applicant failed to meet this requisite burden of proof as to this allegation, which must be denied and dismissed with prejudice.

Allegation: “Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing” and “failing to present any information or evidence to the trial judge to mitigate the sentence imposed.”

Applicant argues trial counsel was constitutionally ineffective for “failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing” and “failing to present any information or evidence to the trial judge to mitigate the sentence imposed.” In his pre-hearing memorandum, Applicant argues, “there was virtually no sentencing hearing.”

When questioned about these allegations at the evidentiary hearing, trial counsel testified he and Applicant had already discussed and decided an appeal would be filed if Applicant was convicted, and accordingly, they did not want Applicant to say anything that could be detrimental on appeal.

As discussed previously, Applicant failed to testify at his evidentiary hearing or otherwise present evidence in accordance with the rules of evidence as to what he would have said to the court during sentencing. Accordingly, this Court finds cannot meet his burden of proof as to this allegation. See Glover, 318 S.C. at 498–99, 458 S.E.2d at 540 (“The applicant’s

mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.”).

Moreover, Applicant failed to present any of the evidence he alleges should have been presented to the trial court and fails to establish how the presentation of any such evidence would have resulted in a different sentence. Accordingly, this Court finds he cannot meet his requisite burden of proof as to this allegation, which must be denied and dismissed.

Allegation: “The cumulative effect of trial counsel’s errors denied Mr. Spade his right to a fair trial.”

Applicant argues in addition to the numerous individual grounds of ineffective assistance of counsel raised, he is also entitled to post-conviction relief based on the cumulative effect of trial counsel’s deficiencies. However, this Court finds this argument fails, as Applicant failed to meet his requisite burden of deficiency for each ground raised.

Traditionally, an applicant must show both deficient performance and prejudice to establish his or her trial counsel was constitutionally ineffective. Strickland, 466 U.S. 668. However, “[w]hen counsel’s deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice.” Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). “Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina.” Id. (citing Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002)).

Recently, in Smalls v. State, the Supreme Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 864 (2018) (“As we have explained, the strength of the evidence must be considered along with the specific impact of counsel’s errors.”). “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. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to 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." Id. at 188, 810 S.C. at 844 (internal citations omitted).

Here, since Applicant has failed to establish any instances of counsel error, this Court declines Applicant's request to conduct a cumulative error analysis. See Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (recognizing "the threshold to asking the cumulative prejudicial question is to first find multiple errors"). See also Lorenzen v. State, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n. 3 (2008) (noting whether several errors, which are independently found not be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina).

Ineffective Assistance of Appellate Counsel

Applicant next argues appellate counsel C. Rauch Wise was ineffective for "failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County."

On appeal, appellate counsel filed a merits brief and raised five substantive issues on which he claimed Applicant was entitled to a new trial:

Question I: Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the state to prove Mr. Spade had abused his daughter?

Question II: Did the trial court err in declaring that the attorney for Daniel Spade improperly struck Juror 199 based upon her gender strike when the attorney specifically stated the juror was struck for her age and being retired?

Question III: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Question IV: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

Question V: Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the state had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the state did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

(Final Brief of Appellant).

Despite raising five issues on appeal, Applicant claims appellate counsel was constitutionally ineffective for failing to raise the directed verdict issue on appeal. This Court finds this allegation is without merit.

Just as a defendant is entitled to affective representation during his general sessions proceeding, a defendant is also entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice as outlined above. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate

counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). “For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . .” Jones, 463 U.S. at 754. Additionally, our South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. “‘Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.’” Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Accordingly, in order to meet his burden of proof, Applicant must establish a reasonable probability that, but for appellate counsel’s failure to raise a specific issue on appeal, he would have prevailed on his appeal. Smith, 528 U.S. at 285-86. Based on this standard set forth above, this Court finds Applicant cannot meet his requisite burden of establishing any constitutional ineffectiveness of appellate counsel. The decision as to which issues to raise on appeal clearly rested within counsel’s discretion and his strategic decision as to which issues to raise on appeal do not render his performance deficient. Thrift, 302 S.C. at 539, 397 S.E.2d at 526; see also Jones, 463 U.S. at 754 (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy.”)

Moreover, Applicant cannot establish any resulting prejudice as there is no reasonable likelihood this issue would have been successful on appeal. As discussed above in regards to purported errors made by trial counsel, the State properly established the venue was in Spartanburg County. During Applicant’s trial, Investigator Cantrell testified the Holiday Inn

Express in question was in Spartanburg County (Trial Tr. p. 126). Trial counsel made a motion for directed verdict on several grounds, including that the victim failed to establish the abuse occurred in Spartanburg County, which trial court properly denied. There is no reasonable likelihood Applicant would have been successful had this issue been raised on appeal. This allegation must be denied and dismissed with prejudice.

Prosecutorial Misconduct

Applicant argues the State committed prosecutorial misconduct regarding the appropriate venue of the case, its failure to disclose relevant DSS records, and failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and law enforcement found them to be unfounded. This Court finds these allegations do not have merit.

Allegations of Prosecutorial Misconduct Pertaining to Venue

As discussed in regards to ineffective assistance of trial counsel and appellate counsel, this Court finds Applicant failed to establish venue was not in Spartanburg County.

Applicant's assertions that the State committed a Brady violation for failing to disclose evidence that venue was not in Spartanburg County are without merit. Initially, this Court notes appears Applicant knew of these purported Brady violations at the time of his trial, as he was provided with Thompson-Loftis's notes prior to trial and made a motion for a continuance based on the late production of these records, and accordingly, should have raised these issues on direct appeal. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief.

Regardless of the propriety of raising this claim now on post-conviction relief, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989). Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)). "The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.'" Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006)

The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings. State v. Gulledege, 326 S.C. 220, 487 S.E.2d 590 (1997). Rule 5(a)(1)(C) requires:

Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id. The definition of "material" for purposes of Rule 5 is the same as the definition used in the Brady context. Fradella v. Town of Mount Pleasant, 325 S.C. 469, 482 S.E.2d 53 (Ct. App.

1997). In order for Applicant to prevail on a Rule 5 claim, he must show not only an actual violation, but also that he suffered prejudice as a result. State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Ct. App. 1992); State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

This Court finds Applicant cannot meet his burden of proof as to this allegation. As discussed above, there is no evidence that venue was not proper in Spartanburg County. Moreover, Applicant cannot establish that the State elicited or failed to correct false testimony regarding venue. As Investigator Cantrell testified, she determined venue was properly in Spartanburg County as it was the only hotel where Applicant and the victim were together alone. Simply put, the State did not elicit any false testimony and there was no false testimony to correct. This Court finds Applicant's assertions otherwise are without merit.

Allegation the State failed to Disclose the Relevant Portions of the DSS file

Applicant also alleges the State committed prosecutorial misconduct by failing to disclose relevant Department of Social Services records obtained by Investigator Cantrell. In support of this allegation, Applicant cites to the transcript of the 2012 termination of parental rights trial in family court wherein Investigator Cantrell mentions she had the DSS records for the victim. At the evidentiary hearing, Investigator Cantrell testified she did not have a copy of the DSS file in this case and likely misspoke when testifying at the family court proceeding because she was called to the stand from the road and did not have her file in front of her.

This Court finds Applicant has failed to establish the State was in the possession of the DSS file or that anything in the DSS file would have had material information not already known to counsel. Accordingly, Applicant has failed to meet his requisite burden of proof. This allegation must be denied and dismissed with prejudice.

Allegation the State failed to Disclose the Investigation into Cara Lintner

Applicant also the State committed prosecutorial misconduct by "failing to disclose that

law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and LE found them to be unfounded.” As discussed above, Investigator Cantrell testified Lintner was not considered a suspect. Thompson-Loftis similarly testified she did not report any allegations of abuse by Lintner to law enforcement because she did not believe the victim’s references to Lintner amounted to disclosures of abuse, but rather, Lintner’s attempts to comfort the victim. This Court finds Applicant has failed to meet his burden of proof as to this allegation. This Court denies and dismissed this allegation with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes that if Applicant wishes to appeal this order, Applicant, though his counsel of record, must file and serve a notice of appeal within thirty days from the receipt of this Order. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel’s assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant’s behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant Daniel Spade shall remain remanded to the custody of the State of South Carolina.

AND IT IS SO ORDERED this _____ day of _____, 2020.

J. MARK HAYES, II
Presiding Judge
Seventh Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Daniel W. Spade, SCDC # 358974

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-42-02372

ORDER OF DISMISSAL

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SPARTANBURG COUNTY
ANY V. COX

This matter comes before this Court by way of an application for post-conviction relief filed on July 13, 2017, by Daniel W. Spade (Applicant). Thereafter, Applicant retained E. Charles Grose, Jr., to represent him in this action, and, through counsel, filed three subsequent amendments to his application on October 2, 2017, December 24, 2018, and May 14, 2019. The State of South Carolina (Respondent) filed a return requesting an evidentiary hearing.

An evidentiary hearing was convened May 15 through May 20, 2019 at the Spartanburg County Courthouse. Applicant was present and was represented by counsel Grose. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson and Assistant Attorney General Johnny Ellis James, Jr. At the hearing, testimony was taken from several witnesses and numerous exhibits were introduced. Following the hearing, the Court and both parties reviewed the Department of Social Services (DSS) file regarding the underlying custody action involving Applicant, the minor victim, and her parents (mother and adoptive father). Thereafter, the Court requested post-hearing memorandums from each party on the issues raised in the third amended application for post-conviction relief and at the evidentiary hearing.

Following the hearing, this Court undertook a lengthy review of the record, the evidence and testimony presented at the evidentiary hearing, and the memoranda presented, after review and consideration, this Court finds that the Applicant has failed to establish any constitutional

violations or deprivations entitling him to post-conviction relief and denies this application with prejudice. ¹

PROCEDURAL HISTORY

The records establish that Applicant is presently confined in the South Carolina Department of Corrections following his conviction in Spartanburg County. During February 2014 term, the Spartanburg County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor based the allegation he had sexually assaulted his four-year-old biological daughter during an overnight visit at a hotel in Spartanburg County (2011-GS-42-4171). Applicant retained the services of Shawn Campbell, Esquire, and Kenneth Shabel, Esquire, who had been representing him in an on-going custody dispute involving the minor child, to represent him in this criminal matter. Seventh Circuit Solicitor Barry J. Barnette, Assistant Solicitors Jennifer Jordan and Kimberly Leskanic, and Special Prosecutor Doug Brannon prosecuted the case. On February 24, 2014, Applicant proceeded to a jury trial before the Honorable R. Keith Kelly, circuit court judge. The jury convicted Applicant as indicted. Judge Kelly sentenced Applicant to imprisonment for thirty-five years. ²

Applicant filed a timely notice of appeal and was represented on appeal by C. Rauch Wise,

¹ In an effort to comply with *Fisburne v. State* 427 S.C. 505, 832 S.E.2d 584 (2019), initially this Court issued a lengthy preliminary analysis to the attorneys wherein the State was requested to prepare a proposed formal order for this Court's review and editing. Consistent with *Fisburne* (pre-SCRPC Rule 59 Motion for Reconsidering), this Court also received written input from Applicant's Counsel. The present order is the by-product of this Court's effort to comply with the intent and spirit of *Fisburne*'s directives to comply with S.C. Code § 17-27-80 (1976).

² History relevant to this matter but not procedurally linked to the success or failure of the application includes that on June 29 and 30, 2009, the Honorable Georgia C. Anderson convened a hearing in the Family Court for Spartanburg County regarding Heather and David Jolley's petition to terminate Danny Spade's parental rights. This action was not successful. Judge Anderson issued a final order on January 13, 2010. This order was supplemented on June 29, 2010. Heather Jolley filed another Family Court Action on November 23, 2010. On May 3, 2011, Investigator Nikki Cantrell and officers of the Prince William County Police Department arrested Mr. Spade in Virginia, charging him with first-degree criminal sexual conduct with a minor involving his daughter. On January 9, 2012, the Jolleys amended the November 2010 complaint to petition to terminate Mr. Spade's parental rights and to allow David Jolley to adopt the child. Beginning on October 15, 2012 the Honorable James F. Farley, Jr. convened a hearing in the Family Court for Spartanburg County. Judge Farley ultimately terminated Mr. Spade's parental rights and allowed Mr. Jolley to adopt the child.



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Esquire.³ Mr. Wise raised the following grounds on appeal:

Question I: Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the state to prove Mr. Spade had abused his daughter?

Question II: Did the trial court err in declaring that the attorney for Daniel Spade improperly struck Juror 199 based upon her gender strike when the attorney specifically stated the juror was struck for her age and being retired?

Question III: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Question IV: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

Question V: Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the state had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness within a reasonable time before trial and the state did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

(Final Brief of Appellant). The South Carolina Court of Appeals affirmed Applicant's conviction by unpublished opinion on July 6, 2016. State v. Spade, Op. No. 2016-UP-352 (S.C. Ct. App. filed July 6, 2016). Applicant subsequently filed a petition for rehearing, and, following the denial of rehearing, filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. On June 16, 2017, the Supreme Court denied the petition for certiorari. The Remittitur was returned to the circuit court on June 22, 2017.

Thereafter, on July 13, 2017, Applicant filed a *pro se* application for post-conviction relief, initiating this current action. Subsequently, Mr. Grose appeared on applicant's behalf and filed amended applications.

³ Trial counsel Kenneth Shabel originally assisted in the appeal but withdrew as counsel for Applicant when he changed law firms and began practicing law with Special Prosecutor Brannon. Counsel Shabel filed a motion to be relieved as counsel with the Court of Appeals on March 21, 2016, and his motion was granted on May 6, 2016.

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SUMMARY OF FACTS ELICITED AT TRIAL

The following factual summary was provided in the Court of Appeals opinion from Applicant's direct appeal, State v. Spade, Unpub. Op. 2016-UP-352 (filed July 6, 2016):

[Petitioner] is Victim's biological father, and in September 2010, he traveled from his home in Virginia for visitation with Victim. During the visit, [Petitioner] sexually abused Victim in a bathroom located in the pool area of a Duncan, South Carolina hotel.

Victim—who was seven years old at the time of the February 2014 trial—testified [Petitioner] stuck his “private part” in her mouth inside the bathroom and told her that if she did not perform the act he would not take her home. Mother testified that when she picked Victim up from the visit, Victim displayed signs of extreme anxiety such as wetting herself and crying uncontrollably. Mother alerted [Petitioner] to Victim's high anxiety levels, but after another visit with [Petitioner] in October 2010, Victim displayed continued anxiety. Specifically, Mother testified Victim became terrified of the dark, hid in a corner and refused to come out, and suffered panic attacks. Victim complained of stomach and head aches and would “revert back to the way a two year old would talk.” Mother subsequently sought anxiety counseling for Victim, and in November 2010, Mother filed to suspend [Petitioner]'s visitation based on Victim's anxiety.⁴

On cross-examination, Mother acknowledged Victim also showed signs of anxiety after visiting [Petitioner] in Virginia in July 2010, and she admitted that the ten-day visit was the first time Victim had been away from her for an extended time period. The anxiety counselor diagnosed Victim with anxiety and adjustment disorder. The counselor also testified Victim displayed nervousness and anxiety when asked to talk about [Petitioner], but Victim did not disclose sexual abuse. In March 2011, Victim disclosed the sexual abuse to her maternal grandmother (Grandmother). Subsequently, Victim disclosed during a forensic interview with a Children's Advocacy Center employee that she was sexually abused at “the hotel with a pool.” Additionally, Victim disclosed abuse to Meredith Thompson-Loftis, who served as Victim's therapist after May 2011.⁵ The jury convicted [Petitioner] of first-degree CSC with a minor.

State v. Spade, Unpub. Op. 2016-UP-352 (filed July 6, 2016):

CURRENT PROCEEDING

In his *pro se* application for post-conviction relief filed July 13, 2017, Applicant alleged

⁴ The anxiety counselor diagnosed Victim with anxiety and adjustment disorder. The counselor also testified Victim displayed nervousness and anxiety when asked to talk about Applicant, but Victim did not disclose sexual abuse.

⁵ The record indicates Applicant's parental rights were terminated in November 2012 due to abuse and failure to support.

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he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel in failing to request continuance to fully review exculpatory therapist records given last-minute."
 - a. "Court of Appeals opined as much; several critical exculpatory findings within the notes post-conviction."
2. "Ineffective assistance of counsel in failing to call character, lay, and expert witnesses."
 - a. "No expert witness to counter State's witness in that notations in records support therapist was inappropriately "prepping" child for trial."

Thereafter, Applicant, though retained counsel, filed three amended applications setting forth numerous allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct. At the hearing, Applicant proceeded forward on the following claims from his third amended application:

A. Ineffective assistance of counsel during the guilt phase for:

1. "Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information."
2. Not only failing to object to the trial judge instructing the jurors that their role is to "search for the truth" and make sure "justice is done," which impermissibly diminishes and shifts the burden of proof, but also adopting that language in closing argument, thereby diminishing and shifting the burden of proof."
3. "Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child's allegations."
4. "Failing to investigate, develop, and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting the case."
5. "Failing to request a ruling on Mr. Spade's contention that the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470."
6. "Failing to move for disclosure of exculpatory information in the possession of the [Special] Prosecutor, N. Douglas Brannon."
7. "Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which

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would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony."

8. "Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility."
9. "Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualification as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. *See, e.g., S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011)."
10. "Failing to admit the videotaped interview from the Children's Advocacy Center that contained exculpatory information."
11. "Failing to investigate, develop, and present evidence that venue was not in Spartanburg County."
12. "Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County."
13. "Failing to request a jury instruction on venue."
14. "Failing to object to the Special Prosecutor's improper closing argument that appealed to the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest 'bad people,' he (as Special Prosecutor) tells the complaining witness' story, and 'the jury takes care of good people.' Tr. 305-07."
15. "Advising Mr. Spade not to present any evidence, including but not limited to his own testimony."⁶
16. "Excluding evidence from the forensic computer examination that was exculpatory."
17. "The cumulative effect of trial counsel's errors denied Mr. Spade his right to a fair trial."
18. "Failing to obtain through discovery, by subpoena, or court order relevant Department of Social Services records."

⁶ Allegation #15 as set forth in the third amended application was expressly withdrawn at the hearing and accordingly will not be addressed herein.

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19. "Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony."
 20. "Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."
 21. "Failing to present expert testimony to confront the State's witnesses and demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."
 22. "Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with his daughter P.J. Law enforcement determined these allegations by P.J. to be unfounded. This ground is based on the deposition testimony of Cara Lintner."
- B. Ineffective assistance of counsel during the sentencing phase for:
23. "Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing."
 24. "Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed."
- C. Ineffective assistance of appellate counsel, in that
25. "Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County."
- D. Denial of due process because of prosecutorial misconduct, in that
26. "Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County."
 27. "Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County."
 28. "Eliciting false testimony regarding venue."
 29. "Failing to correct false testimony regarding venue."

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⁷ Applicant did not introduce transcripts of the depositions of Cara Lintner or John Hall during this proceeding. Neither deposition is part of this record.

- 30. Failing to disclose relevant Department of Social Services records obtained by Spartanburg County Sheriff Investigator Nicki Cantrell
- 31. Failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and LE found them to be unfounded.

At the evidentiary hearing, Applicant presented the following witnesses in support of his application for post-conviction relief:

- Dr. Maggie Bruck, Ph.D, who was admitted as an expert in child abuse disclosure, forensic interview techniques, treatment of child sexual abuse victims, and suggestibility;
- Meredith Thompson-Loftis, who was the victim's counselor;
- Appellate Counsel C. Rauch Wise;
- Seventh Circuit Solicitor Barry Barnette;
- Dr. Michael Lamb, Ph.D., who was admitted as an expert in psychology with a specialty in child interviews;
- Trial Counsel Kenneth Shabel;
- Applicant's brother-in-law Josh Trumpower;
- Applicant's close friend Michael Mizak;
- Alexandria Wolf, the victim's former guardian ad litem in the family proceedings, and
- Special Prosecutor Douglas N. Brannon.

Respondent presented the following witnesses:

- Investigator Nicki Cantrell, formerly with the Spartanburg County Sheriff's Department;
- Trial counsel Shawn Campbell
- Tabitha Weber, MSW, LISW-CP, the Clinical Director and Forensic Supervisor of the Children's Advocacy Center of Spartanburg, Cherokee, and Union Counties who was admitted as an expert in the field of child abuse assessment and treatment.

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Numerous exhibits were also introduced during the hearing, including the videotaped forensic interviews of the victim with Weber. This Court has watched all forensic interviews in full.

Following the hearing, both parties and the Court reviewed the DSS file regarding the victim, which has been made a part of this record under seal.⁸

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged various claims of ineffective assistance of trial counsel during both the guilty phase and sentencing phase, ineffective assistance of appellate counsel, and prosecutorial misconduct. Applicant claims each of these instances of counsel error or prosecutorial misconduct is so significant that it impacted the verdict and warrants a reversal of his conviction and should be remanded back to the court of general sessions for a new trial. As will be set forth in detail below, this Court finds that Applicant has failed to meet the high burden required for the grant of post-conviction relief and all allegations are denied with prejudice.

Ineffective Assistance of Trial Counsel

Applicant's first twenty-four allegations assert trial counsel was ineffective for a litany of reasons and Applicant asserts each of these errors caused him to suffer the requisite prejudice to warrant a new trial. After a thorough review of the record and in light of the findings above, this Court finds Applicant has not met his burden of proof and is not entitled to relief on any of these grounds.

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution, U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action,

⁸ Considerable efforts by the parties and the Court were expended to obtain the DSS file and perform the necessary reviews. The Court requests the parties to inform this Court if a seal copy (with redactions) is not in Clerk's file. If a copy of the redacted DSS information is not filed with the Clerk's Office, the parties should proceed forth with having a copy filed under seal.

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and when alleging that counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney,' " 466 U. S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)). Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation, a lack of foresight, or for failing to prepare for what appear to be remote possibilities. Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

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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.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance required of a criminal defense attorney." Id. at 690.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Strickland at 688; Harrington v. Richter, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate "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. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding," Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. See Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 690. Even under de novo review, the standard for judging counsel's representation is a most confidential one. Unlike a later reviewing court, the attorney that observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result

would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

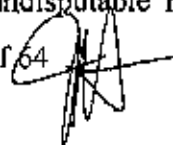
Based on the testimony and evidence presented at the evidentiary hearing, Applicant has failed to meet his burden of proof as to each allegation of ineffective assistance of counsel. This Court will address each individual allegation against counsel below:

***Allegations Pertaining to the Forensic Interviews (Failure to Call Expert Witnesses,
Failure to Publish the Forensic Interviews to the Jury)***

A significant and material approach of the present PCR was to attack the decisions of trial counsel to not publish the victim's forensic interviews to the jury and to not call expert witnesses to attack the credibility/reliability of the victim's single trial accusation made against him by discrediting the forensic interviews. Since a substantial portion of the PCR testimony and evidence related to the forensic interviews, this Court's discussion of the forensic interviews will be disproportionately longer than its discussion of other issues.

Significant to this Court's post-conviction relief analysis was that the video interviews were not seen by the trial jury that convicted the applicant. The prosecution nor the defense offered the video tapes into evidence during the trial. Therefore, the videos were not screened pursuant to the rules of evidence for admissibility purposes. Therefore, this Court reviewed all content of the videos without consideration of issues related to admissibility. Here Applicant offers the videos and the expert analysis to attack the reliability of the interview process.

Applicant's assertion at trial and as part of this PCR was that the victim's claim was untrue because she was coerced or coached into saying it. Applicant buttressed his position that the singular trial allegation was untrue with the undisputable historical timing/link to the bitter



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domestic litigation then existing between the victim's mother and soon-to-be adoptive father, and the Applicant. Applicant presented new evidence (evidence not presented during the criminal trial) that supported the timing/link of the beginning of the criminal process against applicant to a material development in the family court litigation that could have potentially derailed the victim's mother and soon-to-be adoptive father's desire to terminate Applicant's parental rights with the child.⁹

The history preceding the forensic interviews strategically link the motivation for the interviews to the domestic dispute. Nevertheless, the history preceding the forensic interviews also does not disprove the single sex abuse trial allegation against the Applicant. A therapist had recommended that meetings/sessions should begin with the goal of long term association of Applicant with the child. These sessions were to involve all members of the family, including the applicant. Significant to this new evidence was the testimony of the victim's family court guardian ad litem (GAL). Part of the GAL's testimony included that she was closed off from the victim by the mom and soon-to-be adoptive father. This Court easily concluded the GAL felt strong hostility from the mom and soon-to-be adoptive father. Their conduct and attitude towards the GAL materially interfered with her work as the GAL for the minor. This new evidence and the timing/link to the family court issues was further supported by the information revealed post-PCR hearing from the DSS file.

This Court was troubled that the legal history of this case includes private parties being encouraged to be uncooperative and thereby frustrate the work of the DSS and a family court GAL. This Court was also troubled that law enforcement made inconsistent factual statements to different courts.

⁹ This statement is not a finding of fact, but rather an explanation of this Court's view of the purpose of Applicant's use of the evidence during the PCR to buttress applicant's trial narrative. The Applicant did not convince this Court that his lawyer was wrong in not seeking to admit the evidence (with expert testimony). And, even if admitted, did not persuade this Court a different trial outcome was possible or probable.

Again, the forensic interviews were material to the PCR. Applicant was successful at discrediting the forensic interviews in this case. As part of the review process, the forensic interviews were viewed by this Court. Certain sections of the video interviews were reviewed several times. The PCR hearing testimony of the Applicant's two expert witnesses and the testimony of the forensic interviewer (also admitted as an expert) were all considered. The audio recording of the PCR testimony was also reviewed by this Court post-PCR hearing.

The expert witnesses called by Applicant have the highest credentials in their areas of expertise. They both can be considered experts of the highest esteemed. Also they both appeared credible on the witness stand. Together, they explained what the "best-practices" are for obtaining information from a child during a forensic interview. They both explained how the forensic interviews in this case deviated from their "best-practices." They were also critical of the prior sworn testimony of the forensic interviewer when that testimony was compared to what is reflected in the video interviews.

The forensic interviewer also testified during the PCR hearing. She strongly defended the techniques she used with the child in this case. While she acknowledged the expertise of the Applicant's two expert witnesses and did not directly discredit their methodology, she strongly advocated for her methodology and defended its application with the interviews conducted with the victim.

In reaching the conclusion that Applicant was successful in discrediting the video interviews, this Court notes, again, that no witness challenged the credentials of Applicant's experts nor the validity of their methodology. Based on the information presented to this Court, these two witnesses presented the highest levels of expertise in their respective fields. They appeared extremely credible during the hearing. After viewing the videos and applying the standards offered by these experts, this Court agrees with their assessment that the forensic



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interviews were suggestive.¹⁰

All three expert witnesses (Applicant's two experts and the forensic interviewer who was also admitted as an expert) felt the videos should have been played to the jury. Each felt that if videos had been played to the jury, the publication to the jury would have supported their respective positions. All three encouraged this Court to view the videos. As stated, this Court did so extensively.

The forensic interviewer and Applicant's two experts assisted the Court in understanding the complexities and challenges generally faced when attempting to obtain information from a minor victim. The forensic interviewer testified to her interaction with the victim in obtaining information from the victim. The forensic interviewer also explained the historical need and her methodology in obtaining disclosures from child victims of sexual abuse. Applicant's two experts also explained the historical perspective of needing a reliable method to obtain information from a child so that wrongful convictions based on information obtained during a forensic interview do not occur.

The forensic interviews in this case may be classified as uncharacteristic in several respects. The forensic interviews were privately arranged (not by law-enforcement). The more common practice is for the forensic interviewers to be arranged by law enforcement for law enforcement investigation purposes. The interviews here were arranged for a private purpose. The initial purpose for conducting the forensic interviews was to determine what, if any, bad thing(s) the victim would disclose about Applicant. The motivation behind the initial arranging of the interviews may explain some of the manner of the questioning seen in the interview videos.

¹⁰ This Court's agreement with applicant that interviews were suggestive, should not be interpreted as a finding that conclusively supports his application. In the present case, neither party admitted the videos. Thus, the videos in this PCR are collateral to the evidence presented by the State to establish applicant's guilt. While true the videos, when accompanied by appropriate expert testimony establish exculpatory evidence, the videos (with or without countering expert testimony), also, present evidence consistent with the jury's finding of guilt.

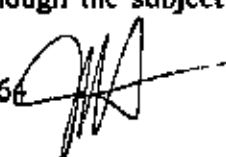
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This Court notes that the term "disclosure" was used broadly by the witnesses. Also the relatedness of the victim's trial testimony to what was disclosed on the videos is, at best, only related by inference.

As mentioned herein, Applicant's experts were critical of the forensic interviewer's suggestive style of questioning and lack of scrutiny of the child's statements. The testimony was that the victim made some type of sexual assault disclosure, that involved Applicant to her maternal grandmother. The testimony was that this disclosure was revealed by the grandmother just after the therapist recommended that counseling sessions should include Applicant. The therapist's services were terminated after the grandmother revealed the disclosure and referrals were made for the forensic interviews. Testimony was presented to this Court that indicated the "treating" therapist made the referral for the forensic interviews because of the disclosure. This Court can conclude that whatever "disclosure" may have been made to the "therapist", it did not rise to the level of abuse or neglect to merit reporting by the therapist, to law enforcement. The record reflects that law enforcement may have been notified was after the second interview. After the forensic interviews concluded, the victim did not return to the treating therapist. A new therapist was hired by the family. The new therapist was formerly employed with the forensic interviewing center. The new therapist regularly received referrals from the forensic interview center.

The exact nature of what the grandmother revealed about the initial sexual abuse disclosure is unknown from the videos. Even though the victim made repeated statements during the videos that Applicant had done nothing or otherwise exculpated Applicant, nothing was seen in the interviews (and Applicant's experts were very critical of the interviewer) that tests the validity of the child's accusatory statements. Most evident was that the forensic interviewer failing to explore what may have influenced a young child of four years to "strongly" declare that her biological father was "not her father" in the videos even though the subject of fatherhood had not been



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brought up. Also, it appears the only direct questioning of the child about coaching occurred only for a few seconds at the end of the fifth (last) session while the child appeared to be running around the room.

Again, as suggested and encouraged by all three witnesses, this Court viewed the videos to determine the content of the videos instead of basing its decision on the testimony of the witnesses as to what was contained in the videos. In so doing, this Court was able to view consistencies and inconsistencies in the descriptions offered by the forensic interviewer and the expert witnesses during the PCR hearing when compared with what is reflected in the videos.

Again, Applicant claimed that his trial counsel was constitutionally deficient by not publishing the interview videos to the jury and not calling experts to testify before the jury to discredit the interviews. On this issue, this Court cannot find that applicant met his burden of proof, as his attorneys made a strategic decision not to publish the videos or present expert testimony.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis omitted). "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" Id. (quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). The decision not to call witnesses, including expert witnesses, can be part of a reasonable trial strategy. Putnam v. State, 417 S.C. 252, 261, 789 S.E.2d 594, 599 (Ct. App. 2016)

"[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998). See also Abney v. State, 408 S.C.



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41, 48, 757 S.E.2d 544, 547 (Cl. App. 2014) (Pieper, Jr., concurring) (“[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined. What motions to file and whether to put on evidence so as to preserve the final word in closing argument are also strategic and tactical decisions to be made by trial counsel.” (internal citations omitted)).

“In most PCR cases in which the applicant seeks relief for trial counsel’s failure to call witnesses, the PCR court’s analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” Buckson v. State, 423 S.C. 313, 320–21, 815 S.E.2d 436, 440 (citing Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64–65 (2011) (deferring to trial counsel’s strategic considerations); Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770–71 (1998) (same); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same)). “A PCR court’s analysis of counsel’s strategic decisions must be ‘highly deferential’ to counsel’s judgment, and ‘a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.’ ” Buckson, 423 S.C. at 321, 815 S.E.2d at 440 (quoting Strickland, 466 U.S. at 689)). “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id.

This Court concludes trial counsel made a sound, well-reasoned strategic decision not to present any expert witnesses or introduce and publish the forensic interviews. In CSC with a minor cases where these type of forensic interviews were videotaped, every defense trial attorney faces the decision, “what do I do about the videos?” The law, at the time of Applicant’s trial and now, allows the publishing of the videos (subject to evidentiary rulings). In Applicant’s trial, the State

made the decision not to offer the videos for publication to the jury. Applicant's trial attorney also did not offer the videos for publication to the jury. As mentioned before, the facts of this PCR mean that substance of the videos and the testimony of three (3) experts are collateral to the evidence that established the applicant's guilty beyond a reasonable doubt to the jury.

Trial counsel felt it best to defend against a single/isolated allegation rather than the other references made by the minor/victim (arguable some non-specific and vague) on the tapes. While this Court finds Applicant has been successful in discrediting the forensic interviews for being suggestive, this Court also agrees with the testimony and opinion of the forensic interviewer that if the videos were shown to the jury, they would view a young four-year-old-child with non-age appropriate knowledge of potentially sexual matters. This Court cannot criticize trial counsel for his decision, even if that decision may have proved to be wrong. This Court also notes the use of the word "disclosure" by the forensic interviewer and Applicant's experts and the broad difference in meaning.

The Applicant's asserted factual narrative from the trial and the PCR was that Applicant did not commit the offense and that his daughter's statement should not be believed because it was the product of an aggressively fought Family Court proceeding. The acrimonious history of the corresponding Family Court action/proceedings is well documented and cannot be contested. The Family Court timeline supports the inferences desired by Applicant. The timing of the initial disclosure by the grandmother after the counselor recommended therapy to include Applicant, the lack of cooperation by the family with the Family Court GAL after the grandparent revealed the disclosure, the private referral to the Child Advocacy Center (not by law enforcement), and the resistance by the family to cooperate with DSS, are factual events consistent with Applicant's narrative. Additionally, information from the DSS file also support Applicant's narrative.

This factual narrative was presented to the jury during the criminal trial and argued by trial

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counsel. Notwithstanding, the jury convicted applicant. Again, at trial, Applicant's attorney wanted to minimize the focus on the victim's allegations. His attorney desired the focus to be on the motivation to fabricate the allegations.

The child did not appear before this Court. The only opportunity by this Court to witness the child was through the videos. As expected, she was a very young child speaking about some (although vague) adult subject matter through child-like means (primarily pointing at crayon drawn pictures). In contrast, her trial testimony reads that she was assured and unambiguous about what the applicant had done to her. Her testimony reads in stark contrast to the video interviews which, frequently, appeared chaotic and uncontrollable. The child/victim's video version of Applicant's conduct towards her was not as clear or direct. Rather, her video statements generally ranged from that nothing bad happened, if something bad happened it was by a third person from class, to applicant doing something bad, including bad things happening involving her father's girlfriend while in Virginia.

The victim's examination at trial was brief, just over five pages in length. She was seven years of age at the time of the trial. In response to the question, "can you tell the ladies and gentlemen what happened to you at the hotel", her response was "he stuck his private part in my mouth." She went on to physically demonstrate to the jury what she meant by private part by pointing to its location using her own body and explaining that this event happened in the bathroom by the hotel's pool.

In response to the direct examination, trial counsel performed a cross examination. The cross examination reads that trial counsel performed a relevant and competent examination. Trial counsel's cross examination reads that he successfully made several points attacking the credibility of the child, including the fact that the teddy bear she took with her to the witness stand and held while testifying was not her bear, the location of the pool/bathroom, the crowd at the pool and that

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the events she related did not happen in their hotel room's bathroom.

Trial counsel attempted to establish, as was strongly asserted through the PCR, that the child should not be believed because she was coached into creating the allegations against Applicant. At trial, and as part of the PCR, some very consequential facts were proven true to support this theory. Again, when the initial disclosure was made by the grandmother, motivation to influence the child existed due to the ongoing family court litigation. The timing of the disclosure was argued to be suspect due to it occurring immediately after the therapist recommended a joint meeting with the parents, child and Applicant. Once the disclosure was made, the services of the therapist ended. A private referral was made to the forensic interview service. Information suggested that the parents paid for the forensic interview services. Cooperation with the Family Court GAL ended. Once the multiple sessions of forensic interviews concluded, a referral was made to a new therapist who was formerly with the forensic interview service.

The difficulty, again, for applicant's PCR purposes, was that the jury received these facts before returning their guilty verdict. Again, this Court cannot find error in trial counsel's decision to not publish the video tapes nor can error be found in not calling expert witnesses. The same clash/conflicting testimony concerning the interviews presented during the PCR hearing most likely would have been presented to the jury. The Court can conclude the reasoning why the State did not publish the videos. The videos potentially could do more harm than good to the State's case. Also, from the State's position, the videos may at best, as described by the forensic interviewer, reflect generally age-inappropriate sexual knowledge by the child, but do not support the specific act alleged at trial. At best for Applicant, if the videos had been published and experts presented to the jury, the factual narrative that the child/victim's trial testimony was the result of undue influence potentially may have been enhanced. The risk was also present that the child single accusation against the applicant would have been made more believable.



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In conclusion, this Court finds trial counsel has a sound, well-reasoned trial strategy not to present expert witnesses or publish the forensic interviews to the jury, and accordingly, Applicant cannot establish any constitutional ineffectiveness of counsel as to these allegations.

Allegations pertaining to Special Prosecutor Brannon, including "Failing to investigate, develop, and present evidence that Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting the case," "failing to move for disclosure of exculpatory information in the possession of Brannon," and "failing to request a ruling on Applicant's contention that Brannon was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470."

Applicant also asserts trial counsel's efforts of objecting to the use of the private trial attorney who represented the victim's parents against the Applicant in the prior trial of the related Family Court matter to assist the Solicitor's office in prosecuting the criminal case amounts to ineffective assistance of counsel.¹¹ The PCR record established that the family court private trial attorney was associated late by the family's private counsel in the family court process for the purpose of conducting the family court trial. Applicant's trial counsel's objection was overruled and affirmed, for the most part, on appeal.

As the Court of Appeals correctly determined, the trial judge properly allowed Brannon to serve as a special prosecutor in Applicant's case, and Applicant's contention that Brannon's service as a special prosecutor violated his constitutional rights is contrary to well-reasoned and settled precedent. In State v. Addis, a private attorney who had previously represented the victim's family in a civil claim against the defendant participated in the defendant's criminal trial alongside the solicitor. 257 S.C. 482, 486, 186 S.E.2d 415, 416 (1972). The civil claim was settled prior to trial. Id. In finding no error with respect to the private attorney's participation in the case, this Court found that "traditionally in this State private counsel has been permitted to assist the State

¹¹ These issues of the propriety of Brannon acting as a special prosecutor also arose in a subsequent disciplinary matter opinion from the South Carolina Supreme Court that was shared with this Court. In the Matter of N. Douglas Brannon, Op. No. 27933 (filed Dec. 18, 2019). However, as discussed below, this Court finds Applicant is not entitled to relief on any claims pertaining to Brannon's role as special prosecutor.



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in prosecutions." *Id.* at 487, 186 S.E.2d at 417. The Court also stated: "the defendant has no right to complain" where private counsel "participates in the trial of a case and does only what a solicitor should do." *Id.* Finally, the Court held: "We cannot say that the participation of private counsel violates the constitution or any statutory or common law principle. Such ruling would appear to be in keeping with the weight of authority." *Id.* at 487-88, 186 S.E.2d at 417.

In State v. Nichols, a 1997 murder case, the defendant asserted it was unconstitutional to allow the solicitor to use three private attorneys hired by the victim's family to prosecute his case. 325 S.C. 111, 119, 481 S.E.2d 118, 122 (1997). The Supreme Court again rejected this argument, ruling as follows:

Private counsel's participation in a trial to assist the solicitor has been sanctioned in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986); State v. Addis, 257 S.C. 482, 186 S.E.2d 415 (1972); State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971); and State v. Gregory, 172 S.C. 329, 174 S.E. 10 (1924).

In State v. Addis, 257 S.C. at 487-88, 186 S.E.2d at 417, we declined to find error in the allowance of a private attorney's participation in a criminal trial. The trial court has discretion to allow the solicitor to have the assistance of counsel employed by the prosecuting witness or other person interested in securing a conviction with the consent of the solicitor. *Id.* A special assistant solicitor is not automatically disqualified because of his simultaneous representation of an interested party. Disqualification occurs when a special assistant solicitor attempts to use his authority in the criminal action to the advantage of his civil client or otherwise compromises his neutrality in the criminal proceeding. State v. Mattoon, 287 S.C. at 494-95, 339 S.E.2d at 869. There is no evidence the private attorneys who acted as special assistant solicitors here stood to gain an unfair advantage in the civil matter as frowned upon in In re Jolly, 269 S.C. 668, 239 S.E.2d 490 (1977). Further, the solicitor maintained control of the case. We do not find error in the use of private attorneys here.

Id. at 119, 481 S.E.2d at 122-23 (emphasis added).



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The reasoning of Nichols and Addis applies in Applicant's case.¹² The Seventh Circuit Solicitor's Office maintained control of Applicant's case, Mr. Brannon's service in the case was as a "third chair" and assisted with some aspects of the trial, including arguing two motions, examining one witness (the victim's therapist), and presenting the State's closing argument. Even though a "third chair", his role in trial was substantial. Nevertheless and significantly, in Applicant's case, unlike in Nichols, Mr. Brannon did not "simultaneously" represent an interested party; instead, his representation of the victim's mother and adoptive father concluded in October of 2012, more than a year and three months before Applicant's trial. (App. 120). Mr. Brannon stood to gain nothing (other than a sense of personal satisfaction, perhaps) from providing *pro bono* assistance to the State, nor has there been any contention that he attempted to use his authority as a special prosecutor in some improper way.

Applicant's argument on appeal and now in this instant post-conviction relief action is based on a belief that Mr. Brannon *might* have learned something during his representation of the victim's mother and adoptive father in the past that *might* have been helpful to the defense in this case, and assumes that Mr. Brannon failed to turn such information over to the defense. He further argues that his representation might require him to violate his oath of confidentiality to his former clients. In support of this allegation, Applicant relies on the discovery affidavit and attached email dated April 23, 2012, from Mr. Brannon's family court file, discussing the "unfortunate timing of [the victim]'s disclosure" of sexual abuse just three days after counselor Kimberly Roseborough suggested a co-parenting session to work on reunification of Applicant and the victim. This email heightens this Court's opinion that the private family court matter was of a concern higher than the

¹² This Court in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), discouraged the practice of appointing private counsel to prosecute criminal cases. The private attorney appointed to prosecute the case in Mattoon was the sole prosecutor and no one from the solicitor's office was present during trial. Mattoon at 494-95, 339 S.E.2d at 868-69. In any event, despite the statement of discouragement in Mattoon, the decisions of our Supreme Court have consistently upheld the use of special private prosecutors when attacked by the defendant. The Nichols case decided about eleven years after Mattoon reiterates this view.

potential criminal allegations. However, this email is cumulative to other evidence already in possession of trial counsel, which is readily apparent as this argument was one of the main defense theories at trial.

Mr. Brannon testified at the evidentiary hearing that he never maintained a criminal file in this matter and did not use his family court file. He testified he reviewed his family court file for this action in accordance with a court order and the sole email was produced out of an abundance of caution although the information was already known to all parties, as was readily apparent at the evidentiary hearing. Moreover, Mr. Brannon was not actively representing the victim's parents at the time of the criminal trial, as the family court action had concluded in late 2012 with the successful termination of Applicant's parental rights. Applicant has failed to meet his requisite burden of proof as to these allegations and this Court denies and dismisses them.

Applicant also argues that trial counsel was constitutionally ineffective for failing to request a ruling on Mr. Spade's contention that the Special Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce governor's commission pursuant to S.C. Code Ann. § 1-7-470." As with the previous allegation, this issue was raised on direct appeal but found to be unpreserved and/or waived at trial, as trial counsel conceded that the solicitor "does have the right to appoint a special prosecutor." Trial counsel is correct that the Seventh Circuit Solicitor had the authority to appoint Mr. Brannon as a volunteer special prosecutor to assist in this case and accordingly, no objection would have been proper on this basis. This allegation is without merit and should be denied and dismissed with prejudice.

This Court finds Section 1-7-470 is not applicable to Applicant's case, since the Seventh Circuit Solicitor appointed Mr. Brannon as a volunteer special prosecutor for the duration of one trial, rather than as a paid "assistant solicitor" as discussed in the statute. This is further illustrated by reference to sections 1-7-405 and 1-7-406 of the South Carolina Code, which appear in the

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same Article and clearly contemplate a full-time hired assistant solicitor and not a one-time special appointment. The case of State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), cited by Applicant on appeal, is distinguishable because, in addition to dealing with a different statutory provision (S.C. Code § 1-7-405), the private attorney in Mattoon was appointed as a "special assistant solicitor" and had an agreement (presumably for pay) to prosecute "a series of obscenity cases" in the county. This Court finds Applicant cannot meet his burden of proof and denies this allegation.

Allegation: "Not only failing to object to the [trial] judge instructing the jurors that their role is to 'search for the truth' and make sure 'justice is done' and the prosecutor embracing this language in the its opening statement, which impermissibly diminishes and shifts the burden of proof, but also adopting that language in Mr. Spade's opening statement and closing argument, thereby diminishing and shifting the burden of proof."

Applicant also argues counsel was constitutionally ineffective for failing to object to the trial court's instruction to the jury that its role was to "search for the truth" and make sure "justice is done," and to the prosecutor's use of similar language in its argument. Additionally, Applicant contends trial counsel also erred when he used similar language in his argument, which compounded the harm caused and shifted the hurden from the State and confused the jury.

During its opening comments, the trial court instructed the jury as follows:

Now, we are about to try the case of the State of South Carolina versus Daniel William Spade, who is the defendant in this matter, but before we begin this trial I want to tell you that this trial will probably be different from what you might expect. Many people do not have the chance to attend an actual court session, as you are doing now, and many people believe from watching television or movies or reading books that trials are always fill of high drama, intense action and riveting circumstances. Now, while all these things may be true at times, this trial is not for entertainment purposes. This trial is a fundamental part of our democracy - a search for the truth in an effort to make sure that justice is done between the parties before the court. Searching for the truth and making sure that justice is done is often slow, deliberate and repetitive, the opposite of what you may have seen on television or in a movie or read in books. This courtroom is a place of honor dedicated to the protection and preservation of citizen's rights through what many have called the greatest justice system ever created.

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The attorneys appearing before you are advocates for the parties they represent, but first and foremost they are officers of this court, sworn to uphold the integrity and fairness of our judicial system and to help you in the search for the truth. You should expect them to be professional, competent and ethical in their representation of their client's interests, and you also are expected to be professional, reasonable and ethical. Again, we thank you for your service as jurors this week.

What I say now is intended to serve as an introduction to the trial to this case. My remarks are not a charge on the law of this case. I will instruct you on the law at the end of the trial before you retire to consider your verdict. My remarks are merely an explanation of the procedure that we will follow in the trial of this case that you may better understand what may be happening.

(Trial Tr. p. 109-11).

During opening arguments, the State referenced the trial court's preliminary charge, stating, "As Judge Kelly advised you, this is a search for the truth. And as representing the State of South Carolina, that's what we are here to do is ask you to listen to the testimony (Trial Tr. 120).

Thereafter, trial counsel addressed the jury and gave the following opening argument.

Good morning, ladies and gentlemen. I want to thank you guys in advance, ladies and gentlemen, for your willingness to come, your participation, your attentiveness, your focus over the next several hours, potentially several days; the testimony, lots of lawyers speaking, and as Judge Kelly said, a search for the truth. The key word in that statement, ladies and gentlemen, is the word search. That means that you have to look for. It's not just handed to you. It's not just thrown at you. You have to find it. Take that into consideration as every witness takes that stand and as every document comes before you. It's a search. You have to look for it.

This case, ladies and gentlemen, is about a man, Daniel Spade, a man who became a father, a man who wanted to become a dad under the most difficult of circumstances. A man, who lives in Virginia, got into a relationship with a woman who lives in South Carolina. She got pregnant. He became a father and he wanted to be a dad. So, as Ms. Leskanic said, Family Court got involved. He wanted to be a dad.

[The victim]'s mom and stepdad wanted to terminate his parental rights. They didn't want him to be a dad, so he fought to be a dad and he got the chance to be a dad. He got to visit with his daughter as a dad. Unfortunately for Mr. Spade his journey to be a dad didn't get to end with a high school graduation, or a college graduation, or a medical school graduation. It didn't get to end with walking his daughter down the aisle at the wedding. It's culminated in a criminal trial. It's culminated in a criminal trial where he is being accused of an awful, awful crime, but as Judge



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Kelly has said, and will say again, Mr. Spade, just like any other defendant in this state, is innocent until the State can prove him guilty beyond a reasonable doubt.

So I'll ask you, ladies and gentlemen, over the course of the next several hours, potentially the next several days, to begin that search for the truth, with the understanding that it is the State's responsibility to prove that truth in here.

I submit to you that when this search is over and the State has given you and handed you everything that they want to hand you, the search will lead you to find Mr. Spade is not guilty of the crime that he's been accused of. It's a horrible crime. It's a horrible act, but this isn't about the horrible act. It's about whether Daniel Spade, a man who wanted to be a dad, committed the act. I look forward to the journey for the truth with you. Thank you.

(Trial Tr. 120-23).

Applicant contends that trial counsel should have objected to the trial court's use of truth-seeking language in its opening charge, objected to the prosecutor's reference to the trial court's truth-seeking language in the State's opening argument, and should not have used such truth-seeking language in his own opening argument. Applicant argues such arguments misled the jury into thinking the purpose of the trial was to search for the truth and not to determine if the State had met its burden of proof. Applicant argues because credibility was central in this trial, such truth-seeking references prejudiced Applicant to such a level that he is entitled to a new trial.

Applicant is correct that the trial court's statements and his attorney's statements crossed into the Beatty sphere of improper statements that shift the jury's focus away from the State's obligation of meeting its burden of proof. At the time of Applicant's trial, Beatty had not been decided and its jurisprudence was not universally recognized. Therefore, counsel cannot be deficient for failing to object or making such arguments. Also, given the other arguments made by his attorney and statements of law made by the trial court, this Court finds prejudice was not established.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charged the jury to "search for

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the truth” ran the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the “seek the truth” language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge.

Recently, the South Carolina Supreme Court again considered the use of “truth seeking” language by the trial court in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018). The Beaty Court concluded:

[A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal.

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Id. The Beaty opinion signified the first time the Court issued a general and blanket admonishment to the bench and bar that such “truth-seeking” language should be avoided at any point during the trial, but nonetheless found a harmless error analysis applied if such charges or commentary was given by the trial court.

In both Aleksey and Beaty, the South Carolina Supreme Court determined that while the trial court's use of “truth seeking” language was improper, the error was not significant enough to warrant reversal of the convictions. The same holds true in Applicant's case. Initially, it is important to note that at the time of Applicant's trial in 2014, the trial court's opening charge included truth-seeking remarks that were widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. Sec

Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016); see also Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). Beaty made clear to the trial bench that such language was not to be argued during a trial to a jury even though, as referenced by applicant, State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2013) existed.

Here, when these "truth seeking" comments are viewed in conjunction with the record as a whole, the trial court properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Applicant. Because the jury instructions as a whole were proper, Applicant cannot establish any resulting prejudice. See Brown v. Stewart, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Cl. App. 2001) ("In reviewing jury charges for error, we construe the court's charge as a whole in light of the evidence and issues presented at trial. If the instructions of the trial court, construed as a whole, correctly state the law, there is no reversible error. To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury verdict." (internal citations omitted)).

Additionally, trial counsel repeatedly reminded the jury in his opening argument that the State firmly held the burden of proof and must establish beyond a reasonable doubt that Applicant was guilty. Based on this, in conjunction with the proper jury instructions on the State's duty to prove Applicant's guilt beyond a reasonable doubt, Applicant cannot establish deficiency of counsel or prejudice. In sum, at the time of Applicant's trial, trial counsel was not on notice that such an objection must be made to these introductory comments by the court and solicitor. Similarly, trial counsel did nothing improper by adopting such remarks in his opening statement, wherein he also repeatedly reminded the jury of the State's burden of proof. This Court finds Applicant cannot establish constitutional ineffectiveness and denies relief.

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Allegation: "Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information."

Applicant alleges trial counsel was constitutionally ineffective for failing to move for a continuance to allow more time to review additional mental health records from the victim's counseling sessions with Meredith Thompson-Loftis that were not provided to the defense until shortly before trial. Applicant asserts that trial counsel was unprepared for trial based on the late disclosure of these additional records, covering February 2012 through December 2013 counseling sessions of the victim with Thompson-Loftis, and trial counsel should have moved for a continuance to allow extra time for him to review and possibly consult with an expert witness about these additional records. Applicant contends this last batch of counseling records referenced sexual abuse of victim by Applicant's fiancée Cara and mentions abuse occurring in Greenville, both of which should have been explored by counsel and required a continuance to do so. This Court finds that the trial record reflects, however, that trial counsel made numerous objections. Most rulings, unfortunately for Applicant, were not favorable to him. The trial court actually limited the testimony of Thompson-Loftis. This Court can find no error for PCR purposes by trial counsel under our jurisprudence that existed at the time of trial.

In analyzing this allegation, it is important to review the timeline of how the issues pertaining to these records arose before and during trial, including counsel's actions and representations to the trial court concerning the victim's counseling records. Before Applicant's trial, this Court, acting in its capacity as the current Chief Administrative Judge for General Sessions for the Seventh Circuit, filed an order that stated, in pertinent part: "The State shall not be required to turn over any mental health records of the alleged victim from Meredith Thompson Loftis at this time; however, if the State intends to call her as a witness in their case, they must turn over all such records within a reasonable time prior to the trial of this case." (R. p. 3). This

order did not provide for any particular remedy in the event a violation occurred. On February 11, 2014, approximately two weeks prior to Applicant's trial, trial counsel filed a motion to exclude the testimony of Meredith Thompson-Loftis on the ground that the State had not yet turned over all of Ms. Thompson-Loftis' records and that "it is no longer a reasonable time prior to the February 24, 2014 call of the case." (R. p. 8). The motion also requested an in camera review of the issue prior to the admissibility of Ms. Thompson-Loftis' testimony. (R. p. 8).

On February 24, 2014, the day the case was called for trial, trial counsel raised the issue of the earlier order and argued the State violated it by failing to turn over records within a reasonable period of time prior to trial. (R. p. 34-35). Specifically, trial counsel asserted that although the State, on October 31, 2013, turned over records covering the dates of May 17, 2011 through February 16, 2012, it was not until "last week," February 20, 2014, that the State turned over records spanning the dates of February 23, 2012 through December 30, 2013. (R. p. 35, lines 15-21). Trial counsel also stated that no records for any dates after December 30, 2013, had been turned over. (R. p. 35, lines 21-23). Trial counsel argued, "in essence, Your Honor, before this trial was to begin they handed over the last twenty-two months of counseling records. I believe that is contradictory to Judge Hayes' ruling. I don't believe they turned over her records within a reasonable time. Therefore, I would ask that any testimony of Meredith Thompson-Loftis be excluded under the terms of Judge Hayes' order, which were issued and filed with the court on February 27 of 2013." (R. p. 35, line 23 - p. 36, line 6).

In response, the State responded that "twenty-two months" of records in fact included only twenty-five pages of counseling notes. (R. p. 36, lines 11-14). The solicitor noted that "[i]t was five pages that included some writings and then twelve pages that included drawings." (R. p. 36, lines 17-18). The solicitor also pointed out that the defense had access to the majority of Ms. Thompson-Loftis' records prior to this; that defense counsel personally cross-examined Ms.

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Thompson-Lofitis in the family court trial that took place in October of 2012; and that the victim had made no new disclosures to the counselor. (R. p. 36, line 19 – p. 37, line 1). The solicitor argued that considering the “un-burdensome” nature of the records turned over four days prior to trial, the records were turned over within a reasonable amount of time. (R. p. 37, lines 2-4). The solicitor further noted that she had requested the records earlier from Ms. Thompson-Lofitis, but there were apparently some issues with obtaining the records; however, the State turned over the records the morning after receiving them via fax at 8:06 pm on Wednesday, February 19, 2014. (R. p. 37, lines 10-17).

Trial counsel agreed that these records were turned over upon receipt and stated, “I’m not saying you withheld it.” (R. p. 37, lines 16-21). However, trial counsel argued that the “legibility” of the records was an issue and having to “translate her handwriting in four days.” (R. p. 38, lines 12-15). He also noted that his late receipt of the records prevented the defense “from being able to have any experts, should we have wanted to have an expert look [at] it.” (R. p. 38, lines 18-21).

The trial judge then asked trial counsel if there was anything new or surprising in the records that had recently been turned over. (R. p. 39, lines 3-4). Trial counsel responded that he had learned the “number of appointments this child had with Meredith Thompson-Lofitis in the year, plus, since the hearing, but *nothing of major significance* that I could see or that I could translate in the four days that I have had to take a look at it.” (R. p. 39, lines 5-9) (emphasis added). The trial judge responded that the records looked “pretty straightforward” and said that he was able to read Ms. Thompson-Lofitis’ handwriting. (R. p. 39, lines 10-14). He also offered assistance with “translating” the records but defense counsel declined. (R. p. 39, lines 15-18). The judge then denied counsel’s motion to exclude the testimony of Meredith Thompson-Lofitis. (R. p. 39, line 19). Defense counsel stated, “All right. Thank you, Your Honor.” (R. p. 39, line 20).

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Later in trial, after Ms. Thompson-Loftis testified that the victim was still a client of hers to date, trial counsel renewed his motion to exclude. (R. p. 267-68). He stated that if the victim is a continuing patient of Ms. Thompson-Loftis, there must be records dated after December 30, 2013 which had not been turned over. (R. p. 268, lines 17-22). He argued the State was therefore not in compliance with pre-trial order and asked that Ms. Thompson-Loftis be excluded as a witness and that all of her testimony be stricken from the record. (R. p. 268, lines 22-25). The State noted that it was not in possession of any records dated after December 30, 2013. (R. p. 269, lines 2-8). Ms. Thompson-Loftis then told the court she did have records for January 2014. (R. p. 270, lines 1-5). Over trial counsel's objection, the judge ruled that Ms. Thompson-Loftis would not be excluded as a witness but would not be permitted to testify as to anything that occurred with respect to sessions after December 30, 2013, since trial counsel had not been privy to those records prior to trial. (R. p. 270-72).

Trial counsel has been representing Applicant since 2007 in his family court actions involving the same victim and included the same allegation of sexual assault presented in this criminal trial. Trial counsel testified he first learned of the allegations of sexual assault against Applicant in March of 2011, nearly three years prior to Applicant's trial in February 2014. As counsel stated both during Applicant's trial and at the evidentiary hearing, he was well aware the victim had received counseling from Thompson-Loftis and was in possession of the vast majority of her counseling records well in advance of Applicant's criminal trial.

At the evidentiary hearing, trial counsel conceded this last batch of Thompson-Loftis counseling records did not contain any new exculpatory or impeaching information that would have been beneficial to him at trial, although he did perplexingly state he should have moved for a continuance despite having no articulable reason why. Trial counsel's assessment is correct—there simply is nothing in this final batch of counseling notes that would have changed counsel's

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preparation for trial or defense. The references to Applicant's fiancée Cara committing sexual abuse against the victim absolutely do not exonerate Applicant as the records could at best be interpreted to show Cara was a witness to or participant in the sexual abuse of Applicant. Moreover, Cara's potential involvement in the sexual abuse had already been vetted by law enforcement, who determined Cara was not involved in any sexual assault, but rather, had tried to comfort the victim with a bath while the victim was visiting their home in Virginia. Thompson-Loftis testified similarly at the hearing, stating she did not interpret the victim's statements regarding Cara to be disclosures of sexual abuse by Cara.¹³

Similarly, Applicant's argument that these records could establish the abuse happened in Greenville are also erroneous. Numerous witnesses all testified the only time Applicant was alone with victim during the period the abuse occurred in South Carolina were in Spartanburg County. Investigator Cantrell testified she investigated whether the allegations occurred in Greenville County or Spartanburg County and all evidence established the sexual abuse occurred at a Holiday Inn Express in Spartanburg County. Thompson-Loftis similarly explained the notation of "Greenville" meant the upstate metropolitan region encompassing both Spartanburg and Greenville.

Counsel also testified that Applicant was eager to get his case resolved as it had been pending for nearly three years and did not want the case continued. He elaborated Applicant was not pleased when the case was continued in November of the prior year to allow additional time to review the latest batch of counseling records. Additionally, counsel testified he would not have called an expert regarding the counseling records such as Dr. Bruck because calling an expert would have required showing the videos of the forensic interviews, which he strategically did not

¹³ From the information presented during the PCR hearing, evidence of Cara's involvement with the victim is inconclusive, and speculative. Nevertheless, no criminal charges were ever brought against Cara. From the PCR hearing, this Court's impression was that Cara may have been a witness hostile to the applicant at time of criminal trial.

want to do because it would have allowed the jury to hear of many more allegations of abuse made by the victim against Applicant rather than the one discrete incident she testified to at trial.

Applicant has not established any deficiency of counsel. As discussed above, there is nothing in this last batch of records that would have or should have altered trial counsel's trial preparation or defense. Upon learning of the additional records from Thompson-Loftis before the trial's originally-scheduled date in November, counsel timely moved for and was granted a continuance to allow him additional time to review these records. When Applicant's case was again called for trial in February, he moved to exclude the testimony of Thompson-Loftis based on the late disclosure of the records, which was denied by the trial court and preserved for appellate review. When Thompson-Loftis then testified as to additional counseling notes that had not previously been disclosed, counsel timely moved to exclude the testimony, which was granted as to the last few months of counseling. Applicant has failed to show how counsel was deficient in his handling of these records or for failing to move for a continuance, particularly when counsel testified Applicant did not want his case continued.

Moreover, Applicant has failed to show any resulting prejudice from counsel's failure to move for a continuance. There is nothing in this final batch of Thompson-Loftis records that would have changed the result of trial or counsel's preparation for trial, which he candidly admitted to the trial court when he moved to exclude the testimony of Thompson-Loftis. These records simply do not amount to any credible evidence that Cara was the perpetrator of any abuse or that the venue was in Greenville County. This Court finds allegations should be denied and dismissed with prejudice.

Allegation: "Failing to call available lay and character witnesses that would have established the unreliability of the child's allegations."

Applicant alleges trial counsel should have presented lay and character witnesses in his defense and was constitutionally ineffective for failing to do so. As discussed above regarding

Applicant's allegation that counsel should have called expert witnesses, this Court finds counsel employed a reasonable trial strategy in not calling witnesses. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis omitted). "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" Id. (quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). The decision not to call witnesses, including expert witnesses, can be part of a reasonable trial strategy. Putnam v. State, 417 S.C. 252, 261, 789 S.E.2d 594, 599 (Cl. App. 2016).

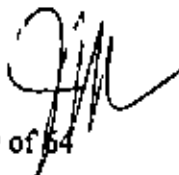
"[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998). See also Abney v. State, 208 S.C. 41, 48, 757 S.E.2d 544, 547 (Cl. App. 2014) (Pieper, Jr., concurring) ("[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined. What motions to file and whether to put on evidence so as to preserve the final word in closing argument are also strategic and tactical decisions to be made by trial counsel." (internal citations omitted)).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320–21, 815 S.E.2d 436, 440 (citing

Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011) (deferring to trial counsel's strategic considerations); Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770-71 (1998) (same); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same)). "A PCR court's analysis of counsel's strategic decisions must be 'highly deferential' to counsel's judgment, and 'a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.'" Buckson, 423 S.C. at 321, 815 S.E.2d at 440 (quoting Strickland, 466 U.S. at 689)). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id.

In Applicant's case, trial counsel made a sound, well-reasoned strategic decision not to present any lay, character, or expert witnesses. At the evidentiary hearing, Applicant presented his brother-in-law and a close personal friend in support of this allegation. Applicant's brother-in-law, Joshua Trumpower, testified generally about what he perceived to be the victim's anxiety based on his two visits with her. He also testified he observed the victim's adoptive father speak about Applicant in a derogatory manner in front of the victim. He testified the victim's maternal grandmother questioned him regarding Applicant's finances and home-life with his fiancée and their children. Applicant's close personal friend, Michael Mizak, testified generally that Applicant was a good father to his other children, although admitted he had not observed Applicant with the victim. Applicant did not introduce the deposition of his former fiancée, and accordingly, such evidence is not before this Court. Applicant did not produce any other lay or character witnesses in support of this allegation, and accordingly, cannot argue others should have been called if not presented. See Martin v. State, 427 S.C. 450, 455, 832 S.E.2d 277, 279-80 (2019), reh'g denied (Sept. 19, 2019) (reaffirming Applicant must present witnesses or evidence in accordance with the rule of evidence to establish claims for failure to call a witness); Glover v. State, 318 S.C. 496,

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498-99, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

When asked why he did not present lay or character witnesses, trial counsel testified he wanted to preserve his right to the final closing argument and did not want to lose the final argument by presenting lay or character witnesses that he did not think would have any impact on Applicant's case. He also testified he did not want to present character evidence based on the likelihood the State would attempt to introduce its own evidence to rebut Applicant's good character pursuant to Rule 404(a)(1), SCRE. He testified such possible evidence would include instances of domestic violence between Applicant and his fiancée for which Applicant pled guilty in Virginia, as well as possible investigations into sexual abuse of his other children. He also testified he made a strategic decision not to call particular witnesses based on the risk that they would be questioned on cross-examination about things that would be detrimental to Applicant, such as Applicant's father who likely would have been questioned about an incriminating jailhouse conversation of a slip-and-slide game where Applicant informed his father he would bathe with his children and let them slide down his nude body, or Applicant's sister who would likely be questioned about text messages with Applicant discussing how to "clean" a computer. Trial counsel also testified he did not present Applicant's former fiancée Cara as a witness because they were no longer together at the time of Applicant's trial and he believed she would have been a harmful witness to Applicant based on their history of domestic abuse.

Just as with his decision not to present expert witnesses, trial counsel also made a sound, well-reasoned decision not to call any lay or character witnesses. Such witnesses would have likely yielded little benefit to Applicant's case and had the potential to be very harmful by subjecting the witnesses to cross-examination by the State or opening the door to rebuttal evidence of Applicant's


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character under Rule 404(a)(1), SCRE. Trial counsel clearly considered and discussed calling possible witnesses and accordingly was not deficient in his performance. This allegation is denied.

Allegation: "Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony."

Applicant alleges trial counsel was constitutionally ineffective for "failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony." In support of this allegation, Applicant introduced numerous emails between the victim's parents and Applicant discussing the victim's anxiety concerns and the testimony of Applicant's brother-in-law, who spent two occasions with the victim. Applicant asserts trial counsel should have used these emails and presented witnesses such as his brother-in-law to establish there was an innocuous reason for Applicant's panic attacks aside from any sexual abuse by Applicant.

During trial, trial counsel asked and was permitted to proffer testimony from the victim's grandmother about alternative sources of causes of the victim's panic attacks, particularly her adoptive father. (Trial Tr. 221-228). After the proffer, the State moved to exclude such questioning based on third-party guilt. Trial counsel responded,

Your Honor, the difference in this case and the cases that are cited in this brief that I have been handed this afternoon is that the evidence that the defense tried to present in those cases was actual solid evidence that they didn't commit the act in question.

This is a situation where there are allegations that the child is having panic attacks. That panic attacks in and of itself could or could not have anything to do with the fact that my client may have committed this act.

What we are trying to do is to give potentially other reasons, non-criminal reasons, why the panic attacks are occurring, not necessarily issues that she's having a panic attack to go as to what her biological father did.

We are not establishing third-party guilt. We are establishing explanation for symptoms, which the State of South Carolina is going to argue is a symptom of child sexual abuse and she's having panic attacks because of what her biological father did.

(Trial Tr. 228). The trial court ruled that trial counsel would be able to question witnesses about alternative sources or reasons for the victim's panic attacks so long as he did not mention specific individuals and would permit Applicant to present an expert about the panic attacks if he so desired. (Trial Tr. 228-30).

At the evidentiary hearing, trial counsel testified he did not want to present any of his own witnesses or evidence in order to preserve the final argument before the jury because he believed the panic attack issue was ancillary and not worth losing the final word with the jury prior to deliberations. He reiterated that his theory of defense was that the victim's parents had concocted this sexual abuse and coached victim on the abuse and the panic attack issue was not central to this defense. Moreover, he testified there was nothing to support that Applicant was not at the least a major contributor to the victim's panic attacks, which got significantly worse during the 2012 visitations in the summer and fall and markedly improved once visitation ceased as Kimberly Roseborough acknowledged during the family court trial.

This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation. The emails and witnesses presented at the evidentiary hearing do not establish that the victim's panic attacks were not caused or exacerbated by Applicant. The evidence before the Court establishes that Applicant's panic attacks got significantly worse during the periods victim had visitation with Applicant, particularly solo visitation, and considerably improved once visitation stopped. Applicant has failed to present any evidence that would allow him to succeed on this allegation. This allegation is denied.

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Allegation: "Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility."

Applicant alleges trial counsel was constitutionally ineffective for failing to object and move for a mistrial in response to various instances of vouching or bolstering by State's witnesses. First, Applicant complains that the victim's counselors, Kimberly Roseborough and Meredith Thompson-Loftis, were improperly qualified as expert witnesses, thereby bolstering the victim's testimony. Next, Applicant contends that although the State did not seek to qualify Tabitha Weber as an expert witness, she was allowed to testify as an expert witness because she was permitted to testify about her qualifications, education, and experience before the jury. These allegations are without merit. This Court agrees that Tabitha Weber's expertise were unnecessary, but it was not improper not to object. Even if Counsel should have objected, no prejudicial error has been established.

"[A] witness may not give an opinion for the purpose of conveying to the jury directly or indirectly—that she believes the victim," Briggs v. State, 421 S.C. 316, 323, 334, 386 S.E.2d 713, 717 (2017); 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"). While experts may give opinions, they are not permitted to offer an opinion as to the credibility of others. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. Id. (quoting State v. Kromah, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013)).

This Court finds Applicant's assertions the testimony of Roseborough and Thompson-Loftis violated State v. Anderson, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) are also without merit. Anderson, which came out after Applicant's trial, stated best practice is to use a blind expert but did not make such a practice mandatory. State v. Anderson, 413 S.C. 212, 218–19, 776 S.E.2d 76, 79 (2015) ("The better practice, however, is not to have the individual who examined the

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alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility." This Court finds nothing in the testimony of Thompson-Lofis or Roseborough was improper and/or certainly did not warrant moving for a mistrial.

As to the next allegation that Weber's background testimony regarding her education and experience amounted to improper bolster, there is also no merit to the claim Weber vouched for the credibility of the victim because "the prosecution qualified [her] as an expert witness, without actually asking the trial judge to qualify her and[sic] an expert witness." The "qualifications" that Applicant alleges were improper were simply asking Weber to state what type of education, training, or experience she had to qualify her to work at the Children's Advocacy Center, which she replied, "I have a Bachelors Degree in Psychology, a Masters Degree in Social Work, and I'm a licensed independent social worker through the State of South Carolina. And I have extensive training in child development, child abuse, linguistics, developmental delays, pediatric psychotherapy, play therapy. Lots of issues surrounding children, primarily." (Trial 24:48). This Court finds that brief background testimony regarding a witness's education and experience is proper and does not amount to the State improperly eliciting expert testimony as Applicant asserts. Courts have consistently held that such introductory questions are relevant and all the finder of fact. See S.C. Dep't of Highways & Pub. Transp. v. E.S.I. Investments, 332 S.C. 490, 495, 505 S.E.2d 593, 596 (1998) ("It is a routine practice in trials for an attorney to ask his witness certain preliminary questions which may not be relevant to the issues being litigated, which may go beyond mere identification and which are designed to show that the witness will be somewhat credible or not biased in favor of the side calling him. For example, the educational background or professional status or employment position of a non-expert witness may be asked, or the witness's lack of prior contact with the side who has called him may be brought out. These questions give

the jury some knowledge of the individual and a more complete perspective in considering his testimony. . . . We conclude that such questions, within reasonable limits, serve the useful purpose of informing the jury about the witness, and thus may be allowed." (internal citations omitted)). See also State v. Jamison, 365 S.W.3d 623 (Mo. Ct. App. 2012) (noting preliminary questions directed toward aiding the jury in setting a proper estimate on the testimony of a witness may be properly asked and it is entirely proper, either by way of introduction or cross-examination, to identify a witness and to inquire into his residence, antecedents, social connections and occupation, particularly as they reflect his credibility either for good or bad.); State v. Summerville, 98 N.C. App. 167, 390 S.E.2d 358 (N.C. Ct. App. 1990) (holding evidence of robbery victim's scholastic achievements which was presented by prosecution during preliminary questioning was not improper; evidence was offered as means of introducing victim to court and to jury and to assist in explaining victim's background, particularly in light of fact that defendant portrayed victim as aggressor.); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (N.C. Ct. App. 1988) (noting that on prosecution of defendant for second-degree sexual offense involving his step-daughter, prosecutor's question regarding whether the victim was afraid to sleep in her own bed merely sought to establish background information, rather than elicit crucial testimony of elements of crime charged, and was not prejudicial.); State v. Sports, 41 N.C. App. 687, 255 S.E.2d 631 (N.C. Ct. App. 1979) (holding when a witness has been sworn and takes the stand, preliminary questions are properly put to him as to name, residence, knowledge of the case, et cetera, as the purpose of such questions is generally to introduce the witness to the court and the jury and to show why he is there testifying, and are thereby relevant). This Court finds the information provided by Weber amounted to entirely appropriate background questions intended to introduce the court and jury to the witness and provide context for her testimony. Applicant has failed to cite to any precedent establishing the impropriety of asking a witness basic questions about his or her background before

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diving into the substantive portion of the witness's testimony as occurred here. This allegation is without merit and is denied and dismissed with prejudice.

Allegation: "Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualification as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. See, e.g., S.C. Dep't of Soc. Servs. v. Mary C., 396 S.C. 15, 720 S.E.2d 503 (Cl. App. 2011)."

Applicant argues trial counsel was constitutionally ineffective for failing to object to the qualifications of Thompson-Loftis as an expert because her testimony was unreliable. In support of this allegation, Applicant cites to S.C. Dep't of Soc. Servs. v. Mary C., 396 S.C. 15, 720 S.E.2d 503, 507 (Cl. App. 2011), a case where Thompson-Loftis was the counselor working with the child who made sexual assault allegations against her father. In that case, the Court of Appeals noted that Cindy Stichnoch, an independent expert in the assessment and treatment of sexual behavior issues in children, "was highly critical of Ms. Loftis' interviewing techniques, specifically her continuing to have therapy sessions with Anna G. about the sexual abuse allegations until a full assessment was conducted. Ms. Stichnoch stated a child of Anna G.'s age is easily influenced, and repetitive sessions and questions about the allegations could inadvertently and inappropriately reinforce those allegations with the child." Id. Applicant uses this case to assert Thompson-Loftis's methods were unreliable and her testimony should have been excluded.

This Court finds Applicant's use of S.C. Dep't of Soc. Servs. v. Mary C. to support this allegation is improper for several reasons. First, the Court of Appeals does not render an opinion as to the reliability of Thompson-Loftis's methods, but rather, the Court of Appeals merely notes that an independent expert expressed concerns in that particular case to the family court. Second, unlike the minor child in S.C. Dep't of Soc. Servs. v. Mary C., the victim in the present case did not begin therapy with Thompson-Loftis until after disclosures of sexual abuse and her forensic interviews has been completed. Here, Applicant has failed to establish that Thompson-Loftis's

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methods were unreliable or that she should not have been qualified as an expert witness. Trial counsel testified he believed Thompson-Loftis was properly qualified as an expert witness and this is why trial counsel did not object. This Court finds these allegations are denied and dismissed.

Allegations pertaining to venue not in Spartanburg County

Applicant alleges trial counsel was ineffective for: "failing to investigate, develop, and present evidence that venue was not in Spartanburg County;" "failing to support the directed verdict motion with evidence that venue was not in Spartanburg County;" and "failing to request a jury instruction on venue."

From a PCR perspective, venue not being in Spartanburg County, at best for Applicant, was speculative. This Court viewed the evidence in this record as substantial that venue was not an issue in the case. If the criminal events happened, as the jury believed they did, they happened in Spartanburg County, or they did not happen at all. Law Enforcement and/or the solicitors did not hide evidence of venue. In the present case venue was in Spartanburg County, or the events did not happen.

All the evidence presented at the evidentiary hearing clearly establishes venue was proper in Spartanburg County. As discussed previously, Investigator Cantrell testified she investigated whether the allegations occurred in Greenville County or Spartanburg County and all evidence established the sexual abuse occurred at a Holiday Inn Express in Spartanburg County. Moreover, the counseling records from Thompson-Loftis that indicate the abuse happened in "Greenville" refer to the Greenville-Spartanburg metropolitan area, as Thompson-Loftis testified, not to a specific jurisdictional area. As Applicant has failed to present any credible evidence to establish venue was not proper in Spartanburg County, this Court finds these allegations must be denied and dismissed.


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Allegation: "Failing to object to the Special Prosecutor's improper closing argument that appealed to the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest 'bad people,' he (as Special Prosecutor) tells the complaining witness' story, and 'the jury takes care of good people.' Tr. 305-07."

Applicant argues trial counsel was constitutionally ineffective for failing to object to the State's closing argument wherein Special Prosecutor Brannon argued the jury takes care of good people. Specifically, Applicant argues Special Prosecutor Brannon's closing argument was "emotionally charged" and asked the jury to convict based on the improper reason that the victim was a "good person." Trial counsel testified he did not believe the closing was objectionable and accordingly, did not object.

In certain situations, this type of argument can be constitutionally improper. The rule is that a solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences. 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. The argument in the present matter can be argued as wrong because it sought to have the jury view the evidence through an emotional lens rather than factual. More concerning in the present case was that private counsel acknowledged during the PCR that his motives in making the argument was to appeal to the jury's sympathies. Nevertheless, private counsel's argument did not rise to the constitutionally improper level as described in Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), or Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). When private counsel's argument is viewed as a whole, it appears to be based on a proper analysis of the evidence and the burden of proof; and unlike Simmons, private counsel did not misrepresent the law to the jurors. Counsel's argument was not the type of argument found in Tappeiner v. State, 416 S.C. 239, 250-51, 785 S.E.2d 471, 477 (2016).

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In the present case, Applicant has failed to establish the prosecutor's closing argument was improper. The comments did not ask the jury to convict Applicant based on anything other than the evidence presented, which he went through piece by piece with the jury. Special Prosecutor Brannon repeatedly reminded the jury that the State had the burden of proof and that the State had met that burden with the evidence presented. The State's closing argument was proper and certainly did not "so infect the trial with unfairness" as to warrant a new trial. This Court finds this allegation must be denied and dismissed.

Allegation: "Advising Mr. Spade not to present any evidence, including but not limited to his own testimony."

Applicant alleges trial counsel was ineffective for advising him not to present any evidence, similar to his allegation above pertaining to counsel's failure to call witnesses on his behalf.

As an initial note, Applicant failed to take the stand or otherwise offer what his testimony would have been at trial, and, accordingly, cannot establish his burden for failure to present himself as a witness. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

As discussed previously, counsel made a strategic decision not to present any witnesses. Specifically regarding whether Applicant should testify, trial counsel testified he and co-counsel discussed whether Applicant should testify with him numerous times. He testified one major concern with having Applicant testify was the likelihood that Applicant would open the door to possible "unflattering" evidence, such as his aggressive demeanor and comments to law enforcement when interviewed in Virginia, a jailhouse phone call with his father describing the "slip and slide game" discussed previously, and emails and other electronic evidence asking for information on how to "clean" a computer. Trial counsel testified the trial court ruled none of this evidence would be admissible unless Applicant took the stand and opened the door to such

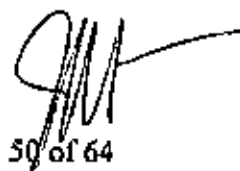
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evidence, and accordingly, trial counsel and Applicant were in agreement it was in his best interest not to testify during trial to avoid any risk of opening the door to such information. Moreover, Applicant failed to testify at trial or otherwise present evidence as to what his testimony would have been at trial. This Court finds Applicant cannot meet his requisite burden of proof as to this allegation, which is denied and dismissed.

Allegation: "Excluding evidence from the forensic computer examination that was exculpatory."

Applicant alleges trial counsel was ineffective for excluding evidence from forensic computer examination that was exculpatory. In his pre-hearing memorandum, Applicant states, "Based on questions asked during Cara Lintner's deposition, Mr. Spade is concerned the State will continue to insinuate his computer was "wiped," despite Ms. Jordan's contrary representation to the trial judge." However, Applicant has failed to set forth what particular information he believes should have been introduced at trial and how counsel was ineffective for excluding it. Moreover, when this issue was addressed during the hearing, Investigator Cantrell testified text messages were recovered between Applicant and his sister providing instructions as to how to "clean" a computer. Trial counsel testified he was concerned the State may try to introduce this information at trial and this was one of the reasons he did not think Applicant should testify. Applicant has failed to set forth with any specificity exactly what "exculpatory evidence from the forensic computer examination" should have been presented to the jury and accordingly has failed to meet his requisite burden of proof.

This Court finds allegations or issues related to the wiping of the Applicant's computer were not at issue in this PCR, there was no proof that the computer was wiped, and it was not mentioned before the jury. This Court finds this allegation is denied and dismissed.


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Allegation: Failure to obtain relevant Department of Social Services Records

Applicant alleges trial counsel was ineffective for failing to obtain, either by subpoena or court order, relevant Department of Social Services (DSS) records for the victim. Prior to the hearing, Applicant was granted leave of Court to conduct discovery and subpoenaed the file from DSS. DSS failed to comply with the subpoena and did not produce the file during the hearing. Following the hearing, this Court ordered DSS to produce its file for in-camera inspection by the Court. After this Court reviewed the file, both parties reviewed the file together in chambers. Thereafter, this Court made a full and complete copy of this file part of the record in this case, under seal. As described above, this Court found the DSS records helpful and presented an unbiased/third party view of the background information and timeline related to the case.

The DSS file caused this Court concern. The file was produced after the present PCR hearing was conducted. This Court received briefing from the attorneys. The file's contents can be read as having supported the underlying narrative offered by both sides. As stated, this Court views the DSS file as unbiased. Based on the briefing presented to this Court, the DSS file can best be characterized as cumulative of the information already known at the time of trial. The new information supported the idea that the family was uncooperative, even with DSS's effort to investigate, by adding factual details to what was presented during the PCR hearing. The file also added to issues which the applicant or his witnesses could have faced on cross examination if character became an issue at trial.

After a thorough review of the DSS file, this Court finds Applicant cannot meet his burden of proof as to this allegation as there is nothing in the DSS file that would have changed the result of his trial. The vast majority of the file contains information that was already readily available to trial counsel through other means and is cumulative. The rest of the file is simply irrelevant to the case or would not have had any impact on the proceedings. Accordingly, this Court finds Applicant

cannot prove that but for counsel's failure to procure a copy of the DSS file, there is a significant likelihood he would not have been convicted.

Allegation: "Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony."

Applicant alleges trial counsel should have moved to prohibit the victim from testifying because her testimony was "tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony." In support of this allegation, Applicant cites to the testimony of his two experts, Dr. Lamb and Dr. Bruck, to argue the forensic interview conducted by Weber and the counseling conducted by Meredith Thompson-Loftis, tainted the victim's testimony and rendered it unreliable.

In South Carolina, every person—including a minor child—is generally presumed to be competent to serve as a witness unless otherwise stated by statute or rule. Rule 601 of the South Carolina Rules of Evidence states: "Every person is competent to be a witness except as otherwise provided by law." *State v. Lambert*, 276 S.C. 389, 401, 279 S.E.2d 364, 365 (1981) ("[T]here is no age at which an individual must attain in order to be a competent witness."). In fact, even a convicted perjurer is presumptively qualified to testify as a witness in our state. *State v. Needs*, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998). So long as an individual has the ability to perceive an event with a substantial degree of accuracy, remember it, communicate about it intelligibly, and be mindful of the duty to tell the truth under oath, that individual is considered to be competent to testify during trial regardless of his or her age or past actions. *Id.*; *see State v. Green*, 267 S.C. 599, 603, 230 S.E.2d 618, 619 (1976) ("The mere fact that Tommy was but a six year old boy at the time of trial did not in itself make him incompetent to testify."); *see also State v. Karolas*, 28 So. 3d 913, 914 (Fla. Dist. Ct. App. 2010) ("Testimonial competency relates to the capacity of a witness to recollect and communicate facts and appreciate the obligation to tell the truth. It is a test of intellectual capacity, *not veracity*," (emphasis added)). Critically, if a witness is competent to testify, that

witness's testimony can typically be admitted during trial, and it is solely up to the jury to resolve any issues regarding the credibility of the testimony presented. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977); see Needs, 333 S.C. at 144, 508 S.E.2d at 862 ("[T]he resolution of the credibility of the witness is within the province of the jury."); see also United States v. Scheffer, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that the *jury* is the lie detector." (internal quotations omitted)).

Applicant failed to cite to any case law that would allow the court to exclude the testimony of the minor victim based on purported concerns over the reliability of the methods used in her forensic interview or subsequent counseling sessions. If counsel had concerns regarding the reliability of the forensic interview or counseling, the proper course of action would be vigorous cross-examination, not moving for the exclusion of the testimony—which Applicant cannot establish would have been granted.

As discussed above, the methods and techniques employed by Weber and Thompson-Loftis were developmentally appropriate and based on proper training, education, and experience. While Applicant's experts were able to provide valuable testimony about their "best practices" and how they believe Weber's methods deviated from those practices, Applicant has failed to establish the techniques used by Weber and Thompson-Loftis yielded "tainted, unreliable, and inadmissible" evidence. This evolution of the victim's allegation was presented to the jury. The jury believed the trial statements of the victim. Applicant has failed to meet his requisite burden of proof as to this allegation, which must be denied and dismissed with prejudice.

Allegation: "Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."

Applicant alleges trial counsel should have cross-examined the State's witnesses, mainly Weber and Thompson-Loftis, to establish the testimony of the victim was "tainted and unreliable"

based on their techniques. As discussed in several other allegations, Applicant has failed to establish the methods used by either Weber or Thompson-Loftis were improper or had a high likelihood of yielding "tainted and unreliable" reports of sexual abuse. Counsel testified he had handled child sexual assault cases numerous time before, particularly when he was an attorney for DSS, and had no reason to believe the methods employed by either Weber or Thompson-Loftis were improper or yielded "tainted and unreliable" as Applicant now asserts. Moreover, as discussed previously, such a cross examination would have likely required the introduction of the forensic interviews, which counsel did not want to do based on sound and well-reasoned trial strategy. This Court finds Applicant has failed to meet his requisite burden of proof on this allegation.

Allegation: "Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with [the victim]."

Applicant argues trial counsel was constitutionally ineffective for failing to "investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with [the victim]. Law enforcement determined these allegations by [the victim] to be unfounded. This ground is based on the deposition testimony of Cara Lintner."

As noted previously, Applicant failed to introduce the deposition of Cara Lintner into evidence, and accordingly, it is not before this Court. Regardless of Applicant's failure to present any evidence to substantiate this claim, this allegation is clearly refuted by the testimony presented at the evidentiary hearing. Thompson-Loftis testified the statements the victim made pertaining to Cara deal with her attempting to comfort the victim, not sexual abuse. Investigator Cantrell testified similarly that law enforcement did not believe there were any allegations of sexual abuse by Lintner and she was never considered a suspect. Moreover, Applicant cannot establish prejudice

as there is nothing to establish an exoneration of wrongdoing by Lintner would exonerate Applicant in the sexual abuse, particularly when the allegation presented at trial was that Applicant had sexually assaulted his daughter during a solo visit to South Carolina. This Court finds Applicant failed to meet this requisite burden of proof as to this allegation, which must be denied and dismissed with prejudice.

Allegation: "Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing" and "failing to present any information or evidence to the trial judge to mitigate the sentence imposed."

Applicant argues trial counsel was constitutionally ineffective for "failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing" and "failing to present any information or evidence to the trial judge to mitigate the sentence imposed." In his pre-hearing memorandum, Applicant argues, "there was virtually no sentencing hearing."

When questioned about these allegations at the evidentiary hearing, trial counsel testified he and Applicant had already discussed and decided an appeal would be filed if Applicant was convicted, and accordingly, they did not want Applicant to say anything that could be detrimental on appeal.

As discussed previously, Applicant failed to testify at his evidentiary hearing or otherwise present evidence in accordance with the rules of evidence as to what he would have said to the court during sentencing. Accordingly, this Court finds cannot meet his burden of proof as to this allegation. See Glover, 318 S.C. at 498-99, 458 S.E.2d at 540 ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

Moreover, Applicant failed to present any of the evidence he alleges should have been presented to the trial court and fails to establish how the presentation of any such evidence would

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have resulted in a different sentence. The trial judge's remarks left little doubt. Accordingly, this Court finds he cannot meet his requisite burden of proof as to this allegation, which must be denied and dismissed.

Allegation: "The cumulative effect of trial counsel's errors denied Mr. Spade his right to a fair trial."

Applicant argues in addition to the numerous individual grounds of ineffective assistance of counsel raised, he is also entitled to post-conviction relief based on the cumulative effect of trial counsel's deficiencies. However, this Court finds this argument fails, as Applicant failed to meet his requisite burden of deficiency for each ground raised.

Traditionally, an applicant must show both deficient performance and prejudice to establish his or her trial counsel was constitutionally ineffective. Strickland, 466 U.S. 668. However, "[w]hen counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). "Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina." Id. (citing Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002)).

Recently, in Smalls v. State, the Supreme Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 864 (2018) ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."). "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. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to 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." *Id.* at 188, 810 S.C. at 844 (internal citations omitted).

Here, since Applicant has failed to establish any instances of counsel error, this Court declines Applicant's request to conduct a cumulative error analysis. *See Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (recognizing "the threshold to asking the cumulative prejudicial question is to first find multiple errors"). *See also Lorenzen v. State*, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n. 3 (2008) (noting whether several errors, which are independently found not be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina).

Ineffective Assistance of Appellate Counsel

Applicant next argues appellate counsel C. Rauch Wise was ineffective for failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County."

On appeal, appellate counsel filed a merits brief and raised five substantive issues on which he claimed Applicant was entitled to a new trial:

Question I: Did the trial court err in excluding the testimony of Dalo Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the state to prove Mr. Spade had abused his daughter?

Question II: Did the trial court err in declaring that the attorney for Daniel Spade improperly struck Juror 199 based upon her gender strike when the attorney specifically stated the juror was struck for her age and being retired?

Question III: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Question IV: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

Question V: Did the trial court err in failing to exclude the testimony of Meredith

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Thompson-Loftis when the state had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the state did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

(Final Brief of Appellant).

Despite raising five issues on appeal, Applicant claims appellate counsel was constitutionally ineffective for failing to raise the directed verdict issue on appeal. This Court finds this allegation is without merit.

Just as a defendant is entitled to effective representation during his general sessions proceeding, a defendant is also entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice as outlined above. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty

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to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Accordingly, in order to meet his burden of proof, Applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he would have prevailed on his appeal. Smith, 528 U.S. at 285-86. Based on this standard set forth above, this Court finds Applicant cannot meet his requisite burden of establishing any constitutional ineffectiveness of appellate counsel. The decision as to which issues to raise on appeal clearly rested within counsel's discretion and his strategic decision as to which issues to raise on appeal do not render his performance deficient. Thrill, 302 S.C. at 539, 397 S.E.2d at 526; see also Jones, 463 U.S. at 754 ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy.")

Moreover, Applicant cannot establish any resulting prejudice as there is no reasonable likelihood this issue would have been successful on appeal. As discussed above in regards to purported errors made by trial counsel, the State properly established the venue was in Spartanburg County. During Applicant's trial, Investigator Cantrell testified the Holiday Inn Express in question was in Spartanburg County (Trial Tr. p. 126). Trial counsel made a motion for directed verdict on several grounds, including that the victim failed to establish the abuse occurred in Spartanburg County, which trial court properly denied. There is no reasonable likelihood

Applicant would have been successful had this issue been raised on appeal. This allegation must be denied and dismissed with prejudice.

Prosecutorial Misconduct

Applicant argues the State committed prosecutorial misconduct regarding the appropriate venue of the case, its failure to disclose relevant DSS records, and failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and law enforcement found them to be unfounded. This Court finds these allegations do not have merit.

Allegations of Prosecutorial Misconduct Pertaining to Venue

As discussed in regards to ineffective assistance of trial counsel and appellate counsel, this Court finds Applicant failed to establish venue was not in Spartanburg County.

Applicant's assertions that the State committed a Brady violation for failing to disclose evidence that venue was not in Spartanburg County are without merit. Initially, this Court references that Applicant knew of these purported Brady violations at the time of trial, as he was provided with Thompson-Loffis's notes prior to trial and made a motion for continuance based on the late production of these records, and accordingly, should have raised these issues on direct appeal. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974).

Regardless of the propriety of raising this claim now on post-conviction relief, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989). Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or

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known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)). "The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.'" Riddle v. Ozmini, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006)

The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings. State v. Gulleedge, 326 S.C. 220, 487 S.E.2d 590 (1997). Rule 5(a)(1)(C) requires:

Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id.

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The definition of "material" for purposes of Rule 5 is the same as the definition used in the Brady context. Fradella v. Town of Mount Pleasant, 325 S.C. 469, 482 S.E.2d 53 (Cl. App. 1997). In order for Applicant to prevail on a Rule 5 claim, he must show not only an actual violation, but also that he suffered prejudice as a result. State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Cl. App. 1992); State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

This Court finds Applicant cannot meet his burden of proof as to this allegation. As discussed above, there is no evidence that venue was not proper in Spartanburg County. Moreover, Applicant cannot establish that the State elicited or failed to correct false testimony regarding venue. As Investigator Cantrell testified, she determined venue was properly in Spartanburg

County as it was the only hotel where Applicant and the victim were together alone. Simply put, the State did not elicit any false testimony and there was no false testimony to correct. This Court finds Applicant's assertions otherwise are without merit.

Allegation the State failed to Disclose the Relevant Portions of the DSS file

Applicant also alleges that the State committed prosecutorial misconduct by failing to disclose relevant Department of Social Services records obtained by Investigator Cantrell. In support of this allegation, Applicant cites to the transcript of the 2012 termination of parental rights trial in family court wherein Investigator Cantrell mentions she had the DSS records for the victim. At the evidentiary hearing, Investigator Cantrell testified she did not have a copy of the DSS file in this case and likely misspoke when testifying at the family court proceeding because she was called to the stand from the road and did not have her file in front of her. The Court notes the extraordinary efforts it took to obtain the DSS file after the PCR hearing occurred. No evidence was presented to this Court that suggests the State interfered with the production of the DSS file.

This Court finds Applicant has failed to establish the State was in the possession of the DSS file or that anything in the DSS file would have had material information not already known to counsel. Accordingly, Applicant has failed to meet his requisite burden of proof. This allegation must be denied and dismissed with prejudice.

Allegation the State failed to Disclose the Investigation into Cara Lintner

Applicant also the State committed prosecutorial misconduct by "failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and LE found them to be unfounded." As discussed above, Investigator Cantrell testified Lintner was not considered a suspect. Thompson-Lofis similarly testified she did not report any allegations of abuse by Lintner to law enforcement because she did not believe the victim's references to Lintner amounted to disclosures of abuse,

but rather, Lintner's attempts to comfort the victim. This Court finds Applicant has failed to meet his burden of proof as to this allegation. This Court denies and dismissed this allegation with prejudice. Additionally, with this Court's understanding that Lintner was hostile to the Applicant's interests at the time of trial and failure to present additional information about Lintner during the PCR hearing, not prejudice was established.

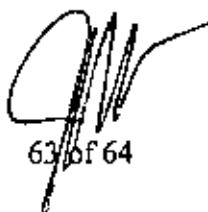
CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes that if Applicant wishes to appeal this order, Applicant, though his counsel of record, must file and serve a notice of appeal within thirty days from the receipt of this Order. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedure for appeal.

IT IS THEREFORE ORDERED:

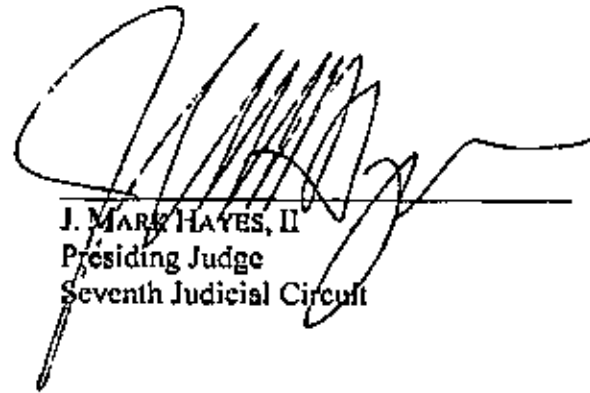
1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant Daniel Spade shall remain remanded to the custody of the State of South Carolina.



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AND IT IS SO ORDERED this 8th day of October, 2020.



J. MARK HAYES, II
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	Case No. 2017-CP-42-02372
Daniel W. Spade,	)	
	)	Rule 59(e), SCRPC Motion
	)	
vs.	)	
	)	
State of South Carolina,	)	
	)	
	)	
	)	
	)	

To: The Honorable J. Mark Hayes, II, Presiding Judge, Seventh Judicial Circuit

Pursuant to Rule 59(e), SCRPC, Daniel Spade moves this Court for an order altering and amending its order dated May 7, 2020, directing the Attorney General's Office prepare an order of dismissal, and the order of dismissal dated October 8, 2020, which is substantially identical to the Attorney General's proposed order. Undersigned counsel received notice of entry of the order of dismissal, via email, on October 8, 2020.¹

The factual and legal analysis set forth in this pleading support granting this motion. By this specific reference, the factual and legal analysis set forth in Mr. Spade's Memorandum in Support of Application for Post-Conviction Relief ("PCR"), Memorandum in Support of Access to DSS Records, and Objections to Attorney General's Proposed Order² and Proffer of Attorney General's Proposed Order are fully incorporated herein.

¹ Because October 18, 2020 was a Sunday, this motion is timely. The Attorney General's Office also served a copy of the order of dismissal, via US Mail, on October 9, 2020.

² Because the objections to the Attorney General's proposed order are incorporated by reference, Mr. Spade will not rehash all of the matters raised in that pleading. Although this pleading will highlight some of the matters raised in the objections to the Attorney General's proposed order, the omission of any specific point is not a waiver of that objection.

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I. PROCEDURAL HISTORY.

On June 29-30, 2009, the Honorable Georgia C. Anderson convened a hearing in the Family Court for Spartanburg County regarding Heather and David Jolley's petition to terminate Dany Spade's parental rights. This action was not successful. Judge Anderson issued a final order on January 13, 2010 and a supplemental order on June 29, 2010. Heather Jolley filed another Family Court Action on November 23, 2010.

On May 3, 2011, Investigator Nikki Cantrell and officers of the Prince William County Police Department arrested Mr. Spade at his home in Virginia, charging him with first-degree criminal sexual conduct with a minor involving his daughter P.J.³ ("child").

On January 9, 2012, the Jolleys amended the November 2010 complaint to petition to terminate Mr. Spade's parental rights and to allow David Jolley to adopt this child. N. Douglas Brannon represented the Jolleys. Kenneth P. Shabel represented Mr. Spade. Alexandria Wolf was the guardian ad litem. Beginning on October 15, 2012, the Honorable James F. Farley, Jr. convened a hearing in the Family Court for Spartanburg County. Judge Farley ultimately terminated Mr. Spade's parental rights and allowed Mr. Jolley to adopt the child. Proceedings on Mr. Spade's Rule 60, SCRCP motion are still pending in the Family Court.⁴

The State tried Mr. Spade before the Honorable R. Keith Kelly and a jury on February 24-26, 2014. Barry J. Barnett, Jennifer A.J. Jordan, Kimberly L. Leskanic, and Mr. Brannon represented the State. Mr. Shabel and Shawn M. Campbell represented Mr. Spade. On February 26, 2014, the jury found Mr. Spade guilty of first-degree criminal sexual conduct with a minor involving his daughter P.J. ("child").

³ The child's name may also appear as P.S., which was her initials prior to the Family Court terminating Mr. Spade's parental rights and her being adopted by David Jolley.

⁴ Mr. Spade filed the Rule 60 Motion *pro se*. Undersigned counsel subsequently entered an appearance. Mr. Brannon continued to represent the Jolleys but subsequently withdrew because of a conflict of interest. *Matter of Brannon*, 428 S.C. 644, 837 S.E.2d 488 (2019). Scott F. Talley currently represents the Jolleys.

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26, 2014, the jurors found Mr. Spade guilty of first-degree criminal sexual conduct with a minor. Judge Kelly sentenced Mr. Spade to thirty-five years imprisonment.

Mr. Spade appealed to the Court of Appeals. C. Rauch Wise and Mr. Shabel represented Mr. Spade. On February 11, 2016, the Court of Appeals convened an oral argument. While the decision was still pending, Mr. Shabel joined Mr. Brannon's law firm and, accordingly, moved to be relieved as counsel, because of the conflict of interest, by petition dated March 11, 2016. On July 6, 2016, the Court of Appeals affirmed Mr. Spade's conviction and sentence. *State v. Spade*, (S.C.Ct.App. Op. No. 2016-UP-352) (Filed July 6, 2016). On August 18, 2016, the Court of Appeals denied Mr. Spade's petition for rehearing.

On October 6, 2016, Mr. Spade filed a petition for writ of *certiorari* to the South Carolina Supreme Court. Mr. Wise represented Mr. Spade. On June 16, 2017, our Supreme Court denied Mr. Spade's petition for a writ of *certiorari*.

On July 13, 2017, Mr. Spade filed a *pro se* PCR application. With the assistance of undersigned counsel, Mr. Spade amended his PCR application on October 2, 2017, December 24, 2018, and May 14, 2019. From May 15-20, 2019, this Court convened an evidentiary hearing.

By written order dated May 20, 2019, this Court ordered the South Carolina Department of Social Services ("DSS") provide the Court with "a complete copy of the DSS file regarding [P.J.] (child), Daniel W. Spade (father), and Heather Smith a/k/a Heather Smith Jolley." After the Court and counsel for the parties reviewed the DSS file, this Court released a copy of the DSS file to the parties by written order dated August 16, 2019.

By written order dated May 7, 2020, this Court made findings of fact, denied Mr. Spade post-conviction relief, and instructed the Attorney General's Office to prepare a formal order. On July 7, 2020, Mr. Spade served his objections to the Attorney General's proposed order and

proffered a copy of the Attorney General's proposed order. By written Order dated October 8, 2020, the Court dismissed Mr. Spade's PCR application. This Rule 59(e), SCRCP Motion follows.

II. STANDARD OF REVIEW.

Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015); and see *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

The second prong of *Strickland* requires a defendant establish that this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "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." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (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.” *Id.* (citing *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.” *Id.* “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Id.* 422 S.C. at 189, 810 S.E.2d at 844. “[F]or the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

In cases, like Mr. Spade’s, where the case turns on the credibility of the witnesses, our appellate courts consistently find prejudice. *See e.g. State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015) (prejudice found when case turned solely on credibility and there was “no physical evidence of sexual abuse”); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011) (prejudice found when “credibility was the most critical determination of this case”); *State v. Berry*, 332 S.C. 44, 503 S.E.2d 770 (1998) (“These credibility questions and inconsistencies in the witnesses’ testimony make it impossible for this Court to conclude that, without reference to the Polite incident, the evidence of Berry’s guilt is overwhelming or that Berry’s guilt is the only rational conclusion that could be reached from the evidence presented.”).

Due process requires a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not raising

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a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

III. ARGUMENT.

A. Threshold Matter.

The hybrid procedure followed by this Court denied Mr. Spade his statutory and constitutional right to have a judicial officer make finding of fact and conclusions of law. *See* Mr. Spade's Objections to the Attorney General's Proposed Order, Section II(A). A comparison of the Attorney General's proposed order with the order of dismissal reveals the following:

- The first three paragraphs introducing the order of dismissal, at 1-2, are identical to the Attorney General's proposed order, except this Court deleted the phrase "before the Honorable Mark J. Hayes, II," changed the word "thorough" to "lengthy," and added footnote 1 acknowledging *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019);
- The section of the order of dismissal, at 2-3, labeled "procedural history," is identical to the Attorney General's proposed order, except this Court added footnote 2 providing some of the history of the family court litigation and added a final sentence stating, "Subsequently, Mr. Grose appeared on applicant's behalf and filed amended applications."
- The section of the order of dismissal, at 4, labeled "summary of facts elicited at trial," is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 4-9, labeled "current proceeding," is identical to the Attorney General's proposed order, except for a formatting change and adding the words "should be."
- The paragraph introducing the section of the order of dismissal, at 9, labeled "findings of fact and conclusions of law," is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 9-13, labeled "ineffective assistance of trial counsel," is substantially identical to the Attorney General's proposed order. This court changed the wording of the final sentence of the opening paragraph and slightly revised the wording of the first full paragraph on page 10 of the order.
- The section of the order of dismissal, at 13-23, labeled "Allegations Pertaining to the Forensic Interviews (Failure to Call Expert Witnesses, Failure to Publish the

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Forensic Interviews to the Jury),” is substantially identical to the Attorney General’s proposed order. This court added the second paragraph to this section on page 13, added footnote 9 on page 14, changed the wording of the final sentence of the third full paragraph on page 15, added footnote 10 on page 16, added language to the final sentence of the second full paragraph on page 16, deleted a word from the opening sentence of the third full paragraph on page 16, added the words “sexual assault” and “by the therapist” to the second full paragraph on page 17, deemphasized the word “instead” in the first full paragraph on page 18, and reworded the second full paragraph on page 20. This Court also added the following sentence on page 20, “As mentioned before, the facts of this PCR mean that the substance of the videos and testimony of three (3) experts are collateral to the evidence that established the applicant’s guilty [sic] beyond a reasonable doubt.”

- The section of the order of dismissal, at 23-27, involving allegations pertaining to Special Prosecutor Brannon, is substantially identical to the Attorney General’s proposed order. This court reworded a portion of the first paragraph on page 25 and added the following sentence on pages 25-26: “This email heightens this Court’s opinion that the private family court matter was of a concern higher than the potential criminal allegations.”
- The section of the order of dismissal, at 27-31, involving the trial judge, prosecutor, and Mr. Spade’s counsel instructing the jurors to search for the truth and make sure justice is done, is substantially identical to the Attorney General’s proposed order. This Court altered some of the discussion of the law, including deleting some of the Attorney General’s analysis, and added, “*Beaty*⁵ made clear to the trial bench that such language was not to be argued during a trial to a jury even though, as referenced by applicant, *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2013) existed” (footnote added).
- The section of the order of dismissal, at 32-37, involving the failure to move for a continuance to have an expert review the records of Meredith Thompson-Loftis, is identical to the Attorney General’s proposed order, except this Court added footnote 13 on page 36.
- The section of the order of dismissal, at 37-41, involving the failure to call available lay and character witnesses, is identical to the Attorney General’s proposed order.
- The section of the order of dismissal, at 41-42, involving the failure to investigate and present evidence that the child’s panic attacks were not related to Mr. Spade, is identical to the Attorney General’s proposed order.
- The section of the order of dismissal, at 43-46, involving the failure to object to improper bolstering, is substantially identical to the Attorney General’s proposed

⁵ *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018).

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order. This Court added two sentences to the first paragraph in this section, deleted a paragraph, and made some minor stylistic changes.

- The section of the order of dismissal, at 46-47, involving allegations pertaining to Meredith Thompson-Loftis, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 47, involving allegations venue was not proper in Spartanburg County, is identical to the Attorney General's proposed order, except for changing the word "properly" to "proper."
- The section of the order of dismissal, at 48-49, regarding the Special Prosecutor's closing argument, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 48-49, regarding the Special Prosecutor's closing argument, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 49-50, regarding trial counsel advising Mr. Spade not to present any evidence, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 50, regarding the computer forensic evidence, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 51-52, regarding the DSS records, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 52-53, regarding the failure to move to exclude the testing of the child complaining witness, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 53-54, regarding the failure to properly cross-examine the prosecution's witnesses, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 54-55, regarding Cara Linter, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 55-56, regarding sentencing, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 56-57, regarding cumulative error, is identical to the Attorney General's proposed order.
- The section of the order of dismissal, at 57-60, regarding ineffective assistance of appellate counsel, is identical to the Attorney General's proposed order.

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- The section of the order of dismissal, at 60-63, regarding allegations of prosecutorial misconduct, is substantially identical to the Attorney General's proposed order. This court deleted a sentence from the proposed order in the section regarding venue, added a sentence in the section regarding the DSS records, and added a sentence in the section regarding Ms. Lintner.
- The conclusion of the order of dismissal, at 63-64, is identical to the Attorney General's proposed order.

As seen, most of this Court's alterations to the Attorney General's proposed order are stylistic. With very few exceptions, the order of dismissal is identical or substantially identical to the Attorney General's proposed order. Mr. Spade's objections to the Attorney General's proposed order addressed the problems with the proposed order that are now incorporated into the order of dismissal. Because the objections to the Attorney General's proposed order are incorporated into this pleading by reference, Mr. Spade will not rehash all of the matters raised in that pleading. Although highlighting some of those problems, this motion primarily will address the few substantive changes this Court made to the Attorney General's proposed order.

B. Footnote 1.

This Court added footnote 1, at 2, to the Attorney General's proposed order, stating the procedure followed in this case is intended "to comply with the intent and spirit of Fishburne's directives to comply with S.C. Code § 17-27-80 (1976)." This footnote also stated, "[t]his Court also received written input from Applicant's counsel." The order of dismissal never specifically identifies Mr. Spade's Objections to the Attorney General's Proposed Order, and, therefore, it is impossible to determine whether this Court consider any of the factual and legal analysis set forth in that pleading. For example, the order of dismissal incorporated the legal analysis in the Attorney General's proposed order without considering the importance of *Weik v. State*, which is discussed in more detail in Subsection D below. Although rejecting the legal analysis in the Attorney

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General's proposed order regarding *State v. Daniels*, this Court overlooked the significance of *Daniels*, which will be discussed in more detail in Subsection G below.

C. Footnote 2.

This Court added footnote 2, at 2, to the Attorney General's proposed order, summarizing the history of the contentious Family Court litigation between Mr. Spade, the child's mother, and the soon-to-be adoptive father of the child. This Court states the Family Court procedural history is "not procedurally linked to the success or failure of the [PCR] application." The remainder of this Court's order, however, discusses the importance of the Family Court litigation as the motive to coach the child to fabricate the allegations of child sexual abuse. This court, in fact, acknowledged the persuasive value of the new evidence Mr. Spade presented at the PCR hearing regarding the Family Court litigation and the underlying motive.

This Court, however, overlooked an additional significance of the Family Court proceedings. Because of those proceedings, trial counsel was familiar with much—but not all of—the State's evidence, which highlighted the need for the defense to consult expert witnesses and present a more vigorous defense at Mr. Spade's jury trial. The order of dismissal overlooked this significance of the Family Court proceedings.

D. *Weik v. State*.

Weik is important in this case because this Court excuses trial counsel's performance based on strategic decisions, even though Mr. Spade alleged trial counsel did not conduct the investigation reasonably necessary to make those decisions. The Attorney General's proposed order did not cite *Weik*. Mr. Spade's objections to the Attorney General's proposed order cited *Weik* fourteen times. The order of dismissal did not address *Weik* at all.

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As discussed in Section II, *supra*, when the State seeks to excuse deficient performance based on trial strategy, trial counsel must articulate a valid strategy. *Freiburger* and *Ingle*, *supra*. The order of dismissal, however, overlooks trial counsel's "duty" to conduct an independent and "reasonable investigation." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). A "reasonable investigation . . . at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). *Weik* reminds the bench and bar, "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." 409 S.C. at 236, 761 S.E.2d at 768.

Mr. Spade's objection to the Attorney General's proposed order reviewed trial counsel's failure to investigate. Despite Mr. Spade's numerous pleas for trial counsel to retain expert witnesses to respond to the State's expert witnesses, trial counsel failed to consult any expert and never learned how an expert witness would help him defend Mr. Spade. Once this Court considers whether the trial counsel conducted a "reasonable investigation," and considers the importance of *Ard*, *Edwards*, and *Weik* in analyzing the reasonableness of an independent investigation, then the need to grant post-conviction relief becomes apparent.

E. Expert Witnesses & Child Advocacy Center Interviews.

The section of the order of dismissal, at 13-23, labeled "Allegations Pertaining to the Forensic Interviews (Failure to Call Expert Witnesses, Failure to Publish the Forensic Interviews to the Jury)," is substantially identical to the Attorney General's proposed order. Because this section of the order is substantially the same as the proposed order, Mr. Spade's objections to the proposed order already addressed this section of the order; however, this motion also will address the slight revisions to the proposed order.

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This court added the second paragraph to this section on page 13 of the order of dismissal regarding the perceived significance of the parties not introducing the videotapes of the interviews during Mr. Spade's jury trial. Although Mr. Spade "offers the videos and the expert analysis to attack the reliability of the interview process," the evidence presented at the evidentiary hearing is far more significant. The videos and expert testimony go to the reliability of the underlying allegations. This Court agreed with Mr. Spade's expert witnesses that the interviews were suggestive. As testified by Dr. Bruck and Dr. Lamb, suggestive interviews can implant false memories that taint the entire proceedings. Dr. Bruck, additionally, testified to matters involving the child's therapy sessions with Meredith Thompson-Loftis, which was not addressed in the order of dismissal.

This Court added footnote 9 on page 14 of the order of dismissal regarding the new evidence Mr. Spade presented at the evidentiary hearing, whether trial counsel was ineffective for failing to present this evidence, and whether Mr. Spade persuaded this Court that the outcome of this trial would have been different. Respectfully, it is impossible to read the factual findings contained in the May 7, 2020 order—now incorporated into the order of dismissal—without concluding this Court would have reached a different result than the jurors after hearing the new evidence.

This Court added footnote 10 on page 15 of the order of dismissal regarding the suggestiveness of the child advocacy center interviews and concluded "the videos in this PCR are collateral to the evidence presented by the State to establish applicant's guilt." This Court also added the following sentence on page 20: "As mentioned before, the facts of this PCR mean that the substance of the videos and testimony of three (3) experts are collateral to the evidence that established the applicant's guilty [sic] beyond a reasonable doubt." As discussed above and in Mr.

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Spade's objections to the Attorney General's proposed order, the videos and expert testimony go to the reliability of the underlying allegations.

F. Special Prosecutor.

Regarding the email disclosed during the PCR litigation by the special prosecutor, this Court added the following sentence on pages 25-26 of the order of dismissal: "This email heightens this Court's opinion that the private family court matter was of a concern higher than the potential criminal allegations." As discussed in the objections to the Attorney General's proposed order, at 5, this Court had access to the incident report containing the child's purported initial disclosure to her grandmother. That the child's grandmother, mother, and soon-to-be adoptive father would place the Family Court matter above potential criminal allegations is further evidence of the underlying motive to coach this child to make false allegations. That the attorney for the child's mother and soon-to-be adoptive father—who later became the special prosecutor—would place the Family Court matter above potential criminal allegations is more evidence of the inherent conflict between the duty of loyalty to the parties in a civil action and the special duties of prosecutors in a criminal case.

G. *State v. Daniels*.

The section of the order of dismissal, at 27-31, involving the trial judge, prosecutor, and Mr. Spade's counsel instructing the jurors to search for the truth and make sure justice is done, is substantially identical to the Attorney General's proposed order, except this Court rejected the Attorney General's legal analysis regarding *State v. Daniels*. In place of that analysis, this Court stated, "*Beatty* made clear to the trial bench that such language was not to be argued during a trial to a jury even though, as referenced by applicant, *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2013) existed." Although rejecting portions of the Attorney General's proposed legal analysis,

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including as it pertains to *Daniels*, the order of dismissal overlooks the significance of *Daniels*.⁶ *Teamer v. State*, 416 S.C. 171, 182-83, 786 S.E.2d 109, 114-15 (2016) recognized *Daniels* decided this issue. Because of *Daniels*, “reasonably competent trial counsel should know to object,” *Briggs v. State*, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017), to this burden shifting instruction and argument, as well as avoid the burden shifting argument by the defense. This Court apparently believed “trial counsel was without the ‘pointed guidance’ provided by” the *Beaty* opinion. *Thompson v. State*, 423 S.C. 235, 243, 814 S.E.2d 487, 491 (2018). *Thompson* rejected a similar argument regarding the application of *Briggs* to opinion testimony by child advocacy center interviewers. Once this Court recognizes the significance of *Daniels*, the need to grant post-conviction relief is apparent.

H. Meredith Thompson-Loftis and Footnote 13.

The section of the order of dismissal, at 32-37, involving the failure to move for a continuance to have an expert review the records of Meredith Thompson-Loftis, is identical to the Attorney General’s proposed order, except this Court added footnote 13 on page 36 of the order of dismissal, concluding “evidence of Cara[Lintner]’s involvement with the [child] is inconclusive, and speculative.” This statement is not consistent with other portions of the order of dismissal regarding law enforcement’s vetting of the allegations the child made involving Ms. Lintner witnessing and participating in the alleged abuse. As discussed in the objections to the Attorney General’s proposed order, the lack of credibility of the child’s allegations involving Ms. Lintner is further exculpatory evidence that should have been presented.

⁶ As set forth in Mr. Spade’s Memorandum in Support of his PCR Application, *Cage v. Louisiana*, 498 U.S. 39 (1990), is the constitutionally controlling authority.

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Also, as discussed above and in Mr. Spade's objections to the proposed order, this Court never addressed the ability of an expert witness, like Dr. Bruck, to testify about the child's therapy sessions without having the play the videos of the child advocacy center interviews. Afterall, Ms. Thompson-Loftis testified about the therapy sessions at trial without either party introducing the videos.

I. Improper Bolstering.

The section of the order of dismissal, at 43-46, involving the failure to object to improper bolstering, is substantially identical to the Attorney General's proposed order. This Court added two sentences to the first paragraph in this section, deleted a paragraph, and made some minor stylistic changes.

This order of dismissal, at 43, added a sentence stating this Court agrees with Mr. Spade that testimony about Tabitha Weber's expertise was not necessary, "but it was not improper not to object." Not only was this testimony not necessary, it was objectionable pursuant to *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009). Ms. Webber testified that, based on the interviews, which were not introduced into evidence, she contacted law enforcement and recommended the begin therapy. Mr. Spade's Objections to the Attorney General's Proposed Order, Section III(H) addresses additional testimony of Ms. Webber that improperly bolstered and vouched for the child's credibility.

This Court deleted a paragraph from the Attorney General's proposed order making factual findings about the testimony of Kimberly Roseborough and Meredith Thompson-Loftis. This Court's order of May 7, 2020, at 8-9, did not make findings of fact or conclusions of law on this issue, except for stating Mr. Spade

also took issue with the presentation for counselors Roseborough and Thompson-Loftis. The trial record reflects, however, that trial counsel made numerous

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objections. Most ruling, unfortunately for [Mr. Spade] were not favorable to him. The trial judge actually limited the testimony of Thompson-Loftis. This Court can find no error for PCR purposes by trial counsel *under the South Carolina jurisprudence that existed at the time of the trial* in the manner in which he objected.

(emphasis added). This statement implies a finding of fact that trial counsel failed to object to improper bolstering based on South Carolina current jurisprudence regarding improper vouching. Perhaps this Court reached this conclusion because our Supreme Court decided *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015)⁷ after Mr. Spade's jury trial—which appears to be incorporated into the order of dismissal, at 43-44. If so, then this Court overlooked *State v. Kromah*, 401 S.C. 340, 37 S.E.2d, (2013), *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010), *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), and *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001). See also *Briggs and Thompson, supra*.

The prosecution's overall strategy to bolster and vouch for the child's credibility, the improper testimony of Kimberly Roseborough and Meredith Thompson-Loftis, and the trial judge's handling of these objections are discussed in Mr. Spade's Objections to the Attorney General's Proposed Order, Section III(H).

J. DSS Records.

The section of the order of dismissal, at 60-63, regarding allegations of prosecutorial misconduct, is substantially identical to the Attorney General's proposed order, but added, at 62:

The Court notes the extraordinary efforts it took to obtain the DSS file after the PCR hearing occurred. No evidence was presented that suggests the State interfered with the production of the DSS file.

⁷ The order of dismissal focuses on the so-called "blind expert" procedure adopted by *Anderson*. Mr. Spade's PCR claims relate to the improper bolstering and vouching, not the procedure adopted by *Anderson*.

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Mr. Spade, however, presented the Family Court transcript where Investigator Nikki Cantrell testified she obtained the DSS file and provided it to the Solicitor's Office. This Court, furthermore, was troubled by Investigator Cantrell changing her testimony at the evidentiary hearing. This Court must resolve this inconsistent testimony in favor of Mr. Spade. *State v. Pulley*, 423 S.C. 371, 381, 815 S.E.2d 461, 466 (2018) (“[W]e require trial courts to exercise discretion when considering whether contradictory statements from the same witness create legitimate factual issues.”) (citing *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (providing “a court may disregard a subsequent affidavit as a ‘sham,’ that is, as not creating an issue of fact ..., by submitting the subsequent affidavit to contradict that party's own prior sworn statement” and *McMaster v. Dewitt*, 411 S.C. 138, 144, 767 S.E.2d 451, 454 (Ct. App. 2014) (holding a trial court must exercise discretion to determine whether to accept a “sham” affidavit)). Moreover, whether the prosecution acted in good or bad faith is irrelevant in determining whether a *Brady* violation occurred.” *State v. Durant*, 430 S.C. 98, 107, 844 S.E.2d 49, 54 (2020) (citing *Brady*, 373 U.S. 83, 87 (1963)).

K. State's Closing Argument.

The section of the order of dismissal, at 48-49, regarding the Special Prosecutor's closing argument, is identical to the Attorney General's proposed order. This Court's order of May 7, 2020, at 9—now incorporated into the order of dismissal—acknowledges a closing argument indicating an accused is “a bad person simply for being arrested and that the jury takes care of ‘good’ people can be constitutionally improper” and the “argument in the present matter can be argue[d] as wrong because it sought to have the jury view the evidence through an emotional lens rather than factual.” This Court specifically found, “More concerning in the present case was

that private counsel acknowledged during the PCR that his motives in making the argument was to appeal to the jury's sympathies."

Our Supreme Court has long held, "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) (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) and *State v. Linder*, 276 S.C. 304, 278 S.E.2d 335 (1981)). Our Supreme Court "strongly disapprove[s]" of closing arguments calculated "to improperly arouse the passions and prejudices of jurors, urging them to abandon their sworn role as fair and impartial arbiters of the facts and view the evidence from an improper perspective." *Id.*, 360 S.C. at 614, 602 S.E.2d at 746.

IV. CONCLUSION.

For the reasons set forth in Daniel Spade's Memorandum in Support of Granting Post-Conviction Relief, Memorandum in Support of Application for Post-Conviction Relief, Objections to Attorney General's Proposed Order and Proffer of Attorney General's Proposed Order, and this Rule 59(e) motion, this Court should reconsider the order of dismissal, vacate the order of dismissal, grant post-conviction relief, and remand this case to the Court of General Sessions for a new trial.

IT IS SO MOVED.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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Attorney for Daniel Spade

October 19, 2020
Greenwood, South Carolina

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THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	Case No. 2017-CP-42-02372
Daniel W. Spade,	)	
	)	
Applicant,	)	
	)	
vs.	)	
	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-04-22-01, Section (c)(13), by emailing at copy to counsel, at the AIS email address, as reflected below:

Megan Harrigan Jameson, Esquire
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By s/E. Charles Grose, Jr.

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October 19, 2020
Greenwood, South Carolina



ALAN WILSON
ATTORNEY GENERAL

January 13, 2021

The Honorable Amy W. Cox
Clerk of Court for Spartanburg County
Post Office Box 3483
Spartanburg, SC 29304-3483

Re: **Daniel Spade, #358974 v. State of South Carolina**
2017-CP-42-2372

Dear Ms. Cox:

Enclosed for filing please find Respondent's Return to Applicant's Rule 59(e), SCRCF Motion and the certificate of service for the above-referenced post-conviction relief case. Please let me know if anything additional is needed.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

MHJ/jj
Enclosure

cc: The Honorable J. Mark Hayes, II, Presiding Judge (by email and U.S. mail)
E. Charles Grose, Jr., Esquire (by email and U.S. mail)

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF SPARTANBURG)

SEVENTH JUDICIAL CIRCUIT)

DANIEL SPADE, #358974)

CASE NO: 2017-CP-42-2372)

Plaintiff,)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

Plaintiff's Attorney:
E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, SC 29646
Phone: _____ Fax: _____
E-mail: _____ Other: _____

Defendant's Attorney:
Megan Harrigan Jameson, Esquire.
Address: South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211
Phone: _____ Fax: _____
E-mail: _____ Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

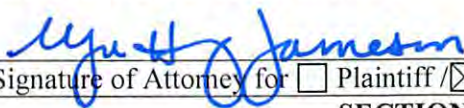
SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____ Court Reporter Needed: ☐ YES / ☒ NO**SECTION II: Motion/Order Type**

- ☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for ☐ Plaintiff / ☒ Defendant

January 13, 2021
 Date submitted

SECTION III: Motion Fee☐ PAID – AMOUNT: \$ _____

EXEMPT:

(check reason)

- ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED – AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Daniel W. Spade, SCDC # 358974

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-42-02372

**RETURN TO APPLICANT'S
RULE 59(e), SCRPC, MOTION**

This matter comes before this Court by way of Applicant Daniel W. Spade's motion pursuant to Rule 59(e), SCRPC, asking this Court to alter or amend its order of dismissal denying and dismissing his application for post-conviction relief. Respondent the State of South Carolina makes the following return to the motion:

I. PROCEDURAL HISTORY

During its February 2014 term, the Spartanburg County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor following an investigation into allegations he sexually assaulted his four-year-old biological daughter during an overnight visit at a hotel in Spartanburg County (2011-GS-42-4171). Applicant retained the services of Kenneth Shabel, Esquire, who had been representing him in an on-going custody dispute involving the same minor child, and Shabel's law partner Shawn Campbell, Esquire, to represent him in this criminal matter. Seventh Circuit Solicitor Barry J. Barnette, Assistant Solicitors Jennifer Jordan and Kimberly Leskanic, and Special Prosecutor N. Douglas Brannon prosecuted the case. On February 24, 2014, Applicant proceeded to a jury trial before the Honorable R. Keith Kelly, circuit court judge. The jury convicted Applicant as indicted. Judge Kelly sentenced Applicant to imprisonment for thirty-five years.

Applicant filed a timely notice of appeal and was represented by C. Rauch Wise, Esquire.¹ who raised five grounds. The South Carolina Court of Appeals affirmed Applicant's conviction by unpublished opinion on July 6, 2016. State v. Spade, Op. No. 2016-UP-352 (S.C. Ct. App. filed July 6, 2016). Applicant subsequently filed a petition for rehearing, and, following the denial of rehearing, filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. On June 16, 2017, the Supreme Court denied the petition for certiorari. The Remittitur was returned to the circuit court on June 22, 2017.

II. CURRENT PROCEEDINGS

On July 13, 2017, Applicant filed a *pro se* application for post-conviction relief, initiating this current action. Applicant then retained E. Charles Grose, Jr., to represent him in this action, and, through counsel, filed three subsequent amendments to his application on October 2, 2017, December 24, 2018, and May 14, 2019. Respondent filed a return to the application and requested an evidentiary hearing.

An evidentiary hearing on this action was convened May 15, 2019², before the Honorable J. Mark Hayes, II, circuit court judge. Applicant was present and was represented by counsel Grose. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson and Assistant Attorney General Johnny Ellis James, Jr. At the start of the hearing, Applicant also filed and submitted a "Memorandum in Support of Application for Post-Conviction Relief," which had not previously been provided to Respondent or the Court. At the hearing, Applicant proceeded forward on the following claims from his third amended application, absent

¹ Trial counsel Kenneth Shabel originally assisted in the appeal but withdrew as counsel for Applicant when he changed law firms and began practicing law with Special Prosecutor Brannon. Counsel Shabel filed a motion to be relieved as counsel with the Court of Appeals on March 21, 2016, and his motion was granted on May 6, 2016.

² The Court convened for a motion hearing related to this matter on May 14, 2019.

allegation number 15, which Applicant expressly withdrew.

A. Ineffective assistance of counsel during the guilt phase for:

1. "Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information."
2. Not only failing to object to the trial judge instructing the jurors that their role is to "search for the truth" and make sure "justice is done," which impermissibly diminishes and shifts the burden of proof, but also adopting that language in closing argument, thereby diminishing and shifting the burden of proof."
3. "Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child's allegations."
4. "Failing to investigate, develop, and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting the case."
5. Failing to request a ruling on Mr. Spade's contention that the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470.
6. "Failing to move for disclosure of exculpatory information in the possession of the [Special] Prosecutor, N. Douglas Brannon.
7. "Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony."
8. "Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility."
9. "Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualification as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. *See, e.g., S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011)."
10. "Failing to admit the videotaped interview from the Children's Advocacy Center that contained exculpatory information."

11. "Failing to investigate, develop, and present evidence that venue was not in Spartanburg County."
12. "Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County."
13. "Failing to request a jury instruction on venue."
14. "Failing to object to the Special Prosecutor's improper closing argument that appealed to the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest 'bad people,' he (as Special Prosecutor) tells the complaining witness' story, and 'the jury takes care of good people.' Tr. 305-07."
15. "Advising Mr. Spade not to present any evidence, including but not limited to his own testimony."
16. "Excluding evidence from the forensic computer examination that was exculpatory."
17. "The cumulative effect of trial counsel's errors denied Mr. Spade his right to a fair trial."
18. "Failing to obtain through discovery, by subpoena, or court order relevant Department of Social Services records."
19. "Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony."
20. "Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."
21. "Failing to present expert testimony to confront the State's witnesses and demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."
22. "Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with his

daughter P.J. Law enforcement determined these allegations by P.J. to be unfounded. This ground is based on the deposition testimony of Cara Lintner.”³

B. Ineffective assistance of counsel during the sentencing phase for:

23. “Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing.”

24. “Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed.”

C. Ineffective assistance of appellate counsel, in that

25. “Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County.”

D. Denial of due process because of prosecutorial misconduct, in that:

26. “Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.”

27. “Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County.”

28. “Eliciting false testimony regarding venue.”

29. “Failing to correct false testimony regarding venue.”

30. Failing to disclose relevant Department of Social Services records obtained by Spartanburg count Sherriff Investigator Nicki Cantrell

31. Failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and LE found them to be unfounded.

At the evidentiary hearing, Applicant presented the following witnesses:

-Dr. Maggie Bruck, Ph.D, who was admitted as an expert in child abuse disclosure, forensic interview techniques, treatment of child sexual abuse victims, and suggestibility;

³ Applicant did not introduce transcripts of the depositions of Cara Lintner and John Hall during this proceeding. Neither deposition is part of this record.

- Meredith Thompson-Loftis, who was the victim's counselor;
- Appellate counsel C. Rauch Wise;
- Seventh Circuit Solicitor Barry Barnette;
- Dr. Michael Lamb, Ph.D., who was admitted as an expert in psychology with a specialty in child interviews;
- Trial counsel Kenneth Shabel;
- Applicant's brother-in-law Josh Trumpower;
- Applicant's close friend Michael Mizak;
- Alexandria Wolf, the victim's former guardian ad litem in the family court proceedings, and
- Special Prosecutor Douglas N. Brannon.

Respondent presented the following witnesses:

- Investigator Nicki Cantrell, formerly with the Spartanburg County Sheriff's Department;
- Trial counsel Shawn Campbell
- Tabitha Weber, MSW, LISW-CP, the Clinical Director and Forensic Supervisor of the Children's Advocacy Center of Spartanburg, Cherokee, and Union Counties who was admitted as an expert in the field of child abuse assessment and treatment.

Numerous exhibits were also introduced during the hearing, including the videotaped forensic interviews of the victim conducted by Weber.

Following the hearing and on Applicant's motion, the Court issued an order requiring the South Carolina Department of Social Services (DSS) to provide the court with a complete copy of any file or records regarding the underlying custody action involving Applicant, the minor victim, and her parents (mother and adoptive father) within ten days of receipt of the order. On June 11, 2019, the DSS file was hand-delivered to the Court by a DSS attorney.

Upon receipt the file from DSS, this Court instructed both parties to conduct an in-camera

review of the DSS file, which occurred in chambers at the Spartanburg County Courthouse on July 3, 2019, with counsel Grose and Senior Assistant Deputy Attorney General Jameson. Thereafter, both parties requested the Court release the records, subject to a protective order. On July 30, 2019, the Court conducted a telephone status conference on this request, with counsel Grose and Senior Assistant Deputy Attorney General Jameson appearing on behalf of the parties and DSS represented by Robert Rhoden, Esquire and. By order⁴ signed and filed August 16, 2019, this Court issued an order releasing the DSS file to the parties, with special instructions that DSS was to redact any personal identifying information before providing a copy to the parties, that counsel for the parties shall maintain the file subject to the strictest confidence and not make any copies other than as needed for litigation, and that the parties shall not give copies of the file to anyone absence approval of the Court.

On October 31, 2019, following the issuance of this order and the delivery of the DSS file to the parties, the Court requested the parties submit any additional memorandums on the DSS file and the issues raised at the PCR hearing on or before December 17, 2019. On that date, the State submitted its “Post-Hearing Memorandum in Support of the Denial of Post-Conviction Relief” and Applicant submitted a “Supplemental Memorandum of Law regarding the DSS Records.”

On May 7, 2020, this Court issued a ten-page Form 4 denying post-conviction relief on all grounds and instructing the State to prepare a proposed order in accordance with the Form 4 within thirty days. On June 8, 2020, Respondent submitted a proposed order pursuant to the Court’s instructions. On the same date, Applicant’s counsel requested time to review the proposed order with Applicant and submit written objections to the proposed order and the Court granted this request. On July 7, 2020, Applicant submitted “Objections to Attorney General’s Proposed Order

⁴ This order was prepared and submitted by Applicant’s counsel.

and Proffer of Attorney General's Proposed Order."

On October 8, 2020, the Court issued an order of dismissal, denying and dismissing the post-conviction relief action in full.

On October 19, 2020, Applicant served a timely Rule 59(e), SCRCP motion. This return to the motion follows.

III. RESPONSE TO APPLICANT'S MOTION TO ALTER OR AMEND

In his Rule 59(e), SCRCP motion, Applicant "moves this Court for an order altering and amending its order dated May 7, 2020, directing the Attorney General's Office prepare an order of dismissal, and the order of dismissal dated October 8, 2020, which is substantially identical to the Attorney General's proposed order." Applicant stated that his motion "will highlight some of the matters raised in the objections to the Attorney General's proposed order," but to avoid "rehash[ing] all of the matters raised in [his objections to the proposed order]", he incorporates all of his prior arguments and objections by reference. Accordingly, Respondent responds to both the relevant objections to the proposed order and the Rule 59(e), SCRCP, motion in this return.⁵

Response to Objections to Procedure Used by This Court

Applicant first takes issue with the procedures used by this Court, specifically arguing that the process of asking the prevailing party to draft a proposed order for the Court's review and consideration "denied Mr. Spade his statutory and constitutional right to have a judicial officer make findings of fact and conclusions of law." See "Threshold Matter" section of Rule 59(e),

⁵ In his the "Objections to the Proposed Order" and the Rule 59(e), SCRCP, Applicant repeatedly discusses portions of the proposed order that were not included in the final order of the court. As these portions are not part of the ruling of the Court, there is nothing for the Court to alter, amend, or reconsider regarding these portions of the proposed order, and accordingly, Respondent will only be responding to the arguments regarding the final order of this court, signed and filed on October 8, 2020. Because the "Objections to the Proposed Order" and the Rule 59(e), SCRCP, motion address the issues based on a different numbering scheme, Respondent has grouped and summarized these objections or issues by relevant topic.

SCRCP Motion and “Objection to Attorney General’s Office Drafting the Order” in “Objections to the Proposed Order.” Applicant argues by requesting the prevailing party to draft a proposed order for its consideration—a routine practice in not only post-conviction relief cases but the vast majority of cases heard by the circuit court in this state—this Court has somehow violated S.C. Code Ann. § 17-27-80 and the separation of powers pursuant to Article I, Section 8 of the South Carolina Constitution.

Applicant’s argument is premised on a faulty assumption that this Court failed to conduct its own review of the requested proposed order and simply adopted Respondent’s proposed order in full without an adequate review. This is directly refuted by the record, which clearly and unequivocally establishes this Court thoroughly reviewed all evidence presented, watched all forensic interviews multiple times, and replayed portions of the audio from the PCR evidentiary hearing, and then, after this detailed review, made substantial and meaningful changes to the proposed order to create the final order of dismissal that was signed. Applicant’s assertions that this Court merely adopted Respondent’s proposed order of dismissal (submitted at the Court’s express request) are wholly without merit.

It is crucial to note that Applicant misrepresents the quoted portion of the South Carolina Supreme Court’s opinion in Hall by omitting the second half of the sentence: “Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, **we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.**” Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (emphasis added). As discussed by our Supreme Court in Hall in the emphasized portion above that Applicant deliberately omitted, it is common and routine practice in not only post-conviction relief cases but the vast majority of cases heard by the circuit

court in this state for the prevailing party to draft a proposed order for the Court's consideration. The process of submitting proposed orders is built into our rules, (see Rule 5(b)(3), SCRCP, which explicitly references "finds of fact and conclusion of law" as required under Section 17-27-80), and custom, Hall, 360 S.C. at 365, 601 S.E.2d at 341.

As recently as 2019, our Supreme Court has again recognized the practice of calling for proposed orders from litigants remains routine, though the "finalization of [the] order is often a collaborative effort." Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). Our Supreme Court has never required or even suggested that a post-conviction relief judge must write his or her orders from scratch.⁶ If the post-conviction relief court—after careful consideration—adopts the language offered, that language becomes the Court's order. The judge is free to accept or reject a proposed phrasing or finding as the Court deems appropriate.

In Fishburne, our Supreme Court provided guidance on the preferred method for submission of proposed orders in post-conviction relief cases:

When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

⁶ Applicant's apparent assertions that the Uniform Post-Conviction Relief Procedures Act or the South Carolina Constitution somehow require the circuit court judge to draft its own order without the submission of a proposed order is illogical, as a proposed order for all intents and purposes is often the functional equivalent of a memorandum of law outlining and arguing for the grant or denial of post-conviction relief, which Applicant certainly did not object to this Court reviewing in support of his application.

Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019).

The exact method as set forth in Fishburne was followed in this case. The Court, after asking for and reviewing memorandums of law from **both** parties, issued a detailed, ten-page Form 4 order, specifically outlining its ruling on the vast majority of the issues raised by Applicant and requesting Respondent prepare a proposed order. Respondent—based on the explicit instruction from the Court—prepared a proposed order with detailed findings of fact and conclusions of law based on the rulings as set forth in the Court’s Form 4. Respondent then promptly transmitted this proposed order to the Court and opposing counsel. Applicant was then given ample time to review the order with his counsel and submit written objections to the proposed order. Upon receipt of these written objections to the proposed order, the Court then reviewed these objections alongside the proposed order and issued its own final order of dismissal.⁷ Upon receipt of the proposed order, Counsel filed a timely Rule 59(e), SCRCp, motion.

Applicant has failed to sufficiently state how he was deprived any statutory or constitutional right by this process. The Court, as required by Section 17-27-80, made specific findings of fact and conclusions of law, first in a detailed Form 4 and later in its final order after substantial and meaningful edits to a proposed order submitted at the Court’s explicit request.

⁷ In his Rule 59(e), SCRCp, motion, Applicant acknowledges the Court directly references the “written input from Applicant’s counsel” as to the proposed order, but then complains “[t]he order of dismissal never specifically identifies Mr. Spade’s Objections to the Attorney General’s Proposed Order, and, therefore, it is impossible to determine whether this Court consider[ed] any of the factual and legal analysis set forth in that pleading.” See Rule 59(e), SCRCp, Motion p. 9. This argument is illogical, as Applicant’s Objections to the Proposed Order were the only “written input from Applicant’s counsel” provided. Moreover, Applicant appears to be suggesting that the Court, upon receipt of these Objections to the Proposed Order, did not review these objections and adopted Respondent’s proposed order without any consideration to these objections, which is contrary to the Court’s final order indicating these objections were indeed considered.

Applicant’s argument that this Court’s procedures—as directly outlined in Fishburne—violates the Separation of Powers is also unpersuasive. In support of this contention, Applicant cites State v. Langford, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012); however, Langford is not analogous to the case at hand. Langford involved with the specific issue of the statutorily delegated duty of the solicitor—codified in section 1–7–330 of the South Carolina Code—to prepare the dockets for general sessions and determine the order in which the cases are called for trial. Id. The Langford Court concluded the statute violated the separation of powers because it delegated an inherently judicial function exclusively to a member of the executive branch. Id. at 435, 735 S.E.2d at 478. Langford is inapplicable to this situation, partially because the preparation of proposed orders is not exclusively delegated to the Attorney General’s Office. Rather, the post-conviction relief court has the option to request proposed orders from either party, and upon receipt of those orders, is responsible for issuing its own final order.

The procedures employed by this Court were proper and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented by the Court and comports with statutory and constitutional requirements.

Response to Preservation and Disclosure of DSS Records

In his “Objections to the Proposed Order,” Applicant expressed concern as to whether the DSS file regarding the victim has been made a part of this record under seal.⁸ In this Court’s order of dismissal, this Court similarly “requests the parties inform this Court if a sealed copy (with redactions) is not in the Clerk’s file, if a copy of the redacted DSS information is not filed with the

⁸ While Applicant expressed concern as to whether the records were filed under seal—something he moved for and drafted a proposed order on—it is unclear if he ever took any steps to confirm whether this had occurred.

Clerk's Office, the parties should proceed forth with having a copy filed under seal." See Order of Dismissal at FN 8.

For brief review, the DSS file came before the Court upon Applicant's motion. Following an in-camera review of the DSS file by both parties, Applicant moved and Respondent agreed that a copy should be filed under seal. Applicant, through his counsel, then submitted a proposed order for the Court's consideration.⁹ Despite the clear intent of the Court and the parties, this order fails to state that a copy of the DSS records are to be attached and filed under seal. This order was then signed by the Court on August 16, 2019, and filed with the Spartanburg County Clerk of Court. Since Respondent was not responsible for the filing of this order, it is unclear to Respondent if the DSS file and records were attached to this order at the time of filing.

A review of the Spartanburg County Public Index shows this proposed order was signed and filed, but does not indicate whether the DSS records were attached for filing under seal. Because the public index lists the order but does not state whether the DSS records are attached under seal, undersigned counsel contacted the Spartanburg County Clerk of Court's Office and spoke with Deputy Clerk of Court Marissa Fleming, who checked the file and reported the DSS records were not filed.¹⁰ Accordingly, Respondent agrees a copy of the DSS file should be filed under seal, as it was the clear intention of the parties and the Court to have these records a part of

⁹ Notably, Applicant's counsel appeared to have no issue drafting his own proposed orders for the Court's consideration, despite his vigorous protestations against Respondent submitting proposed orders in a similar manner. It appears, then, that Applicant does not take issue with a party drafting proposed orders for a court's consideration, but rather, only when he is not the one drafting the order.

¹⁰ In accordance with this Court's instruction in FN 8 of the order, undersigned counsel inquired from the Deputy Clerk of Court as to the best way to ensure these DSS records were filed under seal and was advised to contact the Court for his Honor's preference for filing under seal.

the record of this case. Respondent defers to the Court as to the appropriate way to ensure these records are filed under seal.

Applicant also asserts this Court erred when concluding “[n]o evidence was presented to suggest the State interfered with the production of the DSS file.” (Rule 59(e), SCRCF, Motion p. 16, and Opposition to Proposed Order).¹¹ Applicant cites to the testimony provided by Investigator Cantrell from the 2012 family court proceedings, which Applicant asserts proves the State had the DSS file. However, despite Applicant’s insistence, the testimony from Investigator Cantrell does not conclusively establish the State had the DSS file. Investigator Cantrell’s testimony can just as easily be interpreted as her indicating did not recall if she collected the file from DSS and if she had received the file, then it would be at the Solicitor’s office:

Q: Are the Greenville DSS documents in your file, or do you recall collecting anything from Greenville DSS?

A. They would be at the Solicitor’s Office I don’t recall.

Q. Did you turn over everything you’ve got to the Solicitor’s Office?

A. I did that I’m aware of, yes.

Oct. 15, 2012 Tr. of Jolley and Jolley v. Spade, 2010-DR-42-3372, at p. 374:

Once again, Applicant automatically assumes nefarious motives on behalf of the State without any substantive proof. Investigator Cantrell testified at the evidentiary hearing that she

¹¹ In his “Opposition to the Proposed Order” (see FN 33), Applicant erroneously states that because the State’s post-hearing brief argued the State was not in possession of the DSS file, but the proposed order does not make a similar argument, the State has somehow “abandoned” that position without any authority to support this position. This assertion is nonsensical – the State has clearly and consistently argued that it was not in possession of the DSS file, and by drafting a proposed order in accordance with the detailed Form 4 as instructed by this Court, the State has in no way “abandoned” this position. Applicant’s argument is also confusing—first, he is upset that the proposed order contains too much of Respondent’s argument from its memorandum of law, but then here complains that because portions of Respondent’s argument from its memorandum are not included, the positions are abandoned.

was called to testify at the 2012 hearing without advanced notice, did not have her file in front of her (thus explaining the lack of clarity as to whether she had a copy of the DSS file), and that she did not have a copy of the DSS file. The Court correctly found Applicant failed to establish the State was in possession of the DSS file or improperly withheld the file and failed to establish counsel was ineffective for failing to procure a copy of the DSS file. This Court properly denied relief.

Response to Argument that the Court Failed to Consider Weik v. State

In his Rule 59(e), SCRCF, motion, Applicant argues this Court's order of dismissal is faulty because it fails to consider Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014). Applicant argues this Court "excused trial counsel's performance, based on strategic decisions, even though Mr. Spade alleged trial counsel did not conduct the investigation reasonably necessary to make those decisions[.]" and based on Weik, these findings are erroneous.

Applicant's reliance of Weik and assertions that Weik is dispositive on his case are unpersuasive, as Weik is readily distinguishable from Applicant's case. In Weik, trial counsels not only utterly failed to perform an investigation into evidence that was readily available, but also failed to even review reports and other investigative materials collected by retained experts for mitigation purposes during the sentencing phase of a capital trial. Id. In reversing the denial of post-conviction relief, the Weik Court found, "Indeed, counsel did not undertake a strategic decision to omit the mitigation evidence identified above; counsel simply did not read the investigators' reports and therefore did not know such evidence was available. Decisions made in ignorance of relevant, available information cannot be characterized as strategic." Id. at 236, 761 S.E.2d at 768.

Here, trial counsel made an informed, strategic decision not to present any evidence or witnesses that would require introduction of the forensic interviews or any additional allegations made by the victim based on his thorough review (over several years while working on this case first in a domestic capacity and then in a criminal defense capacity) of the evidence presented and his discussions with his client. As counsel testified at the evidentiary hearing, he considered presenting experts and made a strategic decision not to call any experts. While Applicant might now be dissatisfied with the level of investigation and preparation counsel did based on hindsight after his conviction, his assertions that counsel was wholly unprepared and failed to do any investigation simply does not comport with the record. In accordance with his professional obligations, counsel properly investigated the case and made an informed, strategic decision not to present any evidence or witnesses that would require showing the jury the forensic interviews to avoid the jury being presented with video evidence where the four-year-old minor victim makes a litany of allegations rather than the one discrete instance she testified about during trial. Weik properly recognizes counsel's strategic decisions must be made after a thorough investigation and review of readily available evidence, which was exactly what counsel did in Applicant's case. The Court properly denied relief.

Response to Arguments Regarding the Forensic Interviews and Reliability of the Victim's Testimony

In his "Objection to the Proposed Order" and Rule 59(e), SCRCP, motion, Applicant asserts this Court's ruling that Applicant established the forensic interviews were suggestive can only support a conclusion that counsel was ineffective and the allegations made and testimony given by the victim at trial was unreliable, and therefore, relief must be granted. However, as the Court properly explained—first in its detailed Form 4 and then in its final order of dismissal—the inquiry does not end with a finding that the interviews were suggestive.

Initially, it is of crucial note that the Court did not find that the interviews resulted in tainted or unreliable allegations. Applicant's assertions the Court's findings the interviews were suggestive automatically means the interviews (and the resulting allegation resulting in Applicant's conviction) are unreliable is erroneous. Our courts have made clear that while suggestiveness is one aspect in determining the admissibility of evidence, and even if a procedure used is suggestive, the underlying evidence is still admissible so long as it is reliable. Cf. State v. Traylor, 360 S.C. 74, 82, 600 S.E.2d 523, 527 (2004) ("Even assuming an identification procedure is suggestive, it need not be excluded so long as, under all the circumstances, the identification was reliable notwithstanding the suggestiveness.") and State v. Blassingame, 338 S.C. 240, 251, 525 S.E.2d 535, 541 (Ct. App. 1999) ("Suggestiveness alone does not mandate the exclusion of evidence."). More literally, just because something is suggestive does not mean that is unreliable. Compare NEW OXFORD AMERICAN DICTIONARY 1740 (3rd ed. 2010) (defining "suggestive" as "tending to suggest an idea") with New OXFORD AMERICAN DICTIONARY 1986 (3rd ed. 2010) (defining "unreliable" as "not able to be relied upon").

While this Court concluded Applicant was able to establish best practices for obtaining information from a child during a forensic interview were not followed based on his two expert witnesses¹², the Court correctly found Applicant did not establish trial counsel was deficient for failing to present such expert witnesses or electing not to introduce the forensic interviews during

¹² For clarity of the record, Respondent is not conceding that the forensic interviews were suggestive, unreliable, or in any way flawed and Respondent relies on its arguments regarding the propriety of the forensic interviews as set forth in its post-hearing memorandum. Rather, Respondent is directly addressing the claims made by Applicant in response to the Court's ruling that the interviews did not follow best practices and were suggestive and elucidating how such findings are congruent with a denial of relief.

Applicant's trial. This Court similarly found counsel was not ineffective for not challenging the victim's testimony as unreliable on similar grounds.

As discussed above, trial counsel thoroughly reviewed the evidence and investigated what types of defenses or challenges might be available to the defense, including whether to utilize expert witnesses to challenge the forensic interviews. Thereafter, counsel made an informed, valid, strategic decision not to call any witnesses or present evidence that would require introducing the forensic interviews or any other evidence containing additional allegations because he did not want the jury to hear the other allegations of abuse the victim made against Applicant. This was a valid, strategic decision made after a review of the evidence and considering options available—including whether to call expert witnesses. Moreover, this Court correctly determined Applicant “did not persuade this Court a different trial outcome was possible or probable” had such experts testified. As this Court detailed in its ruling, the jury was presented with Applicant's narrative of events and rejected those arguments based on the compelling testimony of the victim as to one instance of sexual assault. There is no reasonable probability Applicant would have been acquitted at trial had the jury been presented with the five forensic interviews at trial, even with the presentation of such esteemed experts as Applicant presented at trial. This Court correctly denied relief.

Response to Arguments Regarding the Special Prosecutor

Applicant raised several allegations regarding counsel's purported ineffectiveness in failing to challenge the role of Special Prosecutor Brannon, including whether he was operating under a conflict, whether he failed to disclose exculpatory information, and whether the elected Solicitor failed to produce a governor's commission pursuant to Section 1-7-470. In denying relief,

this Court correctly rejected all these claims. Respondent relies upon all arguments made in its post-hearing memorandum in support of the denial of this claim.

In his Rule 59(e), SCRCF, motion, Applicant argues Special Prosecutor Brannon was operating under an actual conflict of interest as evidenced by the email provided in discovery discussing the timing of the victim's disclosure within days of her therapist suggested reunification with Applicant. As this Court correctly found, this information was already cumulative to information known by Applicant and his counsel, so much so that it was one of the main mantras of Applicant's defense—that these allegations were concocted by a disgruntled mother and hopeful-adoptive father in an attempt to rid themselves of Applicant forever. This Court correctly concluded Applicant could not establish the result of his proceeding would have been different had counsel made any of these objections differently. Simply put, Applicant was convicted after the jury heard compelling testimony of the minor victim regarding her sexual assault by at the hands of her father. There is no reasonable probability that sort of challenge or attempt to remove Special Prosecutor Brannon would have had an impact on Applicant's trial. This Court correctly denied relief.

Response to Arguments Regarding Truth Seeking Language during Instruction and Argument

Applicant argued the trial court, the State, and defense counsel all erroneously informed the jurors their role was to seek the truth multiple times during opening charge and opening and closing arguments.¹³ In rejecting this argument, this Court correctly relied on State v. Beaty, 423

¹³ In his Objections to the Proposed Order at FN 14, Applicant asserts the proposed order "conveniently ignores" counsel's use of such language in his closing argument in addition to his opening argument. As both the proposed order and final order of the court note in the section heading and body of the argument, it included both opening and closing argument. Any assertions Respondent intentionally mislead the Court by not explicitly referencing every portion of the transcript is erroneous and offensive.

S.C. 26, 813 S.E.2d 502 (2018) and found that while the comments and instructions are improper now post-Beaty, an objection to such charge was not “universally recognized” at the time of Applicant’s trial, and therefore, trial counsel was not ineffective for failing to object and for using such comments in his own argument. See Beaty, 423 S.C. at 34 FN 2, 813 S.E.2d at 506 FN 2 (holding trial courts “should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict” as these “phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice” but acknowledging “the general sessions benchbook this Court previously supplied to all circuit judges contained language virtually identical to the disputed language employed by the trial judge”).

Moreover, this Court correctly determined Applicant could not establish any resulting prejudice based on the record, as the jury was properly instructed as to the State’s burden of proof and counsel’s vigorous argument advising the jury as to the proper burden of proof. Our courts have consistently held that any error from such type of language does not automatically require reversal and is subject to a harmlessness analysis. See Beaty, 423 S.C. at 34, 813 S.E.2d at 506 (“Although there was error here, our review of the entirety of the judge’s opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal.”). The Court correctly determined there was no reasonable probability that counsel’s failure to object or his use of such language in his own argument impacted the result of the trial and denied relief. This Court correctly denied relief.

***Response to Arguments Regarding Failing to Seek a Continuance Based on
Counseling Records***

Applicant asserts trial counsel was ineffective for failing to move for a continuance based on the late production of records from the victim's counseling sessions shortly before trial. The record reveals that when the matter was first called for trial approximately four months prior, counsel moved to continue the matter based on late production of records. Then, when the matter was scheduled for trial and records were produced shortly before trial, counsel moved to exclude the records and resulting testimony but did not move for a continuance.¹⁴ After questioning from the Court, counsel acknowledged he had time to review the records prior to trial. When questioned as to why he did not move for a continuance, counsel stated he should have moved for a continuance but did not because he knew Applicant wanted the matter resolved, as he was upset when the matter had been continued previously,

In denying this allegation, this Court correctly found nothing in this final batch of records would have changed counsel's preparation for trial. As counsel properly admitted to the trial court,

¹⁴ In his Objections to the Proposed Order at FN 16, Applicant asserts Respondent has "creative[ly] manipulate[ed]" the facts in its proposed order because the proposed order erroneously states in another section regarding prosecutorial misconduct that counsel did in fact move for a continuance. See proposed order at p. 61 ("Applicant knew of these purported Brady violations at the time of his trial, as he was provided with Thompson-Loftis's notes prior to trial and made a motion for a continuance based on the late production of these records, and accordingly, should have raised these issues on direct appeal.") and order of dismissal at p. 60 ("Initially, this Court references that Applicant knew of these purported Brady violations at the time of trial, as he was provide with Thompson-Loftis's notes prior to trial and made a motion for a continuance based on the late production of these records, and according, should have raised these issues on direct appeal.").

Respondent acknowledges this error, which is very blatantly and obviously a scrivener's error with "made a motion for a continuance" erroneously included in place of "made a motion for suppression", as the rest of the order clearly and unequivocally acknowledges counsel did **not** move for a continuance. Respondent agrees this portion of the final order of the Court should be amended to reflect what is very obviously and blatantly a scrivener's error. However, the meaning of the order and ruling does not change—counsel moved for exclusion of the records and any testimony pertaining to the records, which was denied and preserved for appellate review, and accordingly, should have been raised on appellate review. Once again, Applicant's thinly veiled assertions Respondent intentionally mislead the Court is erroneous and offensive.

he had sufficient time to review the records prior to trial and properly determined the records did not alter his defense plan. Despite that, counsel still made an appropriate motion to exclude the records and relevant testimony to preserve any possible issues for appellate review and did not move for a continuance based on the wishes of his client at the time of trial. Moreover, any assertion that he should have moved for a continuance to consult with or retain a defense expert to combat the methods used by Thompson-Loftis is unpersuasive, because there is nothing in this last batch of records that suddenly required retention of an expert. Applicant failed to establish prejudice, as there is no reasonable probability he would have been acquitted had counsel moved for a continuance. This Court correctly denied relief.

Response to Arguments Regarding Failure to Call Witnesses

While not raised or addressed directly in his Rule 59(e), SCRCF, motion, Respondent will address Applicant's arguments regarding the Court's denial of his claim that counsel was ineffective for failure to call witnesses on his behalf based on the arguments set forth in his "Objections to the Proposed Order."

First, Applicant argues the Court's order failed to include guardian ad litem Alexandria Wolf, Esquire, as a potential witness that counsel should have called on Applicant's behalf.¹⁵ Wolf testified as to her interactions with the Jolleys, the victim, and Applicant, as well as her

¹⁵ In his "Opposition to the Proposed Order," Applicant repeatedly states that his position regarding counsel's failure to utilize Wolf is "seen in Section III(F)." However, Section III of his "Opposition to the Proposed Order" does not have any numerical subsections, and Section IV(F) is the section covering this very topic. Accordingly, it is impossible to discern what precise objections or arguments Applicant makes regarding Wolf, but Respondent interprets the claims to be that Wolf would have provided lay testimony regarding her involvement in the family court matter and her interactions with the Jolleys. Respondent notes the proposed order and this Court's final order already include relevant testimony and information regarding Wolf in other sections (see Order of Dismissal p. 14), but has no objection to including specific findings of fact and conclusions of law as to counsel's decision not present Wolf as a lay witness.

involvement in the family court proceedings. Trial counsel testified he considered calling Wolf as a witness to discuss how the Jolleys stopped cooperating with her once the allegations were made. As already discussed in this Court's order, information regarding the timing of the disclosure and the narrative that the Jolleys had coached the victim into making a false accusation to rid themselves of Applicant (including specifically as related to Wolf) was already presented to the jury and rejected. This Court correctly found that any additional information on this ground would not have resulted in a different outcome. This ruling is correct. Counsel was not ineffective for failing to present Wolf as a witness at trial.

Applicant next asserts the Court's order "minimizes the importance" of Applicant's brother-in-law and his potential as a witness. Applicant's assertions are wrong, as this Court's order correctly summarizes the testimony presented by Mr. Trumpower and properly sets forth the strategic reasons why Counsel was not ineffective for electing not to present him as a witness, as he would have provided little benefit to the defense and would have potentially opened the door to harmful character evidence. This Court properly denied relief as to this ground.

Applicant next complains the statement the deposition of his former fiancée is misleading, because through her deposition, the Jolley's stipulated to a series of emails that her erroneously claims establish "collusion" between the three. Applicant's complaints are without merit. Despite his creative assertions as to why Ms. Linter's statements are in the record, neither her testimony from the deposition nor any other sworn statements from Ms. Lintner are in the record. Additionally, the emails that are in the record simply do not establish any collusion (and certainly not collusion to frame Applicant for sexually assaulting his four-year-old daughter). This Court's rulings are correct.

Response to Arguments Regarding Failure to Properly Handle Victim's Panic Attacks

While not raised or addressed directly in his Rule 59(e), SCRCP, motion, Respondent will address Applicant's arguments regarding the Court's denial of his claim that counsel was ineffective for failure to investigate and otherwise prepare a defense pertaining to the source of the victim's panic attacks on his behalf based on the arguments set forth in his "Objections to the Proposed Order."¹⁶ Applicant again asserts expert and lay witnesses would have been able to present evidence to counter "the prosecution's incredibly misleading narrative at trial about the child's anxiety." This Court correctly rejected this argument, finding the evidence presented supported the conclusion the victim's panic attacks did indeed get worse during her unsupervised visitation with Applicant and got better after the visitation stopped. This finding is supported by the record from trial and the evidentiary hearing, as Applicant failed to present any persuasive evidence that Applicant was not a major source of the victim's panic attacks. The emails and witnesses who testified as to whether the victim experienced generalized anxiety do not disprove the evidence establishing the victim's behavior and anxiety became worse as she spent time with Applicant. The Court correctly denied this allegation.

Response to Arguments Regarding Improper Bolstering

In asking this Court to reconsider its ruling, Applicant next asserts this Court's order regarding improper bolstering is erroneous. First, Applicant again asserts trial counsel was ineffective for failing to object to the testimony from Tabitha Weber about her credentials, which

¹⁶ Applicant asserts the record does not support that trial counsel "testified there was nothing to support that Applicant was not at least a major contributor to the victim's panic attacks, which got significantly worse around the 2012 visitations in the summer and fall and markedly improved once visitation ceased, as Kimberly Roseborough acknowledged during the family court trial." This statement is supported by trial counsel's testimony: at the evidentiary hearing, he testified the available information established the victim's anxiety was worse during periods of visitation with Applicant and got better once the visitations ceased, and there was nothing reported to combat this improvement. PCR Tr. p. 570-72. The only logical interpretation of this testimony is that Applicant was a major source of anxiety for the victim, which is supported by the record.

he asserts improperly bolstered and vouched for her testimony. This Court rejected this argument, finding that although the testimony regarding Weber's credentials was "unnecessary," trial counsel's performance was not deficient when he did not object. This Court's finding is correct, as this type of introductory background information is proper and routine questioning for a witness, as "such questions . . . serve the useful purpose of informing the jury about the witness, and thus may be allowed." S.C. Dep't of Highways & Pub. Transp. v. E.S.I. Investments, 332 S.C. 490, 495, 505 S.E.2d 593, 596 (1998). Applicant attempts to argue otherwise, again asserting that these basic, introductory questions somehow amounted to impermissible expert testimony. This argument clearly flawed, as the State did not move to qualify her as an expert witness and her testimony in no way vouched for or bolstered the victim's testimony. This Court properly denied relief.

Next, Applicant asserts the victim's counselors, Kimberly Roseborough and Meredith Thompson-Loftis, improperly vouched for the victim's credibility. However, Applicant acknowledges in his "Opposition to the Proposed Order" that "trial counsel blocked Ms. Roseborough from providing improper testimony." (Opposition to Proposed Order p. 42). Accordingly, any claims against Roseborough should be deemed waived. See Sloan v. Friends of Hunley, Inc., 393 S.C. 152, 159 n.3, 711 S.E.2d 895, 898 n.3 (2011) (indicating a concession allows the court to end the matter).

Regarding Thompson-Loftis, Applicant asserts trial counsel should have objected to her testimony regarding how she came to treat Applicant (i.e., after the victim had been seen by Weber at the Children's Advocacy Center and was referred to her for treatment upon the recommendation of Weber) because it impermissibly vouched for the victim's testimony. In support of this position, Applicant cites to several cases wherein our appellate courts have found forensic interviewers

improperly testified they believed the victim and argues Thompson-Loftis's testimony served no legitimate purpose other than to vouch for the victim's credibility. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) (noting a forensic interviewer should avoid statements: (1) explaining the child was told to be truthful; (2) expressing a direct opinion as to a child's veracity or tendency to tell the truth; (3) indirectly vouching for the child's believability, such as a statement the interviewer has made a "compelling finding" of abuse; (4) indicating to a jury the interviewer believes the child's allegations in the current matter; or (5) providing an opinion that the child's behavior indicated the child was telling the truth; and State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) (finding the trial court erred in allowing a forensic interview's reports into evidence where the reports state the interviewer found the child provided a compelling disclosure of abuse because the indirectly informed the jury that the interviewer believed the child was telling the truth).

However, Applicant's argument is flawed because it improperly labels Thompson-Loftis's testimony as improper bolstering when it was not. To an extent, all relevant evidence in some way "bolsters" the strength of the offering party's case, and a trial court may not exclude evidence that bolsters other evidence absent a constitutional, statutory or rule-based principle of law providing for exclusion. State v. Perry, 410 S.C. 191, 763 S.E.2d 603, 611 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part). "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." State v. Taylor, 404 S.C. 506, 745 S.E.2d 124, 128 (Ct. App. 2013) (quoting State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) rev'd in part on other grounds, 380 S.C. 499, 671 S.E.2d 606 (2009)). "Generally, the prohibition against bolstering is for the purpose of

preventing a witness from testifying whether another witness is telling the truth and to maintain ‘the assessment of witness credibility . . . within the exclusive province of the jury.’” Taylor, at 514-515, 745 S.E.2d at 128 (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)).

Applicant’s assertions Thompson-Loftis was bolstering when she testified she treated the victim—especially without actually testifying as to why she was treating victim—extends far beyond our appellate courts’ concerns as set forth in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) and its progeny of cases regarding obvious indirect comments on credibility extant in an expert’s opinion finding abuse occurred or finding a disclosure of abuse is “compelling.”

Moreover, Thompson-Loftis provided testimony within the confines of Kromah, as her testimony did not vouch for the victim’s credibility, but rather, explained the circumstances of her treatment of the victim. First, Thompson-Loftis was not conducting a forensic interview, she was providing therapy to the victim. Thompson-Loftis did not: (1) testify she told the victim to be truthful; (2) express an opinion about the victim’s veracity or tendency to tell the truth; (3) make any findings or offer any opinions that indirectly vouched for the victim such as a “compelling finding” of abuse (she did not make any findings or conclusions at all); (4) make a statement indicating she believed the victim’s allegations; or (5) provide an opinion that victim’s behavior indicated she was telling the truth. Kromah, *supra*. The Kromah Court specifically allowed for forensic interviewers to testify as to (1) **“the time, date, and circumstances of the interview;”** (2) **“any personal observations regarding the child’s behavior or demeanor;”** or (3) **“a statement as to events that occurred within the personal knowledge of the interviewer.”** *Id.* (emphasis added). Therefore, Thompson-Loftis’s testimony complied with Kromah and its progeny of cases at the time of Applicant’s trial. Accordingly, Thompson-Loftis’s testimony was proper and counsel was

not deficient for failing to object. This Court's denial of this allegation was proper.

Response to Arguments Regarding Venue

While not raised or addressed directly in his Rule 59(e), SCRCF, motion, Respondent will address Applicant's arguments regarding the Court's denial of his numerous claims regarding challenges to venue based on the arguments set forth in his "Objections to the Proposed Order." Applicant argues this Court's findings Applicant failed to meet his requisite burden of proof as to his allegations pertaining to whether venue was proper in Spartanburg County were erroneous, as there is "ample evidence that Mr. Spade's visitation occurred at hotels in both Greenville and Spartanburg Counties." Applicant then boldly asserts because the prosecutors asked about abuse in "South Carolina" rather than Spartanburg County during his trial, the State was somehow eliciting false testimony in an "intentional avoidance of the venue issues."¹⁷

In denying these venue related challenges, this Court found,

¹⁷ Applicant also boldly asserts that the State is attempting to "hide the ball" regarding venue based on the testimony of Thompson-Loftis, who testified she believed the victim's statements regarding the abuse happening in Greenville referenced the upstate region (encompassing both Spartanburg and Greenville area) rather than a specific geographic location. Applicant then erroneously states that this is a "thinly veiled attempt" to revise the counseling records. However, there is nothing improper about asking the victim's therapist to interpret her records, as Respondent properly did at the hearing.

Applicant also asserts that "this Court should be troubled by the State distancing itself from the child's statements regarding the venue issue." In support of this claim, Applicant notes that at his trial, the victim was able to state that she lived in Simpsonville and her specific elementary school. However, this argument overlooks that the victim was significantly older at the time of trial and that it is common knowledge that young children are often explicitly taught their address and the name of a school. Accordingly, there is nothing "troubling" about clarifying that a very young child might not know the precise geographic location of her sexual assault at the age of four but can recall her address and elementary school several years later.

Again, Applicant attempts to assign nefarious intent and improper conduct to the State without anything more than mere speculation. Again, Respondent urges this Court to reject such arguments.

From a PCR perspective, venue not being in Spartanburg County, at best for applicant, was speculative. This Court viewed the evidence in this record as substantial that venue was not an issue in this case. If the criminal events happened, as the jury believed they did, they happened in Spartanburg County, or they did not happen at all. Law Enforcement and/or the solicitors did not hide evidence of venue. In the present case venue was in Spartanburg County od the events did not happen.

All the evidence presented at the evidentiary hearing clearly establishes venue was proper in Spartanburg County. As discussed previously, Investigator Cantrell testified she investigated whether the allegations occurred in Greenville County or Spartanburg County and all evidence established the sexual abuse occurred at a Holiday Inn Express in Spartanburg County. Moreover, the counseling records from Thompson-Loftis that indicate the abuse happened in “Greenville” refer to the Greenville-Spartanburg metropolitan area, as Thompson-Loftis testified, not to a specific jurisdictional area. As Applicant has failed to present any credible evidence to establish venue was not proper in Spartanburg County, this Court finds these allegations must be denied and dismissed.

(Order of Dismissal p. 47). This ruling is supported by the record.

Applicant’s arguments are all premised on the faulty assertions that because there is “ample evidence that Mr. Spade’s visitation occurred at hotels in both Greenville and Spartanburg Counties[,]” there is somehow evidence to support that there was dispute as to whether the criminal conduct occurred in Spartanburg County or Greenville County. However, this conveniently overlooks the testimony from law enforcement that investigated and determined the sexual abuse occurred during Applicant’s solo visitation with the victim, which only occurred in Spartanburg County, as the investigation established Applicant’s fiancée was present for any of the overnight visits in Greenville County. The record reflects, as this Court found, that the criminal act occurred in Spartanburg County. This Court properly denied relief.

Response to Arguments Regarding the State’s Closing Argument

In asking this Court to reconsider its ruling, Applicant asserts this Court should have granted relief as to the prosecutor’s closing argument, which this Court recognized “can be constitutionally improper.”

However, in denying relief, this Court noted that when viewing the argument as a whole and in conjunction with the record, it was not an impermissible argument as it was a proper analysis of the evidence and burden of proof. Specifically, this Court found:

In certain situations, this type of argument can be constitutionally improper. The rule is that a solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences. 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. The argument in the present matter can be argued as wrong because it sought to have the jury view the evidence through an emotional lens rather than factual. More concerning in the present case was that private counsel acknowledged during the PCR that his motives in making the argument was to appeal to the jury's sympathies. Nevertheless, private counsel's argument did not rise to the constitutionally improper level as described in Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), or Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). When private counsel's argument is viewed as a whole, it appears to be based on a proper analysis of the evidence and the burden of proof; and unlike Simmons, private counsel did not misrepresent the law to the jurors. Counsel's argument was not the type of argument found in Tappeiner v. State, 416 S.C. 239, 250–51, 785 S.E.2d 471, 477 (2016).

In the present case, Applicant has failed to establish the prosecutor's closing argument was improper. The comments did not ask the jury to convict Applicant based on anything other than the evidence presented, which he went through piece by piece with the jury. Special Prosecutor Brannon repeatedly reminded the jury that the State had the burden of proof and that the State had met that burden with the evidence presented. The State's closing argument was proper and certainly did not "so infect the trial with unfairness" as to warrant a new trial. This Court finds this allegation must be denied and dismissed.

(Order of Dismissal p. 48-49). These findings are supported by the record, which establishes the closing argument informed the jury that it was the State's burden to establish Applicant's guilt beyond a reasonable doubt and reviewed the evidence and witnesses testimony correctly. See Trial Tr. 296-306. When reviewing the closing argument as a whole, this Court correctly found it was not improper and denied relief. This finding was correct.

Response to Arguments Regarding Cumulative Error

In asking this Court to reconsider its ruling, Applicant asserts this Court should have granted relief based on a cumulative error analysis, which he asserts is supported by McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008). However, Applicant's reliance of McKnight to establish that a cumulative error analysis has been adopted in South Carolina is erroneous, as McKnight does not adopt such an approach. Rather, in McKnight, our Supreme Court determined counsel was deficient on a number of grounds and that each of these grounds resulted in the requisite prejudice necessary for relief. Id. The Court in McKnight did not undertake a cumulative error analysis to adopt relief, but rather, individually determined counsel was deficient and that this deficiency prejudiced McKnight as to each ground raised. Id. Applicant's reliance on McKnight in support of his assertions that this Court should undertake a cumulative error analysis is unpersuasive, particularly when the Supreme Court that same year recognized that "whether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina'" Lorenzen v. State, 376 S.C. 521, 535 FN 3, 657 S.E.2d 771, 779 FN 3 (2008) (citing Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) and Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006)). This Court properly rejected Applicant's assertions that he is entitled to relief based on cumulative prejudice.

Response to Arguments Regarding Appellate Counsel

While not included in his Rule 59(e), SCRCF, motion, Applicant asserts in his "Opposition to the Proposed Order" that this Court failed to make findings of fact and conclusions of law regarding his allegations of ineffective assistance of counsel and urges this Court to grant relief. This assertion is without merit. In this Court's order of dismissal, this Court found counsel was not deficient, as the decision as to which issues to raise on appeal were within counsel's discretion

and counsel raised five issues of error on appeal. Moreover, this Court found Applicant also failed to establish any prejudice because there was no reasonable likelihood that Applicant would have been successful on appeal in raising the denial of directed verdict based on a lack of venue. This Court's order comports with the requirements of Section 17-27-80. See S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."). This Court properly set forth its findings of fact and conclusions of law as to this issue and properly denied relief.

Response to Arguments Regarding Prosecutorial Misconduct

While not included in his Rule 59(e), SCRCP, motion, Applicant asserts in his "Opposition to the Proposed Order" that this Court improperly denied relief as to his various allegations of prosecutorial misconduct. First, Applicant asserts the State withheld information that venue was not in Spartanburg County, elicited false testimony regarding venue, and failed to correct false testimony regarding venue. As fully addressed above pertaining to ineffective assistance of counsel claims as to venue, these arguments are without merit. The record establishes venue was proper in Spartanburg County.¹⁸ Next, Applicant asserts the State failed to disclose the DSS records. As this issue is addressed fully above, Respondent relies upon those arguments and reasserts that this Court properly rejected this claim. Finally, Respondent asserts the State failed to disclose an investigation into Applicant's former fiancée. As this Court properly found, there was no evidence to support that law enforcement ever considered Ms. Lintner a suspect. Applicant's assertions are without merit and this Court properly denied relief.

¹⁸ As discussed above in FN 14, Respondent asks this Court to issue amended findings as to a clear scrivener's error regarding whether counsel moved to continue based on the late production of the victim's counseling records. The record is clear, counsel moved to suppress the records and did not move for a continuance.

CONCLUSION

Based on all the foregoing, as well as the arguments set forth at the evidentiary hearing and in Respondent's post-hearing memorandum, Respondent respectfully requests this Court affirm its denial and dismissal of each of Applicant's allegations for relief.

Regarding the DSS records being filed under seal, Respondent requests this Court provide additional instruction as to how the Court would like the records filed under seal.

Regarding the findings related to prosecutorial misconduct related to the DSS records, Respondent requests this Court issue an amended finding to correct the scrivener's error in the final order to that it correctly reads "made a motion for suppression." See order of dismissal at p. 60 ("Initially, this Court references that Applicant knew of these purported Brady violations at the time of trial, as he was provide with Thompson-Loftis's notes prior to trial and made a motion for a continuance based on the late production of these records, and according, should have raised these issues on direct appeal.").

Respondent additionally requests this Court deny Applicant's Rule 59(e), SCRPC, motion without a hearing by issuance of a written order, as no additional testimony or argument is needed and these issues are all properly preserved for appellate review.

Respectfully submitted,

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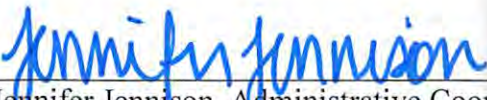
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL
	)	CIRCUIT
	)	
Daniel Spade, #358974	)	
	)	Case No.: 2017-CP-42-2372
Applicant,	)	
	)	
v.	)	Certificate of Service by Mail
	)	
State of South Carolina	)	
	)	
Respondent,	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Applicant's 59(e), SCRCF Motion** in the above-captioned matter on the following people by depositing same in the United States mail, postage prepaid:

The Honorable J. Mark Hayes, II
Seventh Circuit Resident Judge
180 Magnolia Street
Spartanburg, SC 29306

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, SC 29646

DATED this 13th day of January, 2021.



 Jennifer Jennison, Administrative Coordinator
 For Respondent

THE STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

Daniel W. Spade,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2017-CP-42-02372

**Reply to the State's Return to Mr. Spade's
Rule 59(e), SCRPC Motion**CLERK OF COURT
SPARTANBURG COUNTY
MAY 11, 2018

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FILED

To: The Honorable J. Mark Hayes, II, Presiding Judge, Seventh Judicial Circuit

Daniel W. Spade replies to the State's return to his Rule 59(e), SCRPC Motion (hereinafter "Motion" and "Return").

As threshold matters, this Court should be mindful of two legal principles that impact multiple sections of this Court's order. First, this Court has not ruled on the reasonableness of trial counsel's investigation. As the Supreme Court stated:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. 668, 690-91 (1984). Once this Court recognizes that trial counsel unreasonably limited their investigation, the need to alter and amend the final order becomes apparent.

Second, this Court must "consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). It is necessary to

“examine[] the strength of the State’s case as part of our consideration of prejudice.” *Id.*, 422 S.C. at 88, 810 S.E.2d at 844. Here, the child complaining witness’ direct testimony is only six pages of the record, and the State presented no physical evidence corroborating child sexual abuse. Thus, the jurors’ determination of the child’s credibility was the most critical determination of this case.” *State v. Jennings*, 394 S.C. 473, 480, 716 S.E.2d 91, 95 (2011). “[O]ur courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant’s guilt or relied solely on the victim’s testimony to establish the details of the crime.” *Chappell v. State*, 429 S.C. 68, 81, 837 S.E.2d 496, 503 (Ct. App. 2019).

A. Procedure Followed by this Court.

The State argues the procedure followed by this Court complies with *Fishburne v. State*; however, “[t]he preparation and finalization of a PCR order [to be] a collaborative effort.” 427 S.C. at 516, 832 S.E.2d at 589 (2019). The procedure followed in this case is not fair to Mr. Spade, who has a right to have his PCR claims adjudicated by a judicial officer, pursuant to section 17-27-80, charged with the role of “safeguard[ing] the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

By allowing the Attorney General’s Office to draft the final order, this Court signed an order that did not properly consider the reasonableness of the investigation, misapplies the prejudice analysis, and misstates the law as it existed at the time of Mr. Spade’s jury trial.

B. Reliability of Child Advocacy Center Interview and Child’s Testimony (Failure to Request a Taint Hearing).

The State argues this “Court did not find that the interviews resulted in tainted or unreliable allegations.” Return at 17 (emphasis original). Mr. Spade disagrees. It is hard to read this Court’s Form 4 order, finding the interviews to be suggestive, without concluding that tainted or unreliable testimony resulted.

“Due process prevents the State from using evidence so unreliable it offends fundamental conceptions of justice and ordered liberty.” *State v. Adams*, 430 S.C. 420, 427, 845 S.E.2d 217, 220 (Ct. App. 2020) (Citing *Perry v. New Hampshire*, 565 U.S. 228, 237, (2012)). *Adams* considered whether the trial judge erred by not convening a hearing to determine “the victim’s reliability” *Id.*, 430 S.C. at 427, 845 S.E.2d at 221 (citing *State v. Michaels*, 136 N.J. 299, 312, 642 A.2d 1372, 1379 (1994)); and see *Commonwealth v. Delbridge*, 578 Pa. 641, 655, 855 A.2d 27, 35 (2003) (“Taint is the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify.”). *Adams* “conclude[d] the reliability concerns *Adams* raises based on *Michaels* were satisfied here by the witness competency standard and within the framework of § 17-23-175, which in essence requires a pre-trial taint hearing.” *Id.*, 430 S.C. at 428, 845 S.E.2d at 221. In a hearing to determine the reliability of the child’s testimony, S.C. Code Ann. § 17-23-175(B) requires the court to consider (1) “whether the statement was elicited by leading questions,” (2) the training of the interviewer, (3) “whether the statement represents a detailed account of the alleged offense,” (4) whether the statement has internal coherence; and (5) the “sworn testimony of any participant which may be determined as necessary by the court.”

Trial counsel did not request—and the trial judge did not convene—a hearing to determine the reliability of the child’s allegations. This Court did not consider the reliability of the child’s testimony using the section 17-23-175(B) factors. Here, the use of leading or suggestive questions, lack of a detailed account of the alleged offense, lack of internal coherence, and the sworn testimony of Dr. Maggie Bruck and Dr. Michael Lamb require suppression of the child’s testimony.

C. Special Prosecutor.

The State argues Mr. Spade “was convicted after the jury heard compelling testimony of the minor victim regarding her sexual assault by at the hands of her father.” Return, at 19. This statement misstates the strength of the State’s case. As discussed in the introduction, this Court “consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls*, 422 S.E.2d at 188, 810 S.E.2d at 843.

D. Truth Seeking and Do Justice for All Parties.¹

The trial judge instructed the jurors to search for the truth at least three times. Tr. 110 (twice) 116 (twice). The prosecutors told the jurors to search for the truth at least two times. Tr. 120, 122. She also told the jurors testimony of the counselors “will lead you all to the truth of what happened in this case, and this is that the defendant is guilty of criminal sexual conduct with” the child. Tr. 120-21. Trial counsel told the jurors to search for the at least truth *nine* times, including during his last statement to the jurors. Tr. 121, 122, 308-09, 309 (twice), 309-10, 310 (twice), 316.

At the evidentiary hearing, trial counsel claimed to be familiar with *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2013), *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), and *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998), but he could not “recall” when any those cases were decided. PCR 401-03. Counsel explained he didn’t object because “that could potentially

¹ The trial judge’s opening comments stated:

This trial is a fundamental part of our democracy - a search for the truth in an effort to make sure that justice is done between the parties before the court. Searching for the truth and making sure that justice is done is often slow, deliberate and repetitive, the opposite of what you may have seen on television or in a movie or read in books. This courtroom is a place of honor dedicated to the protection and preservation of citizen's rights through what many have called the greatest justice system ever created.

Tr. 110.

really tick the judge off,” but conceded that reasoning was contrary to our state’s error preservation rules. PCR 403. Trial counsel ultimately acknowledged the jurors are tasked with “decid[ing] whether the State met the burden of proof or not,” and “not to determine what the truth is.” PCR 405.

Regarding the performance prong of *Strickland*, the State contends, “[T]his Court correctly relied on *State v. Beaty*, 423 S.C. 26, 813 E.E.2d 502 (2018) and found that while the comments and instructions are improper now post-*Beaty*, an objection to such charge was not ‘universally recognized’ at the time of [Mr. Spade’s] trial.” Return, at 19-20. The State does not even acknowledge *Daniels* holding “the trial judge erred in charging the jury that their verdict would represent the ‘truth and justice for all parties,’” and instructing “trial judge[s] to remove any suggestion from [] general sessions charges that a criminal jury’s duty is to return a verdict that is ‘just’ or ‘fair’ to all parties.” 401 S.C. at 255-56, 737 S.E.2d at 475. *Daniels* admonished:

Such a charge could effectively alter the jury’s perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State’s burden to prove the defendant’s guilt beyond a reasonable doubt. Moreover, to a lay person, the “all parties involved” in a criminal case may well extend beyond the defendant and the State, and include the victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

Id. See also Motion, at 13-14. The State also failed to acknowledge *Teamer v. State*, 416 S.C. 171, 786 S.E.2d 109 (2016), which recognized *Daniels* as the case placing trial counsel on notice to object to jury instructions that the verdict should represent the truth. See also Motion, at 14.

Regarding the prejudice prong of *Strickland*, the State argues, “[T]his Court correctly determined [Mr. Spade] could not establish any resulting prejudice based on the record, as the jury was properly instructed as to the State’s burden of proof and counsel’s vigorous argument advising the jury as to the proper burden of proof.” State’s Return, at 20 (citing *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506). This argument is not supported by the record. As seen, between the trial judge,

prosecutor, and trial counsel, the jurors heard at least fourteen times that their role was to search for the truth or do justice between the parties. The excessive use of this burden reducing language distinguishes this case from cases where the error was limited and deemed not to be prejudicial. *E.g. Battle v. State*, 382 S.C. 197, 204, 675 S.E.2d 736, 740 (2009) (“While we recognize that the trial court employed the “search for” language in a supplemental instruction, the court used “search for” only one time and emphasized that the State retained the burden to prove Respondent’s guilt beyond a reasonable doubt.”).

Our Supreme Court has “found there was no reversible error because the ‘seek the truth’ language was charged in conjunction with the credibility of witnesses charge, and not with either the reasonable doubt or circumstantial evidence charges.” *State v. Beaty*, 423 S.C. 26, 33, 813 S.E.2d 502, 506 (2018) (citing *State v. Aleksey*, 343 S.C. 20, 27-29, 538 S.E.2d 248, 251-53 (2000)). Here, the trial judge instructed the jurors:

You twelve jurors alone will decide what effect, value and weight to be given to any particular testimony or other evidence received. Quite simply, your ultimate goal is to find the truth in this case and by doing so you will have fulfilled your obligations as jurors in giving both the State and the defendant a fair and impartial trial, based on the evidence presented and the law applicable to this case.

Tr. 317. The trial judge instructed the jurors to determine whether there was a “real possibility” that Mr. Spade is not guilty. Tr. 321. Trial counsel also used the “real possibility” language and linked that statement to “a search for the truth, a search for what has happened to lead us to this moment in time.” Tr. 309-10. The last thing trial counsel told the jurors misstated the burden of proof:

Ladies and gentlemen, as I said in the beginning of this argument and this summation, if there is a real possibility that he is not guilty of this crime, you must give him the benefit of the doubt. If there is a real possibility. We just talked about stuff, possibilities.

A search for the truth, I submit to you, culminate in a verdict of not guilty.

Tr. 316. Trial counsel thus asked the jurors to search the record for a “real possibility.” “Implying the evidence must show a real possibility of innocence to justify acquittal trenches on the principle that a defendant is presumed to be innocent.” *United States v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987). Although *State v. Darby* approved the “real possibility” reasonable doubt instruction, our Supreme Court cautioned, “the ‘real possibility’ language” must be “in the context of the preceding language requiring that the juror be ‘firmly convinced’ of the defendant’s guilt” and nothing in the instruction “suggest the defendant himself bears any burden of proof.” 324 S.C. 114, 116, 477 S.E.2d 710, 711 (1996). Both trial counsel in closing and the trial judge in the jury instructions suggested Mr. Spade had the burden of proof.

E. Continuance.

At the evidentiary hearing, trial counsel acknowledged he should have moved for a continuance to evaluate the information contained in Ms. Thompson-Loftis records disclosed by the State on the eve of trial. PCR. 395-96. The failure to seek this continuance in more evidence of trial counsel’s failure to investigate. Dr. Maggie Bruck testified about Ms. Thompson-Loftis records, including the portion disclosed on the eve of trial.

F. Failure to Call Witnesses.

1. Expert Witnesses.

As stated in the introduction, this Court has not ruled on whether trial counsel conducted a reasonable investigation. “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690-91; and see *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014) (“Decisions made in ignorance of relevant, available information cannot be characterized as strategic.”). “An attorney undoubtedly has a duty to consult with the client

regarding ‘important decisions,’ including questions of overarching defense strategy.” *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citing *Strickland*, 466 U.S., at 688). It is against this legal framework that this Court must determine whether trial counsel conducted a reasonable investigation.

At the evidentiary hearing, trial counsel did not consult any expert witnesses. PCR 396-416. He claimed “doing a lot of internet research,” but acknowledged not talking to any experts. PCR 397. Trial counsel did not consult any experts even though Mr. Spade repeatedly requested him to do so. PCR 374-85; Applicant’s Exhibits 22-25, 27, 28. Trial counsel could not recall whether his internet searches discovered Dr. Maggie Bruck or Dr. Michael Lamb. PCR 380. As pointed out in the objections to the proposed order and Rule 59(e) motion, this Court’s Form 4 order contained findings of fact that were very favorable to Mr. Spade regarding this claim. Given those findings of fact, this Court must alter and amend the final order, find trial counsel failed to investigate or unreasonable limited his investigation when he failed to consult a single expert witness, even after Mr. Spade repeatedly requested him to do so.

2. Other Witnesses.

The State does not object to this Court altering and amending the final order to add findings of fact and conclusion of law regarding trial counsel’s failure to call guardian ad litem Alexandria Wolf. Return, at 22, fn. 15.

G. Child’s Panic Attacks.

This Court should consider the emails introduced in the pre-trial hearing. Applicant’s Ex. 1. *See, e.g., Pauling v. State*, 331 S.C. 606, 611, 503 S.E.2d 468, 471 (1998) (“At the PCR hearing, petitioner presented evidence as to the nature of the nurse’s testimony by introducing her triage notes.”).

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H. Improper Bolstering.

The State argues the “unnecessary” review of Tabitha Weber’s expert “credentials” was “routine questioning” about Ms. Weber’s “background information.” Return, at 24-25. This Court must reject this argument for four reasons. First, because neither party introduced the videotapes of the children’s advocacy center interviews, there was no reason for Mr. Webber to testify at all, because the primary purpose of calling the person who interviewed the child is to authenticate the videotapes of the interviews pursuant to S.C. Code Ann. § 17-23-175. Second, *State v. Douglas*, placed trial counsel on notice that it is “unnecessary” to qualify the CAC interview as an expert witness, 380 S.C. 499, 503, 671 S.E.2d 606, 608 (2009), and made clear “that 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). Third, after *Douglas*, *State v. Kromah*, 401 S.C. 340, 37 S.E.2d, (2013), *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010), and *State v. Dawkins*, 386 S.C. 386, 377 S.E.2d 298 (1989)—all decided prior to Mr. Spade’s jury trial—“reasonably competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer gives testimony that indicates the witness believes the victim, but does not serve some other valid purpose.” *Briggs*, 421 S.C. at 325, 806 S.E.2d at 718. Fourth, Mr. Spade’s PCR claim is not limited to the prosecution “unnecessarily” qualifying Ms. Webber as an expert witness—which included a claim that she has “extensive training in child development, child abuse, linguistics, developmental delays, pediatric psychotherapy, play therapy” (Tr. 246-48)—but also includes her improperly bolstering the child’s credibility by testifying that, based on the interviews, which were not introduced into evidence, she contacted law enforcement and recommended the child begin therapy. This testimony, combined with her expert qualifications, conveyed to the jurors that Ms.

Webber believed the child. As this Court pointed out, Mr. Spade's case is unusual because the child's family took the child the CAC rather than law enforcement referring the child. As discussed below, Ms. Thompson-Loftis' testimony is linked to Mr. Webber's testimony, including her qualifications, determination that child sexual abuse occurred, and recommendations for treatment under victim services.

The State argues Mr. Spade "improperly labels Thompson-Loftis's testimony as improper bolstering when it was not." Return, at 26. The State ignores Ms. Thompson-Loftis' trial testimony and the law existing at the time of Mr. Spade's trial. The Special Prosecutor questioned her about her training, education, experience, the nature of her practice, whether part of her practice includes making "diagnoses," and that treatment and therapy follows a diagnosis. She testified

Being that a majority of my clients are trauma victims, or have been in the past, have quite an extensive amount of forensic and sexual abuse training, Post Traumatic Stress training.

The prosecution offered her as an expert in "child abuse diagnosis, treatment, and therapy." Trial counsel objected." The trial judge qualified her as an expert in "Family counseling and child therapy." Tr. 250-58.² Ms. Thompson-Loftis then testified:

² Trial counsel did not request—and the trial judge did not convene as part of its gatekeeping role—a hearing to determine the reliability of Ms. Loftis-Testimony. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) "Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability.); *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (Trial court's gatekeeping function in assuring reliability of expert testimony applies to nonscientific evidence). That trial counsel would not request the trial court to exercise its gatekeeping role is especially troubling in light of the Court of Appeals criticism of Ms. Thompson-Loftis' techniques. *S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 23, 720 S.E.2d 503, 507 (Ct. App. 2011) ("Ms. Cindy Stichnoch, an expert in the assessment and treatment of sexual behavior issues in children, testified before the family court. Ms. Stichnoch reviewed the DSS files; the written reports and videos from Anna G.'s sessions with Ms. Loftis and Ms. McMillan; treatment records from Anna G.'s pediatricians; Father's polygraph results; interview reports and affidavits from Mother, Father, and Father's two daughters; and the GALs' reports. Ms. Stichnoch was highly critical of Ms. Loftis' interviewing techniques, specifically her continuing to have therapy sessions with Anna G. about the sexual

Q. When did you first meet [the child]?

A. [The child] first came to my office back in May of 2011.

Q. Okay. Do you have any idea how or why she appeared in your office? Was she referred there?

A. She was.

I used to work for the Children's Advocacy Center in Spartanburg, so I also do a tremendous amount of victim assistance, which means I treat people who qualify for victim services. And since I took that, Mr. Webber referred [the child] to see if I could provide therapy for her under the victim's assistance and I agreed, and [the child] was brought for her session, first session in May of 2011.

Q. Okay. And the lady who just testified before you, Tab Webber, is this one who referred [the child] to you, is that correct?

A. Yes.

Q. All right. Now, in cases where there is abuse of any kind, is it typical for a child after the Children's Advocacy Center interviews to change therapists?

A. I think once a determination has been made or a recommendation has been made, I typically see most forensic interviews results in therapy or further therapy,³ and I don't think it's unusual for someone to be referred to a different therapist, based upon the type of treatment they provide, or based upon the types of insurance panels there [sic] are on. There could be a number of reasons.

Q. Okay So what this jury already knows is that [the child] was seeing Kim Rosborough. [The child] then went to the Children's Advocacy Center, and then [the child] came to see you. Is that unusual in the typical case of abuse?

A. No, not at all.

abuse allegations until a full assessment was conducted. Ms. Stichnoch stated a child of Anna G.'s age is easily influenced, and repetitive sessions and questions about the allegations could inadvertently and inappropriately reinforce those allegations with the child. Ms. Stichnoch also opined that Ms. McMillan inappropriately led Anna G. and continued to repeat the same questions to the child until she was satisfied with Anna G.'s responses.”).

³ *State v. Dempsey*, 340 S.C. 565, 569, 532 S.E.2d 306, 308 (Ct. App. 2000) (expert stating “when a child says that, ninety-five to ninety-nine percent of the time, that's the truth” is improper bolstering).

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Tr. 259-60 (footnote added). Ms. Thompson-Loftis then testified about “partial disclosure,” “delayed disclosure,” and “coaching.” Tr. 260-63. Ms. Thompson-Loftis next testified she saw the child in “seventy-one times” and the child continues to be her “client.” Tr. 263-64. Ms. Thompson-Loftis next testified about the child’s symptoms and opined, “I have seen a lot of improvement” and “a lot of transformation in” the child and referred to her as “a remarkable child.” Tr. 268-70.

Immediately after this testimony, the Special Prosecutor questioned Ms. Thompson-Loftis:

Q. At any point during your treatment of [the child] up through December 30, 2013, did she make a disclosure of sexual abuse to you.

A. Yes, she did.

Q. Was she specific as to location?

A. She was.

Q. Was the location in South Carolina?

A. Yes, it was.

Q. Was she specific as to time, the time period?

A. The time period, yes.

Tr. 270. The Special prosecutor concluded Ms. Thompson-Loftis direct examination.

The only possible conclusions the jurors could reach from this testimony are (1) Ms. Webber believed the child is a victim of child sexual abuse, (2) Ms. Webber would not have referred the child to Ms. Thompson-Loftis (under victim assistance) if she did not believe the child was a victim of child sexual abuse, (3) Ms. Thompson-Loftis believed the child is a victim of child sexual abuse, (4) Ms. Thompson-Loftis would not have treated the child (under victim assistance) during seventy-one therapy sessions if she did not believe the child was a victim of child sexual abuse, and (5) the child would not still be a patient of Ms. Thompson-Loftis (under victim assistance) if she did not believe the child was a victim of child sexual abuse.

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The State contends Mr. Spade's "assertions Thompson-Loftis was bolstering when she testified she treated the victim-especially without actually testifying as to why she was treating victim-extends far beyond our appellate courts' concerns as set forth in [*Kromah*] and its progeny of cases regarding obvious indirect comments on credibility extant in an expert's opinion finding abuse occurred or finding a disclosure of abuse is 'compelling.'" Return, at 27.⁴ This argument is misleading for two reasons. First, as discussed above, Ms. Thompson-Loftis testified she treated the child for trauma after a determination had been made that the child qualified for victim's services. Second, this statement is misleading about *Kromah* and similar cases. *Kromah* instructed prosecution witness to "avoid" making statements such as "the child was told to be truthful," offering "a direct opinion as to a child's veracity or tendency to tell the truth," making "any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a 'compelling finding' of abuse," refrain from "any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter," or offering "an opinion that the child's behavior indicated the child was telling the truth." 401 S.C. at 360, 737 S.E.2d at 500. Testimony that a disclosure is "compelling" for child sexual abuse is just one type of statement *Kromah* prohibits. In *Smith*, testimony the children's advocacy center interviewer "found the Victim's statement 'believable' and stated the Victim had no reason 'not to be truthful'" required reversal. 386 S.C. at 564, 689 S.E.2d at 631. *Dawkins* held it improper for the prosecutor to ask a treating psychiatrist whether the child's "symptoms are genuine." 297 S.C. at 393, 377 S.E.2d at 302.

⁴ The State's argument is also inconsistent with trial counsel's testimony acknowledging the testimony of "Ms. Webber and Ms. Thompson-Lofts had the effect of vouching for [the child's] credibility." PCR 410.

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Mr. Spade respectfully refers this Court to the March 24, 2021 oral argument in *State v. Makins*, S.C. Supreme Court Appellate Case No. 2020-000024,⁵ regarding the testimony of a treating therapist. At 13:30, Justice Kittredge reviewed the bolstering line of cases, identified the therapist testimony in *Makins* was “an end around” of what the bolstering rules prevent, and observed, “Her purpose on her treatment was: ‘this child was abused, and I believed her.’ Isn’t this what we are trying to avoid.” At 18:05, Justice Few recognized the purpose of the therapist’s testimony but questioned, “What is the legitimate reason for this witness to have told that jury that she treated the child” as opposed to interviewing the child. At 20:50, Justice Few observed therapist testimony is “risky” “because when you have this witness who needs to testify—no doubt about that—but when you have the witness testify that she treated the child, the question then arises, ‘What did she treat her for?’ And why would this professional witness, who knows what she’s doing, she’s trained, been through all this education, ‘Why would she go about treating the child if she didn’t think there was something to be treated for?’” At 34:53, Justice Hearn questions, “What would be the purpose for the State to call a therapist other than to drive home the point that this child has been abused and the child needed therapy?” At 51:30, Chief Justice Beatty observed “there is a clear pattern that [prosecutors] walk to the line, right up to the line, and then walk along the line, if not barely crossing it,” and the Court is “getting a little bothered by continually telling [prosecutors] not to do that.”

In *Makins*, the Court’s questioning included whether the witness has to make a statement about believing the child or whether the witness’ belief can be inferred from the circumstances. This Court does not need to consider that question because Ms. Thompson-Loftis testified (1) Ms.

⁵ Found at <http://media.sccourts.org/videos/2020-000024.mp4> (last viewed March 27, 2021).

Webber determined the child qualified for victim services, (2) Ms. Webber referred the child to her for treatment provided by victim assistance, (3) she treated the child under victim assistance, (4) “most forensic interviews results in therapy,” (5) the child’s symptoms improved with treatment, and (6) the complaining witness is “a remarkable child.”

“[T]he only reasonable conclusion to be drawn from [Ms. Webber and Ms. Thompson-Lofts’] testimony is that, based upon [their] training, [they] believed that the [child] was being truthful.” *State v. Douglas*, 380 S.C. 499, 505, 671 S.E.2d 606, 610 (2009) (Pleicones, J., dissenting). “[O]ur courts have found improper bolstering testimony was prejudicial in every South Carolina case in which the State presented no physical evidence of the defendant’s guilt or relied solely on the victim’s testimony to establish the details of the crime.” *Chappell v. State*, 429 S.C. 68, 81, 837 S.E.2d 496, 503 (Ct. App. 2019) (Noting, “We see no reason to depart from those rulings.”).

I. Venue.

This Court should be aware of two aspects of trial counsel’s testimony at the evidentiary hearing. First, trial counsel testified he did not consider asking for a jury instruction on venue. PCR 550. Second, trial counsel testified he and co-counsel requested the prosecutors to call someone from the hotel, which they did. PCR 544-45. Knowing this was an issue, it is remarkable that trial counsel would abandon their client’s interest and advise the State how to prove its case.

J. State’s Closing Argument.

At the evidentiary hearing, trial counsel acknowledged the Special Prosecutor’s closing argument was not proper. PCR 413-14. This Court recognized this type of closing argument can require a new trial under certain circumstances. This Court also found that the Special Prosecutor had an improper motive—appealing to the jurors’ emotion—for making given this closing

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argument. In fact, throughout his closing argument, the Special Prosecutor built up the emotion by calling Mr. Spade “a father” who “was on a journey to become a dad,” comparing Mr. Spade’s parenting skills to the Special Prosecutor’s parenting skills,” telling the story about his own daughter, and telling the jurors they “take care of good people” like the child witness in this case. Tr. 298-308.

Other jurisdictions have developed tests for assessing prejudice resulting from a prosecutor’s improper statements during a closing argument. The Fourth Circuit Court of Appeals considers “(1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.” *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983).⁶ All four of these factors require a finding of prejudice. First, the remarks misled the jurors by telling them to “take care of the child rather than determine whether the State met its burden of proof. Second, the remarks were extensive as the Special Prosecutor used his closing argument to portray Mr. Spade as a bad person before telling the lengthy story imploring the jurors to “take care” of the child. Third, the child complaining witness’ direct testimony is only six pages of the record, and the State presented no physical evidence corroborating child sexual abuse, meaning the State did not have an

⁶ West Virginia follows the same test. *State v. Sugg*, 193 W. Va. 388, 405, 456 S.E.2d 469, 486 (1995) (“Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.”).

overwhelming case. Fourth, the Special Prosecutor acknowledged an improper purpose—that he intended these remarks to be an emotional appeal to the jurors.

“To assess whether a prosecutor’s improper statements constitute reversible error, [Maryland] consider[s] various factors, including the severity of the remarks, cumulatively, the weight of the evidence against the accused and the measures taken to cure any potential prejudice.” *Sivells v. State*, 196 Md. App. 254, 289, 9 A.3d 123, 143 (2010) (internal quotations omitted); *see also Henry v. State*, 324 Md. 204, 232, 596 A.2d 1024, 1038 (1991) (“In determining whether reversible error occurred, an appellate court must take into account 1) the closeness of the case, 2) the centrality of the issue affected by the error, and 3) the steps taken to mitigate the effects of the error.”). All three of these factors require finding prejudice in this case. First, the child complaining witness’ direct testimony is only six pages of the record, and the State presented no physical evidence corroborating child sexual abuse, meaning the State did not have an overwhelming case. Second, the jurors’ determination of the child’s credibility was the most critical determination of this case. The Special Prosecutor’s closing argument was a direct appeal to the jurors to overlook credibility and “take care” of the child. Third, because there was no objection, the trial court did not do anything to mitigate the effects of this error.

K. Cumulative Error.

The State criticizes Mr. Spade’s reliance on *McKnight v. State*, 378 S.C. 336, 354 (2008) in the cumulative error analysis. Return, at 33. *McKnight* is relevant because it granted relief on multiple errors. Regardless, the Sixth Amendment and Strickland require a cumulative error analysis. *Kyles v. Whitley* instructs the prejudice must be “considered collectively, not item-by-item.” 514 U.S. 419, 436 (1995). Additionally, the United States Supreme Court’s opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire

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postconviction record . . . as a whole and cumulative of mitigation evidence presented originally” in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. “[A]s a whole” implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional *errors*, the result of the proceeding would have been different.” 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of “individual error” or error by error evaluation instead of formulating the prejudice test in light of counsel’s “errors.”

CONCLUSION

For the reasons set forth in Daniel Spade’s Memorandum in Support of Granting Post-Conviction Relief, Objections to Attorney General’s Proposed Order and Proffer of Attorney General’s Proposed Order, and Rule 59(e) motion, and this reply, this Court should reconsider the order of dismissal, vacate the order of dismissal, grant post-conviction relief, and remand this case to the Court of General Sessions for a new trial.

IT IS SO MOVED.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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SPARTANBURG COUNTY
AMY W. COX

Attorney for Daniel Spade

March 29, 2021
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	Case No. 2017-CP-42-02372
Daniel W. Spade,	)	
	)	
Applicant,	)	
	)	
vs.	)	
	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

I certify that I have served a copy of this pleading on the State of South Carolina, pursuant to South Carolina Supreme Court Order No. 2020-04-22-01, Section (c)(13), by emailing at copy to counsel, at the AIS email address, as reflected below:

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By s/E. Charles Grose, Jr.

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March 30, 2021

The Honorable Amy W. Cox
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg, SC 29304-3483

Re: *Daniel W. Spade v. State of South Carolina*
Case Number 2017-CP-42-02372

Dear Ms. Cox:

Enclosed for filing please find Mr. Spade's Reply to the State's Return to Mr. Spade's Rule 59(e), SCRCP Motion, along with a certificate of service, which was provided to the Honorable J. Mark Hayes, II and counsel for the State prior to the hearing on the Rule 59(e) on March 29, 2021.

Thank you for your attention to this matter. If you have any questions or require additional information, please contact me.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.

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AMY W. COX

cc: Mr. Daniel W. Spade (via US Mail)
Megan Harrigan Jameson, Esquire (US Mail)

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3
4 Daniel W. Spade,)
5 Applicant,) TRANSCRIPT OF RECORD
6 -vs-) 2017-CP-42-02372
7 The State.) March 29, 2021
8) Spartanburg, South Carolina
9
10

11 B E F O R E:

12 HONORABLE J. MARK HAYES, II, JUDGE
13
14

15 A P P E A R A N C E S:

16 E. CHARLES GROSE, JR., ESQUIRE
17 Attorney for the Applicant

18 MEGAN HARRIGAN JAMESON, ESQUIRE
19 Attorney for the State
20
21

22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

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Motion -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 (Proceedings March 29, 2021.)

2 (The following takes place with no counsel or parties
3 in the courtroom. The Court and all counsel on webex.)

4 THE COURT: We have with us Judge Bonds, and I was
5 just reviewing some procedural matters with him, and also
6 we're trying to -- he's trying to help me learn technology
7 as well, even though we're into the COVID process. And
8 having conducted numerous remote proceedings, I still find
9 myself challenged.

10 Mr. Grose, was your client -- is -- going to be here,
11 or is he here under another name?

12 MR. GROSE: He is supposed to be here. I assume he's
13 here under somebody's name from S.C.D.C. I don't know who
14 that would be.

15 THE COURT: Okay. Give us the names of the people
16 that were here.

17 MS. JAMESON: Your Honor, I just have gotten an email
18 from S.C.D.C. They're still waiting to be let into the
19 courtroom.

20 THE COURT: Is it under her name -- Bracy?

21 MS. JAMESON: Lieutenant Bracy is the -- the contact
22 from Broad River who has been emailing me.

23 THE COURT: We have a Patricia Hill and Michael
24 Devack -- Patricia Hill.

25 MS. JAMESON: The contacts I were -- was given were a

1 Brown Austin, Beverly Entwanas. I can -- I can respond to
2 this email and ask what name she's using, Your Honor.

3 THE COURT: Okay. Yeah. If you would, do that,
4 because Mr. Spade definitely has a right to be here.

5 Yeah. We've got a Jennifer Baker, Michael Mizack and
6 a Patricia Hail. Christine Trumptower is also with us.

7 MR. GROSE: I know some of those people are Mr.
8 Spade's family and friends.

9 THE COURT: Okay.

10 MR. GROSE: Who were -- wanted to be able to view the
11 hearing this morning, Your Honor.

12 THE COURT: Okay.

13 MS. JAMESON: I have not heard back from the
14 Department of Corrections yet, Your Honor. I will let you
15 know as soon as I do.

16 None of the names listed as panelists or attendees are
17 copied on the email I have. So, hopefully, we'll hear back
18 soon.

19 THE COURT: Okay. And so Ms. Jameson is making the
20 arrangements with the Department of Corrections.

21 You wouldn't know anybody's name, Mr. Grose, or
22 anybody?

23 MR. GROSE: I -- I wouldn't know any more than -- than
24 what she's told you, if even that much, and I do appreciate
25 her coordinating that for us.

1 THE COURT: Oh, certainly, absolutely, yeah. Another
2 one of those challenges that presents itself with remote
3 hearings.

4 (Pause.)

5 THE COURT: I will be right back while we look for the
6 D.O.C. Be right back.

7 (Pause.)

8 THE COURT: Give us one second. Let's be sure
9 Mr. Spade can hook up and hear us.

10 Mr. Spade, are you able to hear us, or at least hear
11 me okay? I don't guess so. Mr. Spade, are you able -- Mr.
12 Spade, are you able to hear -- hear me okay?

13 THE APPLICANT: Yes. Now I am.

14 THE COURT: All right. There you go. Well, thank
15 you, Mr. Spade.

16 Mr. Spade, good seeing you again. Sorry that this
17 time it cannot be where we're together in person or face to
18 face, but during the time of COVID this is the way court
19 administration is allowing us to take care of some court
20 matters.

21 Now, Mr. Spade, this is a hearing that is under South
22 Carolina Civil Procedure 59(e). So this is a hearing where
23 new evidence, testimony, affidavits, those types of things
24 are not presented. So this is an opportunity for you to
25 sit and listen.

1 Mr. -- Mr. Grose -- he is the filing party. He has
2 the burden of [webex dropped] today, so he will argue
3 first. Ms. Jameson then will follow his argument, and will
4 argue in full. Then Mr. Grose then gets to close the
5 arguments.

6 If you would, Mr. Spade, just sit and listen. I'm
7 going to ask the officer to bring you if your technology
8 savvy to give yourself in just a moment because there's
9 really -- if you need to speak with Mr. Grose, don't do it
10 in front of everybody. Reach out to him and talk to him in
11 private. Anything that's said during this hearing between
12 you and Mr. Grose can be heard by everyone and afforded
13 those conversations with the people.

14 So can you still hear us, Mr. Spade?

15 THE APPLICANT: Yes, sir, yes, sir. I -- I was trying
16 to get the seat fixed. It kept going way back. So I was
17 trying to get the seat fixed.

18 THE COURT: Okay. All right. Okay. Mr. Spade, if
19 you would, I'm going to ask if you would -- can you -- can
20 you or the officer -- there you go -- mute your computer.

21 Okay. At this time, again, we will now proceed.

22 This is the matter of Daniel Spade vs. the State of
23 South Carolina. I've got it's case No. 2017-CP-42-02372.

24 We're here on a South Carolina Rules of Civil
25 Procedure 59(e) motion that was filed on behalf of

1 Mr. Spade.

2 I have received the -- the -- the motion, Mr. Grose's
3 information, Ms. Jameson's information.

4 I did receive the reply. I have not reviewed the
5 rely, but I will be sure and do that as well, Mr. Grose.

6 But at this time, Mr. Grose, I'll be more than happy
7 to hear from you.

8 MR. GROSE: Thank you, Your Honor. May it please the
9 Court.

10 As you stated, during the time of COVID we're having
11 to do a lot of things differently, and in some respects
12 it's more difficult. But the silver -- silver lining in
13 this situation is -- is that Mr. Spade has a number of
14 family and friends who are supporters that are out of
15 state. And because we're able to do it this way today,
16 they've been able to -- to join us.

17 And as I said earlier before we went on the record, I
18 appreciate the Court and Ms. Jameson working to arrange for
19 Mr. Spade to be able to appear today from the department
20 and be able to go forward.

21 The -- the -- I may go into a little bit of a
22 different order but the -- the memorandum that I sent this
23 morning is -- is the template for what I want to say today
24 unless the discussion goes in a different direction.

25 At the beginning I want to [webex dropped] the -- the

1 Court of two legal principles, and I -- I begin with a
2 quote from the Strickland case that distinguishes strategic
3 choices made after a thorough investigation of both the law
4 and the facts, strategic choices that are made after a less
5 than complete investigation.

6 When the strategic choices are made after a complete
7 and thorough investigation they're much more difficult to
8 challenge.

9 But in cases like Mr. Spade's where the investigation
10 was limited, the limitations in the investigation are
11 reasonable only to the extent that the decision to
12 eliminate -- limit the investigation was reasonable. But I
13 think this is an issue that comes up in several of
14 Mr. Spade's P.C.R. claims.

15 The second legal principle has to do with assessing
16 prejudice under Strickland, under the Smalls case from our
17 Supreme Court, which is based on the Strickland case.

18 The Court has to assess the specific errors, the
19 specific impact that trial counsel's errors have on the
20 outcome of the case. And as part of the prejudice --
21 prejudice examination it is necessary for the Court to
22 consider the strength of the state's case.

23 Here the direct testimony of the child complaining
24 witnesses -- only six pages in the record -- the state did
25 not present any physical evidence as the Court noted in

1 Your Honor's Form 4 order.

2 There was a lot of sort of motive and background that
3 was introduced both in the trial and in the P.C.R.

4 And a recent case, Chappell vs. State, pointed out
5 that our courts have found improper bolstering testimony is
6 prejudicial in every South Carolina case in which the state
7 presented no physical evidence of the defendant's guilt or
8 relied solely on the victim's testimony to establish the
9 details of the crime. And I'm going to come back and talk
10 about that a little bit later on.

11 We do have a challenge to the procedure with regards
12 to the state drafting the final order. The Fishburne case,
13 I think we both have cited it. I would acknowledge that
14 Your Honor has given more guidance in drafting the order
15 than I see in a lot of cases with the -- the Form 4 order
16 that you filed.

17 However, you know Fishburne tells us it's supposed to
18 be a collaborative process, and from the perspective where
19 Mr. Spade and I sit it is not felt like a collaborative
20 process because some of the points that we've been trying
21 to make don't seem to -- to get incorporated to anything.

22 Significantly by allowing the attorney general's
23 office to draft the final order, the order this Court
24 signed is an order that has not properly considered the
25 reasonableness of the investigation or the limitation in

1 the investigation. This applies to prejudice analysis and
2 misstates the law that existed at the time of Mr. Spade's
3 trial.

4 And I think -- and this is on page four of our
5 memorandum. One of the issues that really I think
6 highlights some of the problems with the order,
7 particularly the misstatement of the law at the time of
8 Mr. Spade's trial, is the truth-seeking or the search for
9 the truth or the instruction to do justice or to seek
10 justice for all parties.

11 Significantly, this is not a case where this was just
12 a passing reference or it was an isolated instruction in
13 opening comments like what happened in the Michael Beatty
14 case.

15 Here the trial judge instructed the jurors to search
16 for the truth at least three times during the opening
17 remarks and then again during the -- the actual charge on
18 the law.

19 The prosecutors in opening statement referred to
20 search-for-the-truth at least two times, and the person who
21 used it the most times was trial counsel who -- who between
22 the opening statement and the closing counsel -- or in the
23 closing argument told the jurors to search for the truth at
24 least nine times, and depending upon how you characterize
25 the comments it might be more.

1 At the evidentiary hearing I questioned trial counsel
2 about State vs. Daniels, State vs. Alexie and State vs.
3 Meeds.

4 while the trial counsel was -- testified that he was
5 able to -- that he was familiar with those cases, he could
6 not recall any or when any of those cases were -- were --
7 were decided or whether any of those cases were before
8 Mr. Spade's trial. All three of those cases were before
9 Mr. Spade's trial.

10 He tried to pass off the failure to object as that
11 could potentially really tick off the judge. While none of
12 us want to tick off the judge, we've been in places before
13 where we have to take that risk because of the extremely
14 unforgiving error preservation rules in our state.

15 But regardless of whether he was trying -- willing to,
16 quote, unquote, tick off the judge, that does not exclude
17 or explain [webex dropped] can't brace term [webex dropped]
18 so much during his opening statement and closing argument
19 when it had been rejected by our Supreme Court,
20 particularly criticized in Alexie but expressly rejected in
21 the -- the Daniels case.

22 Trial counsel however did ultimately acknowledge that
23 the -- the jurors are tasked with deciding whether the
24 state has met its burden of proof or not and not to
25 determine what the truth is.

1 Under the first prong of Strickland the state argues
2 that this Court correctly relied on State vs. Beaty, which
3 was decided in 2018, and found that while comments and
4 instructions are improper now post Beaty, an objection to
5 such charge was not universally recognized at the time of
6 Mr. Spade's trial. And that's in their return at pages 19
7 and 20.

8 The -- the state does not even acknowledge the Daniels
9 holding and the order does not refer to Daniels. Daniels
10 was, as we said before was, decided before Mr. Spade's
11 trial in 2013 and it dealt with a -- a charge regarding
12 truth-seeking and doing justice for all parties. That was
13 in the closing or in the final instructions on the law.

14 And our court was -- was very clear in that case when
15 it said the trial judge erred in charging the jury their
16 verdict would represent the truth and justice for all
17 parties and instructed trial judges to [webex dropped].

18 A -- a criminal jury's duty is to return a verdict
19 that is just and fair to all parties.

20 And Daniels explained such a charge could effectively
21 alter the jury's perception of the burden of proof
22 substituting justice and fairness for the presumption of
23 innocence and the state's burden to prove the defendant
24 guilty beyond a reasonable doubt.

25 Moreover, to a layperson all -- all parties involved

1 in a criminal case may well extend -- extend beyond the
2 defendant and the state to include the victim, and these
3 inaccurate and misleading charges risk depriving the
4 defendant of his right to a fair trial.

5 And Daniels also had language in it about, you know,
6 the -- the verdict representing the truth for all parties.
7 And the charge that the judge gave in his very, you know,
8 initial instructions included language that said a search
9 for the truth and an effort to make sure that justice is
10 done between the parties before the Court.

11 Also, when the state argues that it's proper to look
12 to Beaty, and not before Beaty to Daniels, the state
13 overlooks a case Teamer vs. State, even though that was
14 decided in 2016. What Teamer was doing, it was the
15 opposite of what we have here.

16 The P.C.R. judge in Teamer had found error and had
17 based that decision on Daniels even though Daniels had not
18 been decided at the time of Mr. Teamer's trial.

19 And the Supreme Court in Teamer said, you know, the
20 trial counsel wasn't supposed to be or expected to be
21 clairvoyant and have predicted the decision in Daniels, but
22 it was very clear, I think, in Teamer that -- that the
23 Supreme Court looked at Daniels at -- as a point when it
24 should be clear to any reasonable trial counsel to object
25 to these kinds of instructions and that the Daniels case

1 placed trial counsel on notice.

2 And the -- you know, the extremely, I guess, terse
3 instruction about not including this type of language in
4 jury instructions any more certainly called the attention
5 of the bench and the bar to that this was what the current
6 state of the law was.

7 Regarding the prejudice prong of Strickland, the state
8 argues that this Court correctly determined that there was
9 no resulting prejudice based on the record as the jury was
10 properly instructed as to the state's burden of proof and
11 counsel vigorously -- vigorous argument advising the jury as
12 to the burden of proof. And, again, they're relying on
13 State vs. Beaty.

14 I don't think it's any secret that I was, you know, one
15 of the trial lawyers and the appellate lawyers in Beaty, and
16 probably because of the objection that we made at the
17 beginning of that trial we did not have things going on in
18 the closing arguments and in the final charge like what
19 occurred in this case.

20 I think it's very difficult to find that argument that
21 the state made is supported by the record because between
22 the prosecutor, trial counsel and the judge the jurors heard
23 over 14 or 15 times that their role was to search for the
24 truth, and that included some language to do justice between
25 the parties.

1 The excessive use of this burden-shifting language,
2 like I said, is distinguishable from cases where the error
3 was limited and deemed not to be prejudicial. I mentioned
4 the Beaty case.

5 There's also a case Battle vs. State which found that
6 it was -- that there was no error because that instruction
7 or that language was used just once.

8 Under, even before the Beaty case, in the Alexie case
9 the Supreme Court had indicated that, you know, error could
10 be found when the search-for-the-truth language is charged
11 in conjunction with either credibility of the witnesses or
12 beyond the instruction with the credibility of the
13 witnesses. But it also goes to the reasonable doubt or the
14 circumstantial-evidence charge. And they repeated that in
15 Beaty.

16 In the final instruction the jurors were instructed,
17 "You 12 jurors alone will decide what effect, value and
18 weight to be given to any particular testimony or other
19 evidence received. Quite simply, your ultimate goal is to
20 find the truth in this case, and by doing so you will have
21 fulfilled your obligation as jurors in giving both the state
22 and the defendant a fair and impartial trial based on the
23 evidence presented and the applicable law."

24 The judge also instructed the jurors that they had to
25 find a real possibility that Mr. Spade was not guilty. And

1 while our Supreme Court has approved that instruction under
2 certain circumstances, there is a danger in using that,
3 particularly when it's linked with the search for the truth,
4 and that's what happened in this case when trial counsel
5 said or used the real-possibility language and linked that
6 statement to a search for the truth, the search for what
7 happened to lead us to this moment in time.

8 And the last thing that trial counsel argued was the
9 real-possibility language and the search-for-the-truth
10 language.

11 And this is not just an error in what the Court
12 charged, but this is also an error in how trial counsel
13 presented the -- the case.

14 And the danger is -- is that implying the evidence must
15 show a real possibility of innocence to justify acquittal,
16 runs afoul of the principle that the defendant is presumed
17 innocent and has the effect of lowering the burden of proof.

18 So in this case not only was, you know, trial counsel
19 on notice. Trial counsel was also deficient in how they
20 presented the case to the jury.

21 I want to transition and talk about the reliability of
22 the Child Advocacy Center interviews and the reliability of
23 the child's testimony at trial.

24 The state's argument is -- well, just to back up, the
25 Court, when Your Honor viewed these videos and wrote your

1 Form 4 order, found that some of the questioning was
2 suggestive, and the -- the issue is -- is what impact does
3 that have potentially on the child's testimony.

4 And one of the arguments that we made and the evidence
5 presented at the hearing was, is that those expert witnesses
6 could have been used [webex dropped] on what's referred to
7 as [webex dropped]. Used the word taints specifically in --
8 in the trial.

9 As pointed out in the memorandum, taint is the [webex
10 dropped] or the distortion of real memories caused by
11 interview techniques of law enforcement, social service
12 personnel or other interested adults if so -- that are so
13 unduly suggestive and coercive as to impact the memory of
14 the child remembering the child -- rendering the child's
15 testimony or ability to testify incompetent.

16 And our Supreme Court -- not our Supreme Court. Our
17 Court of Appeals, you know, sort of looked at this idea of
18 having a taint hearing and what procedures that would have
19 to be followed in the State vs. Adams case. And even though
20 that was decided in 2020, they were looking at the -- the
21 framework involving some of this science that we presented
22 at the hearing that had been around, you know, well in
23 advance of Mr. Spade's trial.

24 And in a, you know, pretty, you know, well-reasoned
25 opinion written by Judge Hill, indicated that the concerns

1 raised with regards to a taint hearing can be established or
2 handled in the framework of the Section 17-23-175 hearing.
3 And that not only goes to the admissibility of the
4 recordings but also, as Judge Hill pointed out, in viewing
5 the child's testimony.

6 And those factors include whether the statement was
7 elicited by leading questions, the training of the
8 interviewer or the -- the judge to make a determination,
9 whether the statement represents a detailed account of the
10 alleged offense and whether the statement has internal
11 coherence and the sworn testimony of any other witness that
12 is determined to be necessary by the Court.

13 And so the situation that we are here now, the trial
14 court did not conduct that analysis regarding whether or not
15 this child's testimony was tainted because trial counsel
16 didn't ask them to do that.

17 And the order as it stands now has not analyzed it
18 under those factors, and I suggest that we probably should
19 do that given Judge Hill's opinion that that's how our
20 courts would look at it under the statute that existed at
21 the time of Mr. Spade's -- Mr. Spade's trial.

22 THE COURT: Isn't that -- wouldn't that be a new issue
23 you've raised?

24 MR. GROSE: I -- I don't think it is a new issue that
25 we raised. The -- the issue in the -- the P.C.R.

1 application has to do with the failure to challenge the
2 admissibility of the child to testify at all.

3 THE COURT: Well, yeah. But -- but you've never asked
4 me before to do a -- a taint analysis.

5 You asked to do -- you asked me -- and -- and,
6 Mr. Grose, as I think the record clearly establishes, I
7 have painstakingly but with -- with performing my duty
8 as -- as the judge of the P.C.R. case listened and
9 relistened and listened and relistened and listened and
10 relistened to these videos before I did the analysis that's
11 contained in the Form 4.

12 MR. GROSE: Well, and we may not have specifically
13 used the word taint, and you could take that word out of
14 our argument today.

15 I have asked you to consider whether the child's
16 testimony was admissible based on the implementation of
17 false memories, the distortion of real memories caused by
18 interview techniques of law enforcement, social service
19 personnel or other interested adults that was so unduly
20 suggestive and coercive as to infect the memory of the
21 child rendering the child incompetent to testify. That's
22 what --

23 THE COURT: And you asked your expert witnesses that
24 question. I mean, I remember you asked your expert
25 witnesses questions. But did you ask your expert witnesses

1 that exact question?

2 MR. GROSE: I -- I believe that we -- I believe that
3 we did. I may not have exact asked it in that one
4 particular term but the -- but -- but everything --
5 everything that the experts testified to had to do with the
6 danger of the techniques that were used in improperly
7 influencing the child and -- and --

8 THE COURT: And I think my Form 4 clearly indicates I
9 went your way on those things.

10 MR. GROSE: I --

11 THE COURT: I think Form 4 clearly indicates that on
12 those particular issues when it came to the value, the
13 weight and the importance of the expert testimony presented
14 at the P.C.R. hearing, I took your position.

15 MR. GROSE: I -- I -- I agree, and I think that the --
16 also when we questioned trial counsel we talked about the
17 value, that there was three values that the experts could
18 have added to the case.

19 One value was as part of the investigation to consult
20 trial counsel and help them determine what the issues were.

21 The second one was to be used in a suppression hearing
22 regarding the child's testimony.

23 And the third was -- was to actually testify and
24 present that testimony to -- to the jury. And so I think
25 that was squarely presented in the P.C.R. hearing.

1 THE COURT: I'm sorry if I got you off your argument.

2 MR. GROSE: No. You -- you didn't. Part of this is
3 going a little bit, because I'm going a little bit out of
4 order.

5 The -- the next thing I wanted to talk about was --
6 and I guess this is a good segue in our -- regarding
7 whether or not the trial counsel was ineffective for
8 failing to call the expert witnesses that Your Honor
9 brought up. And, as you said, you -- you did go our way in
10 the Form 4 order with regards to the impact of -- or the
11 effect of the testimony of those experts.

12 And when I began and -- and pointed Your Honor back to
13 Strickland, one of the quotes out of that was, is that
14 strategic choices made after a less than complete
15 investigation are reasonable precisely to the extent that
16 reasonable -- reasonable professional judgment support the
17 limitations on the investigation.

18 And our Supreme Court has followed that in the White
19 case talking about decisions that are made in ignorance of
20 relevant, available information cannot be characterized as
21 strategic.

22 In the Florida vs. Nixon case in 2004 our -- the
23 United States Supreme Court observed that an attorney
24 undoubtedly has a duty to consult with the client regarding
25 important decisions, including questions of overreaching

1 defense strategy.

2 And so when you take this legal framework into account
3 it becomes significant that trial counsel did not consult a
4 single expert in this case. And as I mentioned a minute
5 ago, there's three values for that -- to educate trial
6 counsel, to present during a suppression hearing and to
7 present the testimony to the -- to the trial.

8 The trial counsel testified that he had done a lot of
9 internet research, but he did acknowledge on more than one
10 occasion that he never talked to any expert. And he did
11 this and failed to consult with any experts despite the
12 fact that Mr. Spade repeatedly requested him to do so.

13 And -- and that's in the P.C.R. record in pages 374 to
14 85 and Exhibits 20 to 25, 27 and 28 that we introduced at
15 trial.

16 And it's particularly important in this case, as we've
17 talk about some of our prior pleadings, that trial counsel
18 had the benefit of the family court hearing before. And
19 Mr. Spade I think specifically told trial counsel you went
20 into that family court hearing by carrying a knife to a
21 gunfight and implored on him to get the experts to counter
22 what the experts from the state were saying.

23 And, specifically, trial counsel couldn't recall in
24 his, quote, unquote, internet searches whether he ever
25 discovered Dr. Brough or Dr. Lamb. And I think you'll

1 probably recall the attorney general, one of the attorney
2 generals, questioning Dr. Lamb saying, you know, I think
3 that you either wrote or peer reviewed every significant
4 article on, you know, the topic of interviewing children.

5 So the reasonableness of the investigation has to be
6 taken into account to determine whether or not, you know,
7 the thoroughness has to take into account whether or not it
8 was reasonable to limit it. And we argue under the
9 circumstances of this case it was not and trial counsel did
10 not inform himself to the extent that was necessary.

11 His basic position, quite frankly, was a cop out that
12 he wanted to have the final argument. I don't know how you
13 can know that you want to have the final argument and
14 forego calling experts without even finding out what the
15 experts would -- would be able to say.

16 And, in fact, I asked him what was so powerful about
17 his closing argument that justified him not doing that
18 investigation and not calling those kinds of experts, and
19 he couldn't give an answer.

20 I think the state switching to other witnesses, I
21 think the state concedes that the order needs to be amended
22 to add something about the failure to call the guardian ad
23 litem, Ms. Alexandria Wolf.

24 The next issue which is, I think, huge in this case,
25 which I think also the way it's presented in the order

1 misrepresents the state of the law at the time of Mr.
2 Spade's trial, and that has to do with the improper
3 bolstering.

4 From the opening statement on the state said that
5 their experts were going to lead the jurors to the truth in
6 the search for the truth. And, you know, as I pointed out
7 earlier, the child's testimony on direct was only, you
8 know, six pages in the record. And the -- the state
9 called, you know, three expert witnesses.

10 I think as the order stands now the Court acknowledges
11 that it was unnecessary to review Tabitha Weber's expert
12 credentials. The state contends that those were routine
13 questioning about Ms. Weber's background. And there's --
14 there's four reasons why this court should reject that
15 argument.

16 First, since neither party introduced the video tapes
17 from the Child Advocacy Center interviews there really was
18 no reason for Ms. Weber to testify at all because the
19 primary purpose of calling a witness like her is to
20 authenticate the video tapes of the interviews pursuant to
21 Section 17-23-125.

22 Second, State vs. Douglas, which was decided in 2009,
23 five years before Mr. Spade's trial, placed trial counsel
24 on notice that it was unnecessary to qualify a Child
25 Advocacy Center interviewer as an expert witness and made

1 clear that the forensic interviewer may not be permitted to
2 give testimony that improperly bolsters the credibility of
3 the victim.

4 In Briggs vs. State, which was decided in 2017, is the
5 significant case in giving this court guidance on how to
6 determine what the state of the law was at the time of a
7 particular trial.

8 And in this case there was actually more available to
9 trial counsel than there was in the Briggs decision because
10 Douglas, Cromer, Jennings, State vs. Smith and State vs.
11 Dawkins, State vs. McCurley were all cases that were
12 decided prior to Mr. Spade's trial, and based on those
13 cases, to quote Briggs, reasonably competent trial counsel
14 should know to object when a forensic interviewer gives
15 testimony that indicates the witness believes the victim
16 does not -- does not serve any other valid purpose.

17 THE COURT: Were those cases you just referenced --
18 and this is just an educational question -- were those
19 P.C.R. cases or were those direct appeals, do you recall?

20 MR. GROSE: Okay. All of these were direct appeals
21 except for Briggs. Briggs vs. State was a P.C.R. case that
22 discussed how to apply. Specifically, it was talking about
23 Douglas, Dawkins and actually Smith vs. State --

24 THE COURT: Okay.

25 MR. GROSE: -- would be a P.C.R. case. In the brief,

1 but not exactly in this section, there is a reference to
2 another case -- Dempsey -- and I can't remember if that was
3 a P.C.R. case or a direct-appeal case. But I think with
4 this it's important that Mr. Spade's claim is not limited
5 to the fact that the prosecution unnecessarily qualified
6 Ms. Weber as an expert witness.

7 It also goes to her role, particularly in conjunction
8 with the other testimony, in providing bolstering
9 testimony.

10 Remember, her training included the fact that she had
11 extensive training in child development, child abuse [webex
12 dropped], developmental delay, pediatric psychotherapy and
13 play therapy. And she also testified that based on the
14 interviews that she contacted law enforcement and directed
15 that the child begin therapy.

16 And so combined with her expert qualifications,
17 contacting law enforcement and recommending that the child
18 begin therapy, that I think expresses an opinion on the
19 fact that she believed that the child was telling the
20 truth.

21 And I think there's an important point to keep in
22 mind, which Your Honor made in the Form 4 order, and I
23 think was even troubled by the fact that the Child Advocacy
24 Center interview was initiated not by law enforcement but
25 rather by family members, so this was not an interview that

1 was presented in the contacts of -- in the context of an
2 investigation but was presented in the context of
3 determining whether or not the child had been abused and
4 had asked for therapy. And that kind of helps transition
5 into the link between Ms. Weber and Ms. Thompson-Loftis in
6 particular.

7 If the state argues we improperly labeled
8 Ms. Thompson-Loftis' testimony as improperly bolstering
9 when it was not -- and I think that this argument by the
10 state, which is incorporated into the order as it currently
11 stands -- ignores both the testimony that
12 Ms. Thompson-Loftis presented at trial and the law existing
13 at the time of Mr. Spade's trial.

14 I think it's important to look at what her testimony
15 was and how it was structured. Obviously, they began by
16 questioning her about her training, education and
17 experience and the nature of her practice. When discussing
18 nature of her practice she testified that that included
19 making diagnoses and that treatment and therapy follows the
20 diagnosis.

21 She testified being that the majority of my clients
22 are trauma victims or have been in the past, I have quite
23 an extensive amount of forensic and sexual abuse training,
24 posttraumatic stress training.

25 At that point the special prosecutor offered her as an

1 expert in child abuse diagnosis and treatment and therapy.

2 The jurors heard that [webex dropped].

3 Then there was -- was an off-the-record [webex

4 dropped] in child therapy.

5 So then you get into the testimony regarding the child

6 in this case, and the first question was, was when did you

7 meet the child. And she says May of 2007, I mean, 2011.

8 Do you have any idea why she appeared in your office? was

9 she referred there? She was.

10 Quote, "I used to work for the Children's Advocacy

11 Center in Spartanburg. So I also do a tremendous amount of

12 victims assistance, which means I treat people who qualify

13 for victims services. And since I took that Ms. Weber

14 referred the child to see if I could provide therapy for

15 her under the victims assistance, and I agreed, and the

16 child was brought to her first session in May of 2011."

17 Then the special prosecutor links that.

18 The question: "Okay. And the lady who just testified

19 before you, Tab Weber, is that the one who referred the

20 child to you? Correct?" She says yes.

21 And then they get into the fact that the child had

22 changed counselors from before the interview until after

23 the interview, and the question is is it typical for a

24 child after the Children's Advocacy Center interviews to

25 change therapists.

1 The answer, "I think once the determination has been
2 made or the recommendation has been made, I typically see
3 most forensic interviews result in therapy or further
4 therapy and I don't think it's unusual for someone to be
5 referred to different therapists based on the type of
6 treatment they provide or based on the types of insurance
7 panels they're on. There could be a number of reasons."

8 And then they review sort of the sequence from, you
9 know -- yes, sir.

10 THE COURT: All right. You may -- I want to stop you
11 because I remember that part of the testimony presented
12 to -- that I read at trial and -- and argument was
13 presented at P.C.R. as to the shift in the therapists.

14 You had one therapist prior to [webex dropped]
15 disclose -- to the interview with the forensic interview,
16 would then shift to a new therapist. And the new therapist
17 I [webex dropped] that she had a -- a business prior
18 relationship with the Advocacy Center. And she takes over
19 the treatment of the -- of the child.

20 And I also agree that you pointed out that my concern
21 was in the Form 4 that there -- that the original referral
22 was made not in what this Court views as the typical
23 fashion, which was through a law enforcement referral as
24 part of a criminal investigation, but seemed to be part of
25 a referral that was made by private lawyer that was

1 handling the domestic matter or somehow related to that
2 part of it.

3 So the fact that it's -- my question is the fact that
4 there was a shift in the therapist that was the treating
5 therapist, disclosure made, shift to a new therapist post
6 disclosure, I've not heard that there's any argument that
7 somehow that is nefarious, somehow that's improper or
8 should not have been done. Are you making that argument
9 that that should not have been done?

10 MR. GROSE: No, I'm not making that argument. The
11 argument that I'm making is, is how that was presented at
12 trial is the improper bolstering, because what you -- what
13 you have is you have the child going to the interview with
14 Ms. Weber.

15 Everybody agrees under Douglas it was unnecessary to
16 qualify her as an expert or to review those qualifications.
17 And it gets into talking about her with trauma, and she's
18 the one that recommends that this child go to
19 Ms. Thompson-Loftis.

20 And, again, nothing nefarious in that, but that could
21 have been and should have been handled at trial without
22 saying, or directly or indirectly, that Ms. Weber
23 determined that the child was a victim of trauma,
24 specifically child sexual abuse, that she wanted the child
25 to be referred to somebody who treats trauma, specifically

1 child sexual abuse, as a part of victims assistance or
2 victims services, that Ms. Thompson Loftis testified about
3 the fact that she is familiar with trauma, has a
4 relationship to the Child Advocacy Center, takes cases
5 under victims services.

6 This testimony essentially labeled this child as a
7 victim of trauma, specifically child sexual abuse. And
8 when Ms. Thompson-Loftis testifies that all of her cases or
9 the majority of practice deals with trauma and that most
10 forensic interviews result in cases going to therapy,
11 that's a lot like the Emsie case which was a direct appeal
12 case that was from 2000 which says that implying that the
13 majority of the children are telling the truth is a, you
14 know a, bolstering or vouching problem.

15 And -- and it also gets a little bit deeper into the
16 bolstering because Ms. Thompson-Loftis talked about the
17 symptoms and talked about seeing improvement in the
18 symptoms that the child was having over time, talked about
19 the number of therapy sessions. She was allowed to testify
20 about 71. It actually had been more at that point, but the
21 judge had limited it. And testified that the child was
22 still a client of hers, and testified and labeled the child
23 as, quote, a remarkable child.

24 And so there's really no other conclusions that can be
25 drawn other than the fact that Ms. Weber believed this

1 child was a victim of child sexual abuse, that Ms. Weber
2 would not have referred the child to Ms. Thompson-Loftis
3 under victims assistance if Ms. Weber did not believe the
4 child was a victim of sexual abuse, that Ms. Thompson
5 believed the child was a victim of sexual abuse, that
6 Ms. Thompson would not have treated the child under the
7 victims assistance program during 71 therapy sessions if
8 she did not believe the child was a victim of sexual abuse,
9 and that the child was still a patient of
10 Ms. Thompson-Loftis. She would not still be a patient
11 under the victims assistance if Ms. Loftis didn't believe
12 that the child was actually a victim and had been sexually
13 abused.

14 And the state tries to make an argument -- and this
15 gets back to the state of the law at the time of the
16 trial -- the state argues that we're asserting that
17 Ms. Thompson-Loftis was bolstering when she testified and
18 treated the victim, specifically, without actually
19 testifying as to why she was treating the victim and that
20 that extends far beyond Cromer and other similar cases.

21 And we disagree with that and think that that
22 statement is misleading for two reasons.

23 First, Ms. Thompson-Loftis did testify, as we've just
24 gone through, about treating the child for trauma after
25 determine -- determination had been made that she qualified

1 for victims assistance.

2 Second, the state tries to label Cromer and some of
3 those cases as prohibiting such statements like, you know,
4 a compelling disclosure or I believed. But those cases
5 also limit the indirect testimony that -- or the statements
6 that indirectly convey that.

7 Cromer lists out a number of things that can be
8 considered. The Dawkins case that goes, you know, back to
9 probably the 80s that our Supreme Court relied on Briggs
10 focused on, you know, it's bolstering just to say that the
11 symptoms are genuine.

12 And in this case I think that, you know, her testimony
13 about the symptoms, treating the symptoms and the symptoms
14 improving is testimony that's bolstering that that crosses
15 the line.

16 And this may be unusual, but I would like to recommend
17 to Your Honor that you watch an oral argument that took
18 place last week in our Supreme Court. It's State vs.
19 Makins. It's appellate case No. 2020-000024. That
20 citation, as well as the link, is in the video that I sent
21 to you.

22 And I realize that there's some differences between
23 Makins and Mr. Spade's case, and I'll touch on that in a
24 minute, but I think what is significant is is some of the
25 questioning by the justices.

1 And I -- in the memorandum that I sent this morning I
2 flagged, you know, some of those questionings or some of
3 the questions at the time. That's on page 14. And,
4 specifically, Makins had to do with the state calling a
5 therapist and having that therapist testify in multiple
6 roles similar to what Ms. Loftis did, because she also
7 testified about some of the general characteristics of, you
8 know, child abuse.

9 But some of the questioning had to do with was, you
10 know, it really necessary to call this witness in Makins
11 and have that witness say that she treated the child as
12 opposed to she interviewed the child and be able to get
13 into the portions of her testimony that probably don't run
14 afoul of the rules on bolstering.

15 Specifically, at over 51 minutes into the argument --
16 and this was almost an hour argument -- Chief Justice
17 Beatty comments that there has been a clear pattern of the
18 prosecution in cases walking up to the line, walking along
19 the line and crossing the line when it comes to bolstering.

20 And he commented, and this is not the first time our
21 court has commented on this. It's in some of their written
22 opinions. Commented on the fact that the Court is getting
23 tired of having to handle cases and write opinions
24 instructing prosecutors not to do that.

25 And I think that this clear pattern that, you know,

1 Justice Beatty is talking about, you know, goes back to
2 some of the cases that were decided before Mr. Spade's
3 trial that we've already talked about today.

4 Dawkins, going back to the 80s, is probably outside of
5 that, but the Smith case, the Jennings case, you know, the
6 McKerley, the other cases that we've cited that were tried,
7 you know, in, you know, 2000 -- late 2000s and these
8 opinions coming out in 2009, 10, 12, you know, that era, I
9 think this is precisely that pattern that the chief justice
10 was talking about, and I think that the -- the danger of
11 the way that the state is arguing this about the state of
12 the law at the time of Mr. Spade's trial is concerning
13 because the Briggs case tells us how to look at that.

14 I have another case that was probably even tried a
15 little bit before Danny's case was tried where the state
16 was successful in convincing a judge to sign an order
17 saying that the state of the law hadn't evolved at the time
18 of that client's trial.

19 Then in there when we go up on appeal and their return
20 to the cert petition, they concede error and say, yeah, it
21 clear was a violation of the law and pivot to arguing
22 prejudice.

23 So I think it puts courts in a difficult situation
24 when they ask you to accept their argument about the state
25 of the law at the time and that's contrary to the precedent

1 and it's contrary to, you know, I mean, what was really the
2 state of the law at the time.

3 Now, when you watch the Makins argument, if you decide
4 to do that, some of their questioning has to do with the
5 not so much whether the witness in that case made a direct
6 statement that could be used to infer that the child was
7 abused.

8 That's where Makins is different than Mr. Spade's
9 case. That's where Makins kinda goes into a new area,
10 because, like we had just talked about, we have those
11 statements from Ms. Loftis about the victims services,
12 trauma therapy, all forensic interviews or most of them end
13 up in therapy, the improvement of the child, the child
14 being a remarkable child.

15 So I think that we -- we do have, you know, that here.
16 And -- and I think that the state of the law at the time
17 of -- of Mr. Spade's trial called for, you know, trial
18 counsel to object and either exclude or substantially limit
19 a lot of this testimony.

20 There was no hearing under cases like Watson vs. Ford
21 Motor Company or State vs. White for the trial judge to
22 have a hearing in-camera to determine what the testimony
23 would be and which parts were reliable and which parts
24 weren't reliable because they got into the problems of, you
25 know, cases like Cromer and Jennings and Smith and Dawkins.

1 And that's particularly troubled in given the fact that at
2 the time of Mr. Spade's trial there was the American Sea
3 [sic] see case which the Court of Appeals had cited
4 testimony of an expert witness that was critical of Ms.
5 Thompson-Loftis' techniques.

6 The last thing that I want to talk about is the
7 state's closings argument. And, again, I think that Your
8 Honor has already made some findings that are pretty
9 significant for Mr. Spade with regard to that argument.

10 I think that argument was extremely inflammatory and
11 it was something that he built up to throughout the
12 argument by implying that Danny was a bad father, comparing
13 Danny's fathering skills to his own skills but then telling
14 that story about, you know, his daughter asking who
15 protects the good people and ending by telling the jurors
16 that they were good people and that they should protect the
17 child in this case.

18 I think it's undisputed, and Your Honor has already
19 noted that the special prosecutor testified that -- you
20 know, he did make that argument with the intent to try to
21 appeal to the emotion of the jurors. And I think this gets
22 back to a case wherein the prejudice analysis, you have to
23 look at a number of factors including the strength of the
24 evidence in the case as to whether or not it was
25 prejudicial.

1 And on page 16 and 17 of the memorandum that we
2 submitted this morning I asked the Court to consider some
3 tests for prejudice that have been used by other courts.

4 The first one on page 16 cites to United States vs.
5 Harrison, which is a Fourth Circuit case that's also
6 followed by West Virginia.

7 And then on page 17 I also cite to a Maryland case
8 that has some procedures for determining prejudice. It
9 appears that those were probably post-conviction cases
10 based on how they were styled.

11 But, you know, we have a situation in -- in -- in this
12 case where the case did come down entirely to determine
13 whether or not the child's statements were credible, the
14 child's statement at trial was credible or not.

15 And as the Chapel case that we talked about earlier
16 that's cited in this memorandum pointed out that, you know,
17 our appellate courts when dealing with these improper
18 bolstering issues have found prejudice every single time
19 when there's no evidence, physical evidence, and the case
20 comes down to the credibility of the child.

21 And I think that that's -- that's the situation that
22 we have here. And the experts in the way that they
23 testified, you know, is what the state used to convince the
24 jury to find Mr. Spade guilty. I mean, that's what they
25 said, you know, that they wanted in -- in their opening

1 argument. And I think that this closing argument was, you
2 know, particularly inflammatory, particularly given the
3 facts of this case.

4 And just because a special prosecutor said he ripped
5 that off from somebody else, that he ripped off that
6 argument from Solicitor Gowdy and that maybe it wasn't even
7 really about his child I think kind of goes to his intent
8 of -- of what he was trying to do. And of course Your
9 Honor has already noted that.

10 I -- I appreciate your -- your patience in letting me
11 work through all of that.

12 There are a few other things in the memorandum, and me
13 overlooking those is not intended to -- to waive anything.
14 But I did want to concentrate on what I thought were --
15 were some of the -- the really big points.

16 THE COURT: So you feel like -- so you -- you seem to
17 thank me for some of the things that I did in the Form 4
18 but really criticized me for the -- for having relied upon
19 the state proposing an -- an order for me as part of my
20 preparation to issue a final ruling in -- in this case. I
21 say that from a point of observation.

22 But it seems like that your -- still your -- your big
23 contention is that you want me to go back and you want me
24 to do a prejudice analysis, understanding that based upon
25 the appellate courts of this state where you have a C.S.C.

1 case where it is a no-physical-evidence involved and there
2 is simply the testimony of the victim that I'm then to look
3 at the prejudice analysis under Strickland to that length
4 and to -- and then to weigh the things that I have already
5 acknowledged as being deficient on the part of counsel and
6 determine -- go back and take another look at that
7 prejudice analysis that I have done or not done properly
8 as -- as you would submit to me. And you're saying that
9 I -- if I do it properly, then I would change the order, I
10 would change the final ruling and alter the prior order
11 that's been issued. Do I get that correct?

12 MR. GROSE: I -- I think that's correct, Your Honor.
13 You know, your -- your Form 4 order focused more on -- I
14 mean, it cited law, and I'm not trying to, you know,
15 minimize that or say that that didn't happen, but your Form
16 4 order seemed to focus mostly on your factual analysis,
17 and -- and I think that that factual analysis was -- was
18 very, you know, favorable to Mr. Spade.

19 And -- and when this case goes up on appeal, whether
20 we convince you to change your mind or not -- when this
21 case goes up on appeal your factual determinations are
22 going to be given great deference.

23 But the legal determinations, the legal analysis is
24 not going to be given any deference. They're going to
25 review -- the appellate court's going to review that de

1 novo, and I think that that's where, you know, we -- we
2 begin to have the problem, because that's the part that you
3 delegated, the part of the order that you delegated, to
4 the -- to the state.

5 And, you know, particularly dealing with the
6 bolstering issue and the closing-argument issue, what has
7 been -- now become the order does not correctly reflect
8 what the state of the law was at the time.

9 And I guess I do think you have to look at it in terms
10 of the criminal sexual conduct P.C.R. precedent, but I
11 think you also have to look at it as sort of the broader
12 Strickland analysis like the search for the truth and seek
13 justice and the inflammatory closing argument. I think
14 that that analysis would be, you know, what you would apply
15 in any kind of case.

16 THE COURT: well, and I -- and I appreciate the candor
17 on the fact that it'd go on appeal. I think this case, no
18 matter what I decide, is going to see appellate review, and
19 it's one of the reasons I took as long as I did in going
20 through this factual information of this case.

21 I mean, this -- factually, this is a significant case
22 from the standpoint, from the Court's standpoint, is that I
23 realize other eyes are going to look at the facts and
24 that -- and that a trial court's determination of facts, I
25 understand, is given great deference.

1 So I wanted to be sure that I did the best I could,
2 like it or not, pro for the state or pro for the defense.
3 The facts are the facts, are the facts as to how I found
4 them. So I wanted to be sure that I looked at them, and I
5 appreciate both your and the state's patience while I went
6 through all that.

7 I think that's one of the reasons I wanted to -- was
8 hopeful -- didn't expect it -- that we would get the D.S.S.
9 file. I mean, I was -- I think it's in the Form 4. I was
10 shocked when the D.S.S. file was -- was produced. And --
11 and having gone through that in great detail, reached out
12 to y'all. Y'all then went through it, provided me more
13 analysis. I mean, wanted to do the best I could with the
14 facts.

15 I think the state will probably -- and we're going to
16 take a bathroom break in between the arguments. I think
17 the state will probably argue that my analysis of the law
18 is not exactly the way you're arguing it to me and probably
19 attack me on the facts. So, you know, I see that I can't
20 please anybody these days.

21 But, Mr. Spade, again, anything you say today is not
22 protected by the attorney-client privilege. So I ask if
23 you need to speak with Mr. Grose, just reach out to him and
24 speak to him privately if -- if you would.

25 But at this time -- and anything else, Mr. Grose,

1 before we take a bathroom break?

2 MR. GROSE: No. I -- they usually have a phone at
3 S.C.D.C., and I can give them the cell phone number for him
4 to call me. He probably already has it, but I can give it
5 so they can have it.

6 THE COURT: Do you have a piece of paper or a pen,
7 Mr. Spade, so you can write down? Mr. Grose is going to
8 put his cell number on the record?

9 MR. GROSE: It's -- it's not very -- it's not very
10 private at this point anyway.

11 THE COURT: Okay. Yeah.

12 MR. GROSE: (864)992-3433.

13 THE COURT: Give a thumbs-up if you got it, Mr. Spade.

14 THE DEFENDANT: Can you hear me?

15 MR. GROSE: Yes.

16 THE DEFENDANT: Yes.

17 Your Honor, am I allowed to -- to make a -- one
18 statement?

19 THE COURT: No, sir, because your lawyer -- I -- I
20 mean, I appreciate the question, but the Supreme Court has
21 made it very clear that -- that we as trial courts are not
22 allowed to have bifurcated representation so that when you
23 have a lawyer things you wish to say needs to come from
24 that lawyer. So reach out to your lawyer and he can state
25 to the Court what needs to be said. Okay.

1 THE DEFENDANT: Okay. My -- my worry is I'm not going
2 to be able to get ahold of Charles because there's no
3 officer in here and --

4 THE COURT: Well, I'm going to take a -- you can
5 revisit that when we come back. We're going to take a
6 short restroom break, about ten minutes. We'll come right
7 back.

8 (Whereupon, a recess was taken.)

9 THE COURT: Let me ask the lawyers a question on
10 scheduling.

11 What I would -- hoping to do is to get Ms. Jameson's
12 argument in prior to lunch and then take a lunch break and
13 get Mr. Grose's reply.

14 It is ten minutes till 12:00, and so we could take a
15 lunch break now and then come back a little bit earlier and
16 get Ms. Jameson and then Mr. Grose's reply.

17 Do y'all have a preference?

18 MS. JAMESON: I don't believe I will be nearly as long
19 as Mr. Grose. I'm hopeful I won't.

20 So if -- if we could probably do mine and then see how
21 long it takes. If we are going to come back after lunch, I
22 just need to try to rearrange. I have a doctor's
23 appointment for my child this afternoon, so I will have to
24 try to rearrange that. But if you'll give me a moment, I
25 can do that, Your Honor.

1 THE COURT: Okay. All right. I mean, I think we
2 probably are going to have to come back.

3 Do -- will you plan on being gone the entire
4 afternoon? I guess you were, because who leaves and comes
5 back? I know, yeah.

6 MS. JAMESON: And, Your Honor, it is later in the
7 afternoon. I just don't know how long Mr. Grose's reply
8 will be. So just for scheduling I would imagine I'm going
9 take [webex dropped] long.

10 THE COURT: Okay. I tell you what. We'll go ahead
11 and take your -- take Ms. Jameson's arguments, and then if
12 Mr. Grose hears anything that he feels like he's going to
13 be extraordinarily long, maybe we could get his re -- and
14 it's going to interfere with your doctor's appointment,
15 maybe we could get his argument, the reply argument,
16 tomorrow or something.

17 But we will proceed on. I think Mr. Grose is a very
18 reasonable arguer -- arguer -- presenter. So, you know, he
19 can judge it by what you -- you give us. But at this time
20 we -- we will proceed with Ms. Jameson's argument.

21 Oh, Mr. Grose, I did get the reference in the brief to
22 the oral arguments, but I have -- I don't have a link. If
23 you sent it to me or my law clerk, we, neither one of us,
24 have a link to that. But I do have the reference in the
25 brief though to the link. So I didn't know whether that

1 would -- but we'll do is if you want to us to have that
2 link, send it to the attorney general and you can send it
3 to us later.

4 But, Ms. Jameson, be more than happy to hear from you.

5 MS. JAMESON: Thank you, Your Honor. May it please
6 the Court.

7 As initially as I was kind of referencing to Your
8 Honor, I want to rely heavily on the state's return to
9 their motion to reconsider, alter or amend.

10 The state spent a good deal of time, and it's pretty
11 thorough, as Your Honor can see, 33 pages really setting
12 forth why the state believes this Court's order is proper.

13 So as we painstakingly in our return went over those
14 issues, so I want to kinda hit on some of the highlights
15 that applicant went over this morning and will request that
16 Your Honor again review that return following this
17 argument.

18 It's -- some initial matters that I don't believe came
19 up in applicant's initial presentation, the D.S.S. records
20 need to be filed under seal. They were not.

21 In preparing my return for this I reached out to the
22 deputy clerk of court to see if they were filed under seal.
23 It wasn't clear on the public index. And when I spoke with
24 the deputy clerk of court she instructed -- she let me know
25 that they were not [webex dropped] file and then she

1 instructed that the best manner would be to reach out to
2 Your Honor and see Your Honor's preference for how to get
3 those files under seal.

4 So I know your footnote in the order referenced
5 needing to check on that. I did check on that, and they
6 were not filed under seal.

7 So we do need to have some sort of procedure in place
8 to make sure that's done. I think that would be the intent
9 of all parties and the Court to have that done.

10 THE COURT: Okay. What I would propose that is to let
11 me send out a notice to Rob Rhoden, the attorney for
12 D.S.S., and have him to produce the file under seal to the
13 clerk of court.

14 Is that suitable to both sides? Because he's the one
15 that's got the custody of the file and I -- and he's the
16 one who I put in charge of -- of redacting the -- the
17 necessary information that's considered confidential. So I
18 would trust Mr. Rhoden to present that to the clerk of
19 court.

20 Is that agreeable?

21 MR. GROSE: That's agreeable with us.

22 MS. JAMESON: That's agreeable with the state, Your
23 Honor.

24 THE COURT: All right. And I will -- and I will copy
25 y'all with anything that I send out.

1 Okay. Thank you very much for that.

2 MS. JAMESON: And the other initial matter is there is
3 a pretty obvious typographical scribner's error in the
4 prosecutorial misconduct section of the order, specifically
5 page 60 of the final order. And this is set forth in the
6 state's return in more detail. But the order improperly
7 references that counsel moved to continue rather than moved
8 to suppress. And so that -- that one word needs to be
9 changed in that portion of the order.

10 It logically doesn't make sense to have continued
11 there. It clearly should be suppressed, and so the state
12 is in agreement that that needs to be corrected from the
13 order.

14 Your Honor, I'll start with kinda the procedure
15 followed by the Court.

16 The process that this Court employed [webex dropped]
17 the process is [webex dropped]. There was incredibly a
18 thorough Form 4 that was issued by Your Honor with specific
19 rulings that were given yearly verbatim put into the
20 proposed order.

21 Then there was a meaningful opportunity for applicant
22 to give input, which he did very thoroughly. And that was
23 thoroughly reviewed and edited by Your Honor following your
24 review of all evidence, including the forensic interviews
25 and audio of the evidence you're hearing Your Honor

1 specifically mentioned reviewing both of those things in
2 the final order.

3 And so the order, the final order, in this case isn't
4 the state's proposed order. This is the Court's order and
5 the template or the proposed order submitted by the state
6 [webex dropped] closely to Form 4, and so the state's
7 position is that this is not, you know, merely the state's
8 proposed order that Your Honor signed off on but reflects
9 meaningful input from applicant and meaningful and
10 deliberate review from the Court.

11 I did want to note that there appears to be a problem
12 with the state drafting proposed orders, and there's really
13 no functional difference between a proposed order and
14 memorandum, which applicant prepared a thorough memorandum
15 [webex dropped] prepared several thorough memorandums, and
16 the state did as well.

17 So for all intents and purposes whether both sides
18 prepare proposed orders or thorough memorandums for the
19 Court to review is really much ado about nothing.

20 And, again, applicant did not have any objection to
21 preparing you a proposed order in this case like the order
22 regarding the D.S.S. records. So the -- the issue really
23 appears to be with the state drafting proposed orders.

24 I also did want to touch on the -- the narrative has
25 been that the state was misleading [webex dropped] wrong

1 and a lot of it was included in the memorandum and the
2 proposed order. And the state takes great offense of that.
3 I think there can be intelligent disagreement on the law
4 and the standards, the kind of trial, and that is different
5 from the state misleading or somehow improperly arguing law
6 to the Court.

7 I think that's what we have here. I think the
8 state -- the state believes that the order and the
9 memorandum properly cites the correct standard of law at
10 the time of trial.

11 And so calling, you know, it an intelligent-minded
12 dispute over the law, misleading or trying to infer that
13 the state did something improper is troubling. It's a
14 troubling narrative.

15 Applicant and his attorneys in interpretation of the
16 case law is simply different than the state's
17 interpretation of the case law [webex dropped]. The facts
18 of the case and the law at the time of trial, and that's
19 commonplace and often happens in an adversarial process.
20 And so I did want to note on the record that the state has
21 properly set forth law and has not been misleading and
22 trying to impugn that character of the state based on
23 intelligent disagreement over the law is troubling.

24 Turning to the -- and, again, the Fishburne process
25 was [webex dropped]. The state believes that the final

1 order that was issued reflects a collaborative process with
2 the Court and both parties having an opportunity for input
3 and does not believe that there was any sort of problem
4 with the procedure that was followed in this -- in this
5 action.

6 Turning to the reliability of the forensic interviews,
7 as Your Honor correctly noted in his Form 4 and subsequent
8 order, these forensic interviews are really tangential to
9 the one discrete and compelling incident that was testified
10 to by the minor child that led to the conviction.

11 So calling experts and presenting these interviews,
12 the state's position is that it would not have changed the
13 results of the trial, which is what Your Honor set forth in
14 the Form 4 and ultimately the final order of dismissal
15 issued by the Court.

16 And initially while respecting Your Honor's ruling
17 regarding the expert witnesses who testified, the state
18 does not concede that these interviews were suggestive or
19 improper and want to be clear on the record about that for
20 appellate purposes since applicant has repeatedly asserted
21 that if the state does not make an argument in a supplement
22 return or proposed order that we have abandoned that
23 argument. So the state is not in any way abandoning an
24 argument that these were proper forensic interviews that
25 took place.

1 when you review the testimony from the experts that
2 were presented to Your Honor by applicant at the P.C.R.
3 hearing -- Dr. Bruck and Dr. Lamb -- it's pretty clear that
4 they both have an approach to these interviews with --
5 clear by -- they wanted to establish that these interviews
6 are bad.

7 And I think Dr. Lamb's, as I was reviewing the
8 transcript last night, even admitted during his
9 cross-examination on page 295 of the transcript that -- "As
10 I sit here today I can't see a thing that the interviewer,
11 Tabatha Weber, did right, but it may be because I focus on
12 the value of these interviews and the potential risks
13 associated with that."

14 And that was what was clear if you look at the direct
15 and the cross-examination of these interviews that when
16 these two experts who the state agrees are very esteemed
17 and, you know, the pinnacle of forensic interview is
18 research.

19 When they were cross-examined regarding the things
20 that Ms. Weber had actually done correctly based on her own
21 testimony and research, the response was either an
22 inability to recall what happened in the interviews, aloof
23 hostility when hearing from Dr. Bruck or eventual
24 acquiescence that Ms. Weber had actually done things
25 correctly such as challenging any allegations regarding

1 moving, attempting to refocus the minor child, starting the
2 interview with a reminder of importance to tell the truth,
3 the timing of the interview.

4 Again and again on cross-examination these experts
5 were confronted with -- well, Ms. Weber actually did
6 these -- these things correctly, didn't she, and eventually
7 there was an acquiescence that she had done these things
8 correctly.

9 A review of these interviews showed that while the
10 victim does give unclear account of what happened, she also
11 has a very age inappropriate sexual knowledge and makes
12 several very, very inculpatory statements or disclosures
13 regarding applicant.

14 And so it's -- it's hard to imagine that these
15 interviews could have been played for the jury and somehow
16 made the case stronger for applicant or led to a different
17 result or led to acquittal even with the esteemed
18 credentials of applicant's expert in presenting them either
19 at motion-to-suppress hearing or before the jury.

20 So, respectfully, the state does want to note for the
21 record that we -- we do not believe these interviews were
22 suggestive or improper in any way, but there also is a
23 difference between something being suggested and something
24 being unreliable. And the state's return to the motion
25 sets forth that in great detail, but suggestiveness does

1 not end the inquiry. So merely because Your Honor has
2 found some of the techniques were suggestive, the state
3 would assert that does not show that the resulting
4 allegation that was testified to at trial was unreliable.
5 So the inquiry does not end with suggestiveness.

6 Again, it's not like that these interviews and experts
7 would have led to the child not being able to testify.
8 Again, suggestibility is different than unreliability, and
9 so it does not end with whether these interviews are
10 suggestive.

11 Again, the state does not assert that these interviews
12 are suggestive while, respectfully, understanding Your
13 Honor's ruling in regards to that.

14 And there is not a substantial likelihood that it
15 would have changed the results had these -- had these
16 experts testified or these interviews been played for the
17 jury.

18 Counsel also articulated a clear strong trial strategy
19 of keeping these interviews out and not presenting these
20 experts. He did not want the jury to hear a variety of
21 different allegations leveled against Mr. Spade by the
22 minor victim.

23 There's been an attempt to argue now that this
24 couldn't have been a valid trial strategy because counsel
25 failed to investigate or consult with any expert witnesses.

1 And there's been a comparison to very different cases such
2 as Weeks. The Weeks case is a very different situation
3 than what we have here.

4 In Weeks, which was a capital case, the trial attorney
5 not only failed to do any sort of investigation but he
6 failed to even read the report from the private
7 investigators that were hired to work on this capital case.

8 And that's not what we have here. Counsel testified
9 he'd been working with this file for years. He was very
10 well versed with the specific forensic interviewer that
11 gave the interviews in this case.

12 He'd also done some research. And so to kinda look at
13 me saying internet research, well, he did do research and
14 that's where a lot of research starts. He said he
15 specifically looked at coaching research and did not
16 believe it would be helpful or beneficial to this case.

17 To just to try to frame this as trial counsel spot on
18 his hands and failed to do any sort of investigation into
19 this case is -- is a mischaracterization of the record that
20 we have here.

21 And, again, this case is very dissimilar to Weeks and
22 some of the cases that applicant has cited in his various
23 memorandums or motions.

24 I would agree with the Court that the taint analysis
25 that came up for the first time this morning is a new issue

1 and it's also asking this Court to apply a new standard or
2 process from six years after applicant's trial.

3 And so that goes against the very, very purpose of
4 Strickland, which is reasonableness at the time of trial.
5 And so that's really the touchstone, is what was reasonable
6 at the time of trial. And applicant now asking this Court
7 to adopt a procedure based on a 2000 -- or a 2020 case
8 is -- is not reasonable.

9 Strickland is clear that you can't request -- you
10 can't impugn clairvoyant on trial counsel, and that's
11 basically what applicant is asking this Court to do by
12 asking for a taint analysis that is set forth in Adams.

13 Regarding the special prosecutor, again, that is
14 flushed out pretty thoroughly in this return, but Special
15 Prosecutor Brannon was a pro bono volunteer, so the statute
16 was not implicated and there was no violation of this
17 statute.

18 And applicant also has not shown there was any [webex
19 dropped] of interest or that anything involving Special
20 Prosecutor Brannon led to his conviction. And we rely on
21 the arguments as set forth in our return regarding Special
22 Prosecutor Brannon and his [webex dropped] role as a
23 special prosecutor.

24 Regarding the arguments on truth-seeking language and
25 justice, applicant has really tried to minimize the impact

1 of Beaty, and to argue that counsel should have been on
2 notice to object to these types of comments from the Court
3 in opening and closing and from the state and not adopting
4 these in his own arguments based on Beaty is counter
5 intuitive to the Beaty opinion itself.

6 Beaty is clear that in issuing a clear directive to
7 the bench and bar showing that prior to it the case law was
8 not as clear, there's even a reference in the Beaty opinion
9 talking about we understand that this was in the bench book
10 that is issued to the circuit courts almost vertical to
11 what Traxler happened to Beaty. And so to -- to try to
12 minimize Beaty and say that based on, you know, Daniel or
13 Alexie or any of those other cases counsel is on notice is
14 contrary to the expressed language in Beaty.

15 I did want to note that there was some argument this
16 morning that the state had overlooked Teamer and Daniel.
17 The state cited Teamer and Daniel in its memorandum of law
18 following the hearing on this case.

19 There's actually a note made in either that section of
20 the proposed order or in the motion to reconsider or to
21 amend that the state has not abandoned Daniel because he
22 did not include it in the proposed order of dismissal. So
23 I did want the Court to -- to reference those two arguments
24 as made in our memorandum and our return to the motion.

25 Teamer actually supports the state's position that

1 there was no clairvoyance in Beaty as really the deciding
2 case. I think Teamer, with all due respect, helped the
3 state and is a better argument for the state's case.

4 The Daniel case also distinguishes from this case
5 here. The argument is clear that it's clearly and fully
6 flushed out in the state's post-hearing memorandum.

7 But Daniel specifically dealt with the terms just, or
8 fair language, not truth-stating language, and so I know
9 the response from -- from applicant and Mr. Grose is a much
10 ado about nothing. They're almost the same thing. But I
11 do think it's important and that goes back to why Beaty was
12 such an important directive for the bench and bar to stop.
13 Daniel -- Daniel is distinguishable from this present case,
14 and so Beaty really is controlling in Your Honor's ruling
15 in regards to that, are proper.

16 Additionally, counsel -- in addition to counsel not
17 being deficient, there is also being prejudice because the
18 Court properly advised the jury regarding the burden of
19 proof, that it was totally on the state.

20 The extensive use of the truth-seeking language is not
21 the end of that inquiry. So applicant is citing, well, it
22 was mentioned many, many, many more times than it wasn't
23 the case, but that's not the standard. The standard isn't,
24 you know, a strike of how many times the truth language is
25 made. It was whether there was an impact on the trial, and

1 here the instructions as a whole properly advised the jury
2 of their role in that the burden of proof was totally on
3 the state and routinely told the jurors that their verdict
4 must be based on the evidence presented.

5 So there are also -- is no prejudice even if this
6 Court were to find that counsel was deficient pre-Beaty for
7 failing to object.

8 For failing to call witnesses, the expert witnesses, I
9 think, we've already touched on.

10 There was a reasonable trial strategy that counsel
11 employed. That's why he made a decision not to call expert
12 witnesses.

13 This is not a situation where he wasn't aware of
14 experts. [webex dropped] were introduced by applicant and
15 the record showing it. There was a conversation back and
16 forth between Mr. Spade and his family and counsel about
17 whether expert witnesses should be utilized. And here
18 counsel made a reasonable strategic decision not to
19 introduce any -- not to call any expert witnesses.

20 Other witnesses were included in the order. In the
21 motion to reconsider, alter or amend there was, like, an
22 objection that the guardian ad litem, Alexandria Wolf, was
23 not specifically referenced in that section. She is
24 referenced quite a bit in other portions of the order, and
25 so the state has no objection to [webex dropped] including

1 the guardian ad litem [webex dropped] section or analysis
2 but I don't think the key to the analysis, and she's
3 already covered pretty [webex dropped] Your Honor's order.
4 [webex dropped] failing to call witnesses, counsel
5 testified this risked opening the door to character
6 testimony. It was a strategic decision not to call any
7 additional character witnesses.

8 Regarding the panic attacks, which I don't believe we
9 discussed very much this morning, but I did want to
10 reference pretty quickly for Your Honor.

11 Counsel testified at the P.C.R. hearing that the
12 evidence showed that the victim's panic attacks got
13 significantly worse and were accompanied by regressive
14 behavior when she was [webex dropped] unsupervised at the
15 applicant and they got better when the visitation ceased.
16 I think that's all the evidence we have before us, is there
17 was this regressive behavior and this extreme anxiety
18 around the time of the unsupervised visits.

19 And so while email and other sort of evidence was
20 presented to show that she might have had a generalized
21 anxiety disorder, it's different than that severe behavior
22 that was shown around the sole unsupervised time with the
23 applicant.

24 And I think counsel even made a comment at the P.C.R.
25 hearing when testifying that, yeah, I was aware that she

1 might have had anxiety as a 1-year-old but I don't even
2 know how a 1-year-old can have anxiety.

3 So I think there's a difference between generalized
4 anxiety and the regressive extreme anxiety behavior that we
5 have around the time of these supervised visits and in the
6 vast improvements with the supervised adults, unsupervised
7 visits [webex dropped].

8 Regarding the improper bolstering testimony, this is
9 kind of a three-or-four-prong-multifaceted argument that's
10 being made, at least by applicant, and I'm going to first
11 address whether it was proper to place Tabatha Weber's
12 background on the record.

13 The state's position is these are routine questions
14 that you would ask any fact witness dealing directly with
15 her role of, you know, why is she going to testify, when
16 did she interview the minor victim and --

17 THE COURT: Would the state agree that under the case
18 law now that that would be improper questioning?

19 MS. JAMESON: Well, Your Honor, we don't have any case
20 law on point. I think it would have been improper to have
21 her introduced as an expert witness, tendered as an expert
22 witness, but she wasn't. And there's a big distinction
23 with that.

24 I know that applicant, you know, makes much of the
25 fact that her educational background is based on the

1 record, but there wasn't that instruction. There wasn't
2 that instruction in labeling given by the Court, this is an
3 expert witness and the additional schema that comes with
4 it.

5 So having her testify as to her educational background
6 and her -- that got to the point of interviewing the
7 victim, I don't think it's improper.

8 I think it would have been improper to tender her as
9 an expert witness, but that's not what we have here. I
10 think backgrounds, questions from a witness that are very
11 limited like this, applicant hasn't cited to any case law
12 explaining how that's improper.

13 It would have been improper have her deemed an expert
14 witness, but asking her what her education is and what her
15 role is, it's kind of necessary information the jury needs.

16 She could -- Tabatha couldn't have just been put on
17 the stand and said I interviewed this minor victim without
18 any sort of explanation for the jury of whether she was
19 qualified to do, what her educational background is. And
20 so I don't agree with the applicant that even now that
21 would be improper.

22 THE COURT: But what was Tabitha used -- Tabitha Weber
23 used in this case for?

24 MS. JAMESON: That a disclosure had been made and it
25 was limited to time and place. And the videos did not come

1 in. And so, you know, that is the argument of why did she
2 even testify. But it was limited to time and place, and
3 so.

4 THE COURT: And I ask this question with all sincerity
5 because I have these cases. I'm just trying to get a
6 grasp.

7 So if the applicant is correct that you shouldn't go
8 into the background -- and/or I'm sorry. If the State is
9 correct that it's okay to go into the background but
10 applicant's position that you don't go into the background
11 that they're going to call Tabitha Web -- Tabatha Webster
12 out of the clear blue and put her on the stand and say
13 where you from, I'm from Spartanburg, okay, and you know
14 [webex dropped], yes, I do, how do you, because she made a
15 disclosure at the time and place, and than just it?

16 MS. JAMESON: Well, Your Honor, the state's position
17 is you have to go into the background of how, and the
18 background was gone into if you look at Nennie, the
19 grandmother, Gail Smith, who testified she went into the
20 background how she knows the minor victim.

21 And so it wouldn't have made much sense if you put
22 grandma on the stand and grandma just didn't explain what
23 her relationship was and said, yes, there was a disclosure
24 in time and place. And so I think that's the different --
25 and there isn't any case law at the time of trial or even

1 now saying that that's improper and something that I --
2 counsel should have objected to.

3 And I think that's really important to go back to the
4 touchtone of reasonableness that really flows through
5 Strickland. It's whether counsel was on notice that he
6 needed to object to something like this.

7 And I still have not heard any cases saying that this
8 type of routine questioning is improper -- or excuse me --
9 background information, not in questioning from Tabitha, is
10 improper.

11 So I absolutely agree with Your Honor that she could
12 not have been introduced as a -- as an expert witness now
13 and she wasn't at trial. So I think there were background
14 questions.

15 THE COURT: And -- and the point of my questioning is
16 trying to understand if this is going to be an issue that
17 sets precedent for future, whether it be for me
18 individually or whether it be for other judges.

19 If -- if applicant is correct and this was an error on
20 the part of counsel not to object to this background
21 information that dealt with her education, where-she-worked
22 type thing, then we almost are riding the rule that you're
23 not -- that whenever you have these types of cases and the
24 videos, the forensic videos, are not presented into
25 evidence, then you're not probably -- you're probably

1 safest as the state, is to not call the forensic
2 interviewer at all, because otherwise you've just got some
3 Jane Doe off the street coming in and saying a disclosure
4 was made at the time and place back then.

5 A defense counsel cannot cross-examine her because
6 defense counsel would open the door as to all of the
7 background information about the testimony.

8 And so it just seemed like that if -- if applicant is
9 correct in their argument, we're ending these forensic
10 interviews -- interviewers from testifying in court if you
11 don't present the video.

12 MS. JAMESON: Which, Your Honor, sounds a lot like a
13 change in law which would require clairvoyant, which is not
14 a touchstone of reasonableness at the time of trial under
15 Strickland.

16 THE COURT: Okay.

17 MS. JAMESON: That's really -- that's the state's
18 position is --

19 THE COURT: Okay.

20 MS. JAMESON: -- there was -- there was no reason to
21 be on notice at the time of trial or even now. Again, the
22 state asserts that these questions are proper.

23 Turning to Meredith Thompson-Loftis, first, there has
24 been no showing that her methods are unreliable. Applicant
25 has cited to a Court of Appeals case which cites another

1 expert having concerns regarding her method. That is not a
2 finding that her methods are unreliable. There has been no
3 showing that her methods are unreliable. And the -- the
4 state asserts that Your Honor properly disposed of that
5 allegation.

6 Second, regarding whether the testimony she gave of
7 bolstering or vouching, the state argumently [sic] argues
8 that this is not a bolstering or vouching testimony and
9 certainly wasn't at the time of Mr. Spade's trial in 2014.

10 She does not give an opinion as to whether the victim
11 was abused. She doesn't even tell the jury why she was
12 treating a child, and so this cannot be similar to those
13 line of cases dealing with findings of a compelling
14 reporting of abuse or any indication that she believed the
15 child.

16 She testified regarding personal disclosure, delayed
17 disclosure, coaching, common victim symptoms and then
18 limited to time and place that a disclosure of sexual abuse
19 had been made within the confines of the whole. This is
20 proper and necessary testimony for the jury to hear and it
21 did not violate any case law at the time of trial or even
22 now.

23 And I understand Mr. Grose's arguments regarding
24 Makins. I also thought about Makins when preparing my
25 return to this case. I have watched the oral argument too.

1 Makins hadn't been decided, and it certainly shouldn't
2 impugn trial counsel's performance six or now seven years
3 ago.

4 Again, that -- that touchtone of reasonableness at the
5 time of trial controls in collateral review cases in the
6 United States, not just in South Carolina. And this
7 testimony also doesn't run afoul of Dawkins or Douglas or
8 any those sort of cases because she did not give the jury
9 an impression that the victim was to be believed or that
10 wasn't the only purpose of her testimony.

11 This case is very distinguishable from Briggs and
12 Chapel which were cited to by applicant and discussed this
13 morning.

14 In Briggs the forensic interviewer told the jury that
15 it was her job to determine whether the child -- child was
16 telling truth. And that is not what we have here because
17 no testimony from Meredith Thompson-Loftis that she
18 believed the child or that her role was to determine
19 whether the child was telling the truth. So this case is
20 readily distinguishable from Briggs.

21 It's also readily distinguishable from Chapel. In
22 Chapel the forensic interviewer directly commented on the
23 veracity of a class of persons to which the victim belonged
24 and said that -- I'm paraphrasing, Your Honor -- but minor
25 victims of sexual assault do not make this stuff up.

1 That's not what we have here. Again, we don't have
2 any testimony regarding the veracity [webex dropped] in
3 which she -- you know, why she was treating or seeing the
4 minor victim here.

5 And, again, this is a situation where applicant is
6 asking the Court to kind of read into what's not cited in
7 the record and take all sort of negative inferences to the
8 testimony, which is not proper.

9 We simply don't have any sort of testimony that she
10 believed the victim or that her role was to be pursuant to
11 the lie detector or truth seeker like we had in Briggs.
12 And so the state's position is at the time of trial and now
13 this is not improper bolstering testimony, this was proper
14 testimony.

15 THE COURT: Let me ask you a question.

16 Meredith Thompson-Loftis. Okay. Trial counsel made
17 an objection, trial judge allowed the testimony to go
18 forth. Made the objection to her testimony based on
19 non-production of records that I think I had ordered in
20 some prior court hearing.

21 So Judge Kelly, if I remember it correctly, limits the
22 testimony or limits the timeframe.

23 Okay. So what was the state's purpose if it was not
24 to do -- if it was not to present her in an effort to
25 accept the state's position -- it was not to present

1 bolstering or it was not to somehow make the jury view the
2 victim more believable? Then why would they have -- what
3 was the purpose of presenting Meredith Thompson-Loftis in
4 this case? What was the state's purpose?

5 MS. JAMESON: Twofold, Your Honor.

6 So, first, limited to time and place because she
7 testified there was a disclosure made to me in South
8 Carolina. That's it. So she did properly testify as to
9 time and place disclosure. So that was one of the purposes
10 of her testimony.

11 She also testified regarding personal disclosure,
12 delayed disclosure, coaching, which came up because, again,
13 the whole narrative in trial strategy of trial counsel was
14 that this was a disgruntled mother and soon to be adoptive
15 father who just wanted to rid themselves and their daughter
16 from the applicant, so coaching him up.

17 So she was needed to testify regarding personal and
18 delayed disclosure, coaching the victim. She also
19 testified regarding symptoms and her treatment of the
20 victim.

21 And we have testimony from the mother, Heather Smith
22 Jolly, and the grandmother regarding kind of anxiety and
23 nightmares and things like that, and so there was a need to
24 explain to the jury symptoms, delayed disclosure, that sort
25 of thing.

1 So it wasn't -- it wasn't what we see in Chapel or
2 Briggs where it -- I believe the victim [webex dropped]
3 victim sexual [webex dropped] made this stuff up. They
4 don't lie. This is starkly different than Briggs and
5 Chapel.

6 THE COURT: And I believe trial counsel if I remember
7 correctly made an objection. Now I've lost my train of
8 thought. But I understand [webex dropped] record
9 production was raised as Kelly ruled that he would allow it
10 to a -- a degree.

11 And there was something else that trial counsel had
12 done with in regards to Meredith Thompson-Loftis that now
13 just slips my mind. I'm sorry. I won't interrupt.

14 MS. JAMESON: Your Honor, it may be in regards to her
15 qualifications as an expert witness.

16 She was originally tendered as an expert in, you know,
17 treating child sexual abuse victims. There was an
18 objection.

19 They went off the record, and there was an in-camera
20 hearing and argument back and forth regarding her
21 qualifications.

22 And then they go back on and she's offered and
23 tendered and accepted as an expert in, I think, family and
24 child counseling. I don't have the cite in front of me,
25 but there was an objection to her qualifications as well,

1 Your Honor.

2 THE COURT: Okay. Thank you. All right.

3 MS. JAMESON: Regarding the venue issue, as Your Honor
4 stated in the Form 4 and ultimately Your Honor's order of
5 dismissal, it's clear from the evidence presented at the
6 child advocacy, post-conviction-relief hearing that the
7 crime occurred in Spartanburg County or didn't occur at
8 all. And so Your Honor's rulings regarding venue, the
9 state asks you to reaffirm them.

10 The closing argument of the state and the comments
11 made by Special Prosecutor Brannon, this Court has to
12 review the closing argument as a whole. And when you
13 review, the case law is clear. Arguments must be construed
14 as a whole and then compared to the record to determine if
15 there's any prejudice.

16 And when you review the record as a whole here it
17 properly reviewed the evidence, correctly stated the law
18 and asked the jury to convict based on the evidence.

19 And so Special Prosecutor Brannon comments at the
20 evidentiary hearing that it was intended to place the
21 jury's sympathies are not the end of the analysis. I think
22 that's where applicant wants Your Honor to stop and say,
23 well, there was an ulterior motive for these comments and
24 so requires reversal. That's not the end of the inquiry.

25 Your Honor must look at the entire closing argument as

1 a whole and the record as a whole. And here it's a proper
2 argument when you look at it as a whole and ask the jury to
3 properly consider it based on the evidence --

4 THE COURT: And I'll -- now, counsel at that P.C.R.
5 hearing admitted that he was trying to appeal to their
6 emotions because he said he -- if I remember his testimony
7 correctly, it was almost like he said he couldn't wait to
8 make that same argument that Trey Gowdy had made before.

9 So, I mean, it -- his motive came -- I don't think
10 it's speculative as to what his motive was because he said
11 so at the P.C.R. hearing.

12 Now, was that material or was it substantial, did it
13 make a difference, that's another argument. But I think
14 Mr. Brannon's motives were quite clear. He said so.

15 MS. JAMESON: Your Honor, I want to be absolutely
16 clear for the record.

17 I agree with you and we are not arguing any --
18 anything --

19 THE COURT: Okay.

20 MS. JAMESON: I don't want to in some way have that
21 impugn my credibility, but I -- that's what he testified
22 to.

23 The state's position is the inquiry doesn't end there.
24 You have to look at the entire closing argument as a whole,
25 and when you look at that he properly reviewed the evidence

1 with the jury. He correctly states the law and standard,
2 and he asks the jury to convict based on the evidence.

3 And so that's the state's position, is the inquiry
4 doesn't end just because we have that snip-it from Special
5 Prosecutor Brannon talking about his motives. You have to
6 look at the closing argument as a whole and then also
7 compare it to the record as a whole to determine whether
8 there's prejudice.

9 And then this was not -- not touched on this morning,
10 but in conclusion I did want to address the
11 cumulative-error argument that was made in the motion to
12 reconsider.

13 Cumulative error analysis has not been adopted in
14 South Carolina. It's an unsettled question of law. And
15 the McKnight case that is cited by applicant in his motion
16 to reconsider, alter or amend -- it kinda is cited for, I
17 guess, maybe an intelligent disagreement as to what
18 McKnight says, because McKnight does not adopt a
19 cumulative-error analysis.

20 In McKnight there are several deficiencies and the
21 Court finds that there is prejudice gleaned from several
22 deficiencies.

23 And so to assert that McKnight is somehow dispositive
24 or persuasive that this Court should adopt a
25 cumulative-error analysis, this Court when it strenuously

1 asks -- or excuse me -- the state would strenuously --
2 strenuously ask the Court to decline that invitation
3 provided. Simply put, not my reading of McKnight.
4 McKnight has not adopted cumulative-error analysis.

5 Regarding all other points, I would rely on the [webex
6 dropped] return to the motion that was filed and ask this
7 Court to fix the scribner's error, figure out what it needs
8 to do about the D.S.S. records, if that can be had, and
9 other than that reaffirm this Court's order, which is this
10 Court's order not a byproduct of the state.

11 THE COURT: All right. Okay. Mr. Grose, do you want
12 to proceed or do you need a break or --

13 MR. GROSE: I do not need a break. If the Court's
14 going to proceed, I don't think I will be very long.

15 THE COURT: Okay.

16 MR. GROSE: All right. With regard, just picking up
17 on the last thing that she said about cumulative error, we
18 may have a disagreement on the interpretation of the
19 McKnight case.

20 Certainly, there was multiple error in that case, and
21 they did find a new trial was warranted. But when you look
22 at cases like Strickland itself -- Kyles vs. Whitley from
23 the United States Supreme Court, Williams vs. Taylor from
24 the United States Supreme Court, which are cited in today's
25 pleadings and have been cited in earlier pleadings, the

1 U.S. Supreme Court's already told us that we have to look
2 at cumulative prejudice.

3 And so I -- I think it is part of our jurisprudence,
4 because we are, in fact, interpreting the Sixth Amendment
5 in applying the Strickland analysis.

6 THE COURT: well, any type of analysis that would go
7 into prejudice, when it comes to taking a look at the
8 record as a whole, does not the trial court have to lose
9 confidence in -- in the -- in the proceeding, in the trial
10 proceeding to say that the applicant did not -- that the
11 trial court lacked competence, that the applicant received
12 a -- a fair trial under a Sixth or Eighth Amendment
13 analysis?

14 MR. GROSE: Oh, and I think that's what happened here.

15 I mean, you had the truth-seeking; you had these
16 counselors are going to come in and tell you how to find
17 the truth; the counselors bolster it.

18 You had the closing arguments. You have trial
19 counsel, failure to challenge any of that or consult any
20 experts.

21 Yeah. I mean I -- I have no confidence that this was
22 a -- a fair trial. This was one of the worst trials of
23 misjoinder that I've seen, if not the worst, so.

24 THE COURT: well, I wasn't throwing you a soft ball.
25 I was trying to focus it on the cumulative-error analysis

1 in saying that it -- I mean the cumulative-error analysis
2 being substantial when it comes to terminology, but I -- I
3 think that it's still under a P.C.R. analysis. I've got to
4 take a look at the whole record.

5 MR. GROSE: Well, I think you always have to take a
6 look at the whole record.

7 THE COURT: Okay.

8 MR. GROSE: And I think that she said that, for
9 example, with the closing argument, that you have to look
10 at the -- the whole record and have to look at the whole
11 closing argument.

12 In those cases that I cite from other jurisdictions,
13 you may not follow that analysis, but they do tell you that
14 you have to look at the whole record.

15 And in this case this was a theme that Mr. Brannon
16 built up. I mean, it was a compelling closing argument. I
17 give him credit for that. But this theme about Danny being
18 a bad guy, the child being a good person, who takes care of
19 a good person was something that he built -- built up
20 throughout the entire argument.

21 And it culminated in that story. And -- and he did in
22 that story direct the jurors to do something different than
23 determine whether or not the government met the burden of
24 proof. He told those jurors you are good people, this
25 child is a good person, Ms. Thompson-Loftis said she was a

1 remarkable child, take care of her, Danny Spade is guilty.

2 So when you look at the entire argument it was
3 infected with prejudice, and then when you look at the
4 facts, look at the whole case like what we talked about in
5 the beginning that it turns on the credibility of the
6 child, yeah, that -- that argument we think requires, you
7 know, reversal.

8 Going back to the beginning with regards to the
9 procedure, I think there's a difference between preparing a
10 simple order that says this case is continued to another
11 term of court like the attorney general's office has done
12 versus-or even though ordered to produce these records,
13 which are pretty standard language, and the -- the final
14 order in a P.C.R. hearing, and I think we know that there's
15 a difference in that because the statute specifically
16 instructs judges to make the findings of fact and the
17 conclusions of law. And that differentiates it from other
18 orders that the courts are being asked to -- to draft.

19 THE COURT: Okay. With all due respect, Mr. Grose,
20 given the -- and I say this with all due respect because
21 the Court has a lot of respect for both of the attorneys
22 who are before me now, but I have worked my back side off
23 in this case, and I have reviewed every -- you know, I view
24 the order that has been produced as being my work product,
25 you know.

1 MR. GROSE: Okay.

2 THE COURT: You know, I have -- you know, it might not
3 be perfect because very -- because in my life I have done
4 very few things perfect, but I've done the best I can to
5 fulfill my constitutional requirements that I owe not only
6 to your client but also to the state.

7 So, you know, I have -- you know, yeah. It is what it
8 is when it comes to the mechanics of how I put it together,
9 but I think the record is replete that -- that this order
10 in this case is my work product. And I -- and it will be.
11 I mean, if I get reversed on it, I get reversed on it.
12 I'll live with it. But because, like I said, I am not a
13 perfect person.

14 MR. GROSE: And I don't mean to imply that you've not,
15 you know, worked very hard in this case, and that was --
16 that was not my intent. This is one of those areas where
17 if we have an objection, I think we have to -- to raise it,
18 so.

19 THE COURT: Okay. That's fine. And, like I said, and
20 I won't take it personal if I get reversed. You know, it's
21 happened before, regardless of what my decision is.

22 MR. GROSE: And -- and going back to the -- the
23 experts for a second and the question that you raised about
24 whether taint is something new and the argument that
25 Ms. Jameson made about that, I would refer Your Honor to

1 paragraph 11-A of the P.C.R. application, the final amended
2 application. That's going to be on page five.

3 Claim No. 20 under that is ineffective assistance of
4 counsel for failing to move to exclude the testimony of the
5 child complaining witness because her testimony was
6 tainted, unreliable and inadmissible because of the
7 improper techniques used to obtain the testimony.

8 Claim No. 22 on the same page under paragraph 11-A is
9 ineffective assistance of counsel for failing to present
10 expert testimony to confront the state's witnesses and
11 demonstrate to the jurors that the testimony of the child
12 complaining witness was tainted and unreliable because of
13 the improper techniques used to obtain the testimony.

14 And so I call your attention to that because this is
15 not a new issue or a new argument that we were making
16 today, and that goes to the fact that the experts could
17 have been used to educate trial counsel for a suppression
18 hearing and in front of the -- the jurors.

19 So with regard to the question that the Court asked
20 about whether or not it's improper to go through the expert
21 qualifications of the person who conducted the Child
22 Advocacy Center interviews, if you look at State vs.
23 Anderson, and it's cited in the pleadings, 413 South
24 Carolina 212, granted this was after Mr. Spade's case, but
25 it was applying the law before Mr. Spade's case.

1 It says the statute -- this is under Headnotes 5 and
2 6.

3 "First, the statute requires that the interviewer be
4 called to testify in camera." That's 17-23-175(A)(4). "At
5 the in-camera hearing the interviewer must testify to
6 establish the type of factor set forth in 17-23-175(B),
7 such as their training, background, whether she utilized
8 the Ray Tech or Child First protocol, as well as other
9 testimony that will assist the trial court in determining
10 whether the child's statements possesses particularized
11 guarantees of trustworthy and thus is admissible under
12 17-23-175. Assuming the Court determines that the
13 interview is admissible under the statute, the forensic
14 interviewer will be called before the jury. The sole
15 purpose of her jury testimony is to lay the foundation for
16 the introduction of the video, and the questioning must be
17 limited to that subject. There is to be no testimony to
18 such things as techniques of the -- of the instruction to
19 the interview subject of the importance of telling the
20 truth or the purpose of the interview is about law
21 enforcement to determine whether criminal investigation is
22 warranted. This type of testimony which establishes the
23 particular kinds of guarantees of trustworthy necessarily
24 conveys to the jury that the interview and law enforcement
25 believed the victim and that their beliefs led to the

1 defendant's arrest, those charges and this trial thus
2 impermissibly bolstering the minor's credibility. We hold
3 that none of the evidence necessary for the trial court's
4 determination of whether the statement possesses
5 particularized guarantees of trustworthiness and thus
6 admissible under statute is to be presented as the jury as
7 such evidence necessarily vouches for the credibility of
8 the alleged victim."

9 And that case went on to adopt the procedure of what
10 we now term as the blind expert from the Court of Appeals
11 case in State vs. Brown, and you have cases. That might
12 Chapel or it might be the Court of Appeals in Makins
13 talking about that all Brown did was apply preexisting law.
14 And all of this goes back to Dawkins and Douglas.

15 THE COURT: Did the blind-expert rule predate Spade's
16 trial before Judge Kelly?

17 MR. GROSE: The blind expert, that opinion did not
18 predate the trial before Judge Kelly, and we're not making
19 that as a claim.

20 What we are making as a claim was the swath of case
21 law prior to Mr. Spade's trial that dealt with bolstering
22 including the fact that there was no need to qualify the
23 interviewer as an expert.

24 There was also a statement made that Ms. Loftis didn't
25 tell the jury why she treated the child. She treated the

1 child for trauma; she treated the child for symptoms of
2 trauma; she treated the child for sexual abuse; she treated
3 the child for being a victim in this case. All of that is
4 directly stated on the record and all of that is not
5 allowed under the case law that was in existence at the
6 time of the trial.

7 THE COURT: Okay. Let me ask you a question. You
8 just refreshed my memory, so the question -- I forgot. But
9 I thought -- does not this record establish that trial
10 counsel tried to make part of his case the fact that the
11 child, if she was suffering trauma, that the trauma was due
12 or could have been as the result of something else? Didn't
13 Judge Kelly deny that?

14 MR. GROSE: Actually Judge -- Judge Kelly -- that had
15 to do with the -- the panic attacks and the testimony that
16 came in through the grandmother.

17 THE COURT: Right.

18 MR. GROSE: And Judge Kelly excluded that because, in
19 part because, trial counsel didn't have an expert that
20 could testify and attribute some other meaning to that.

21 THE COURT: But I think the fair reason, wasn't it
22 that the solicitor objected because he was saying it's
23 third-party guilt?

24 MR. GROSE: I -- I don't know that that would be
25 third-party guilt if he had a child that was having

1 symptoms of anxiety and has never been the victim of a
2 crime. That wouldn't be third-party guilt.

3 THE COURT: I mean, I thought the solicitor's argument
4 was that, Judge, it goes to third-party guilt because
5 Mr. Trial Counsel is trying to say that the -- that the
6 trauma that the child was suffering from could have been
7 resulted from the stepfather or some other interaction with
8 a male. I might not be remembering that correctly.

9 MR. GROSE: But that doesn't make the stepfather or
10 that other male guilty of anything necessarily. I don't --

11 THE COURT: I'm not saying that that -- that it did.
12 I'm just trying to remember what the reasons were because I
13 remember reading it. I'm not saying that's --

14 MR. GROSE: And he did try to -- to limit that, but he
15 didn't try to limit the testimony of Ms. Weber and -- and
16 Ms. Thompson-Loftis which is where the -- the vouching took
17 place.

18 I think -- I think under any -- any presentation of
19 this case the family members would have been allowed to
20 testify about what they observed in the child, but the
21 experts should haven't have been allowed to vouch for what
22 that meant.

23 And sort of the final thing to wrap up on is the -- is
24 the truth-seeking the -- in the search for justice. You
25 know, the -- the Daniels case does deal with both of those.

1 And, certainly, you know, the Supreme Court did make a
2 mistake and they did acknowledge their error in the -- the
3 Beaty opinion when they said that they told judges to take
4 that out of their charge book, but they didn't take it out
5 of the charge book but they gave it to judges. That still
6 left that charge as an objectionable charge.

7 And the -- and Beaty was much different in the sense
8 that and -- and I think that the -- the opinion talks about
9 it, that the language that we complained about in that
10 trial came up during the judge's opening remarks to the
11 jury.

12 There was one comment, you know passing comment, by
13 the prosecutor about, you know, the search for the truth,
14 but none of that language ended up in the judge's final
15 charge.

16 It's also important here that Beaty, notwithstanding
17 Daniels, notwithstanding Alexie, found that language to be
18 the type of language that runs the risk of lowering the
19 state's burden of proof and said that it didn't in that
20 case, because in that case it was a limited instruction and
21 it did not go with the instructions on circumstantial
22 evidence or on reasonable doubt.

23 Here you had both the trial counsel and the judge
24 using this language in closing argument and in the jury
25 instruction in connection with what the burden of proof

1 was.

2 So even if we didn't have Daniels and even if we
3 didn't have Beaty, we have a problem where trial counsel
4 was on notice not to do what he did and to object to what
5 the judge did and said based on the Alexie case and other
6 cases before it like Meeds, I mean, this is -- really is
7 not an entirely new body of law.

8 I think it's Cage vs. Louisiana -- it's been around
9 for decades from the United States Supreme Court -- any
10 instruction that lessens the burden of proof is
11 objectionable. So this is not a new concept by any stretch
12 of the imagination.

13 And I think that covers it, Judge.

14 THE COURT: But does -- but your -- but let me see if
15 I understand. Let me focus your position.

16 But doesn't your position, in my opinion doesn't your
17 position, turn on my acceptance of that first, this is a
18 case where there's no evidence of guilt other than the
19 testimony of the victim, i.e., no physical evidence, no
20 eyewitness testimony? And that -- and -- and therefore the
21 importance of the -- raises the importance of the testimony
22 of the child and that then the need for the jury to have a
23 pristine or have the jury have a constitutionally perfect
24 charge in these types of cases so that they do not
25 overly -- so that they do not give more weight than what

1 they should to the testimony of a -- of just the victim?

2 Do I have that? Probably not saying that well.

3 MR. GROSE: Well, I mean, we have multiple problems in
4 this case because we -- we have, you know, the closing
5 argument.

6 well, the burden of proof goes to more than just
7 the -- the child witness. The -- you know, the -- the way
8 that this case was presented, and it includes the expert
9 testimony and the jury instruction, I think when y'all take
10 that together it did elevate and give too much emphasis to
11 that six pages of -- of direct testimony.

12 And if you're looking at sort of the prejudice
13 analysis, I think you have to look at Smalls vs. State,
14 which is a recent case, but it explains what the correct
15 prejudice analysis is under Strickland, and that when
16 you're looking at the, you know the, strength of the
17 state's case, even if the state presents a lot of evidence,
18 which I don't think they did here, even if they present a
19 lot of evidence, in order to, you know, rule out prejudice
20 based on that it has to be something conclusive like D.N.A.
21 or a confession or something that rules out any possibility
22 that the person is -- is not guilty.

23 And when you look at Chapel that catalogs, you know,
24 the C.S.C. with a minor cases on this incident, this type
25 of issue with the -- with the bolstering in particular,

1 every single time that you had a case like Mr. Spade's
2 where the sole -- the main issue was to determine whether
3 or not the child was credible, and there may have been -- I
4 assume that there was time-and-place witnesses called in
5 those other cases that's in the -- I see it in every trial
6 transcript of this I review, just because you have other
7 family members or other witnesses that -- that testify to
8 something, if it's the child's credibility and there's no
9 physical evidence or no confession or something of that
10 level, every single time the appellate courts have found
11 prejudice. And I think that's what we have here.

12 THE COURT: Okay. Now, let me try again.

13 MR. GROSE: Okay.

14 THE COURT: All right. The record in this case in a
15 prejudice analysis under Strickland, I have viewed the
16 testimony of the child at trial pretty straightforward.
17 The testimony of the child, while even though it might be
18 six or eight pages, it was pretty compelling. That's the
19 way that I view it.

20 MR. GROSE: Okay.

21 THE COURT: Okay. In order for me to change my prior
22 ruling I -- I'm going to have to go back. I'm going to
23 have to take a look at these cases because that's what
24 I'm -- for lack of a better word, that's what I'm paid to
25 do. That's my job here, is to be sure that I have applied

1 the law correctly and that I understand what the law is.
2 But it seems that with any prejudice analysis, you know, I
3 cannot throw away what I -- what I've read in the testimony
4 of the child at trial. That's pretty compelling testimony.

5 MR. GROSE: Well, we're not asking you to throw that
6 away.

7 I mean, I think that, you know, that this whole line
8 of cases going back through from Dawkins up to that Chapel
9 most recently, and existed at the time of the trial, I
10 think that, you know, all of these cases had testimony from
11 a child that was abused, and that testimony was probably
12 compelling because you had witnesses in some of those cases
13 testifying that the child's statements were compelling.

14 The question is, is when you look at, you know, that
15 child's testimony was something else done in the case that
16 elevated that and in that, this case, that's what we have
17 with the bolstering from these experts.

18 And so if -- if you agree with us that this, the
19 testimony particularly of Mr. Weber and
20 Ms. Loftis-Thompson, bolstered the child's credibility,
21 then you're looking at Smalls, and you have to find
22 something so compelling like a confession or like D.N.A.
23 evidence or physical abuse in -- in order not to -- and you
24 have to find that in order to save this conviction to be
25 blunt about it.

1 I don't know if I'm making sense, but, you know, the
2 fact that you viewed the child's testimony in that manner
3 is not the end of the -- the prejudice inquiry under
4 Strickland. And I think, you know, we have a whole line of
5 cases, both direct appeals and P.C.R.s, that sorted out the
6 way I'm asking Your Honor to sort it out.

7 THE COURT: And I -- and I -- I appreciate your effort
8 of clarity. I think it -- it helps me.

9 I guess in my seeing the same vain of clarity with the
10 child's testimony being the way I read the testimony, I'm
11 not being -- and in all candor I'm not being that persuaded
12 that trial counsel made an egregious error sufficient
13 enough to say that Mr. Spade was denied his constitutional
14 rights because he did not call these experts.

15 And so with that being said, I'm just putting it out
16 there that I'm going to take a look. I'll take a look at
17 it all, but I'm going to really be taking a look at the
18 other approaches that you were presenting as part of this
19 P.C.R., that being where should he have objected that he
20 did not.

21 MR. GROSE: And if I could respond to that briefly.

22 THE COURT: Yeah, briefly, yeah.

23 MR. GROSE: I -- I don't want anything to be, that I
24 say to be, construed as waiving those expert issues.

25 THE COURT: I understand, and I will not take anything

1 Ms. Jameson said to waiving hers because she [webex
2 dropped].

3 MR. GROSE: Yes. But if you -- if you take the expert
4 issues out of this case there's still paths for us for this
5 court to grant a new trial.

6 And one in particular, path, is for this court to
7 grant a new trial based on the improper bolstering of
8 Ms. Weber and Ms. Thompson-Loftis. I think that path alone
9 gets us a new trial.

10 I mean, even if you didn't have the improper
11 burden-shifting and even if you had a closing argument that
12 complied with the law, I think that path alone gets us
13 there.

14 And then when you throw these other things on top of
15 it, I think -- well, my position is, is all three of these,
16 and not necessarily just limited to those issues, but these
17 are four that we're talking about today.

18 One, take the expert out; the truth-seeking; the
19 bolstering; and the closing argument. Our position is, is
20 that any one of those under the case law that existed at
21 the time of trial was problematic. And any one of those
22 gives this Court a path to ordering a new trial at post
23 conviction, and certainly cumulatively all three of those
24 scream out for a new trial in -- in our opinion.

25 THE COURT: Hopefully, I made myself a little bit more

1 clear. Thank you for the effort as well.

2 Ms. Jameson, do you have anything that you want to say
3 in closing since I engaged Mr. Grose in a lot of
4 questioning that you didn't have a chance to respond to?

5 MS. JAMESON: Just very briefly, Your Honor.

6 And, again, the state has responded to each three of
7 those issues pretty thoroughly in our return, but I did
8 want to clarify one thing that was mentioned on the reply
9 argument regarding any case where there isn't physical
10 evidence or anything other than the child's testimony that
11 our Supreme Courts have always found prejudice enough to
12 result in a new trial.

13 That's dealing with those vouching type cases, and so
14 Chapel and Briggs. And Chapel sets forth the different
15 cases where prejudice has been found in a scenario where
16 there isn't that additional evidence other than the child's
17 testimony.

18 I think that standard applies, and it's probably
19 getting a whole nuance as to prejudice. That applies to
20 those issues regarding improper bolstering. So I don't
21 think that -- I'm hoping I'm not reading Mr. Grose's
22 argument wrong.

23 I don't think that it's proper to say that the Supreme
24 Court has always found prejudice in every single criminal
25 sexual conduct case where there is a form of deficiency

1 that it impacted the trial.

2 I think -- I think the case law -- and Your Honor
3 mentioned he will read Chapel -- discusses in those
4 situations where there has been improper bolstering or
5 vouching.

6 And, again, the state's position is there wasn't
7 improper vouching or bolstering in regards to Ms. Weber,
8 the forensic interviewer, or Meredith Thompson-Loftis who
9 was the therapist who treated the victim after the
10 interviews.

11 Again, going back to the closing argument, the state
12 asserts that Mr. Brannon testified as to his motives for
13 making those statements, but the inquiry not end there.
14 You need to look at the entire record.

15 And -- and the state cited in our return Smalls. We
16 totally agree Smalls is the appropriate analysis that Your
17 Honor needs to look at for prejudice in the State of South
18 Carolina, not a cumulative error. Smalls actually, I think
19 heightens the need to compare the specific prejudice or the
20 deficiency, compare it to the record as a whole and
21 determine whether or not prejudice was established and
22 regarding -- the state would rely on its return.

23 MR. GROSE: And I will just say that I -- I didn't
24 mean to suggest that Chapels when it collected those cases
25 did anything beyond the bolstering line of cases, but I

1 think that we're in agreement, as at least as far as Smalls
2 in the fact that the Court does have to consider the whole
3 record, which would include the evidence or lack of
4 evidence.

5 THE COURT: well, thank you both for the arguments.
6 Thank you both for the briefing.

7 Again, did not have a chance to read or digest or
8 anything Mr. Grose's replies because we just got it this
9 morning.

10 I've never been offered oral arguments before as part
11 of a record. So I've got the -- I've got the link in the
12 reply. I don't have a link by email. I have the link in
13 the reply.

14 So I'm not sure. I -- if I take a look at it, I will
15 let y'all know. Right now I'm not real -- I'm not
16 comfortable taking a look at something like a link, but
17 I've got it. So if my curiosity, intellectual curiosity,
18 gets raised I may take a look at it, but I'll let you both
19 know if I have done so.

20 Mr. Spade, again, we appreciate your patience while
21 the Court has gone through this. As your lawyer will
22 probably explain to you, or I hope your lawyer will explain
23 to you, the issues involved in your case are not
24 something that -- that we can -- we as a court can quickly
25 move through.

1 Since we were first together we've also -- all of us
2 have had to experience the COVID virus and all of the
3 restrictions that have been placed on us. And that has
4 substantially slowed everybody being able to address things
5 through the court system.

6 So I just mention those because I want to encourage
7 you to be patient with the Court but be more patient with
8 your lawyers and those people who are representing you.

9 And if you have any questions about anything, please
10 reach out to them. Continue to have confidence in them,
11 and I'm sure that they will be able to answer any questions
12 you have or advise you properly. So, but we appreciate
13 your time as well, patience with us.

14 With that being said, I will adjourn this hearing.
15 Thank you very much.

16 And good luck at the doctor, Ms. Jameson.

17 Mr. Grose, always a pleasure.

18 MR. GROSE: Thank you very much, Your Honor.

19 MS. JAMESON: Thank you, Your Honor.

20 END OF REQUESTED TRANSCRIPT OF RECORD

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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all of the proceedings that could be understood and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 29th day of March 2021.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

April 15, 2022

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Daniel W. Spade, SCDC #358974

Applicant

vs.

State of South Carolina,

Respondent

) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL
) CIRCUIT

) Case No.: 2017-CP-42-02372

)
) **SCRCP Rule 59(e) Order**
) **Modifying in Part the Order of Dismissal**
) **Dated October 8, 2020**
) **And**
) **Granting a New Trial¹**

This is a post-conviction relief (PCR) case. The matter is presently before this Court on the Applicant's SCRCP Rule 59(e) Motion. Applicant's 59(e) motion timely challenges this Court's prior order (Order of Dismissal) dated October 8, 2020, dismissing his application. As will be explained herein, the motion is granted to the extent that this Order modifies this Court's prior order. If not modified by this Order, the Order of Dismissal is unchanged. Based on this Court's modifications, the application for post-conviction relief is granted and a new trial is ordered.

General Background

While the PCR case arises from the Applicant's 2014 conviction for first degree criminal sexual conduct with a minor, and his subsequent efforts of direct appeal, the record in this PCR case also involves a bitterly fought private Family Court dispute, a Department of Social

¹ The granting of a new trial in a post-conviction relief (PCR) case is not a judicial conclusion that an Applicant is guilty or innocent of the crime he is accused. A post-conviction relief proceeding is a collateral challenge to the underlying criminal case that examines the constitutionality of the underlying proceeding. Typically, a PCR challenges the underlying process by raising issues related to the adequacy of trial counsel's representation, improper actions of the prosecutor or other aspects of the underlying criminal case. PCR matters are authorized by statute S.C. Code § 17-27-10, et al.

Services (DSS) investigation, and law enforcement investigations in two states; South Carolina and Virginia.²

The PCR, the criminal case, the family court dispute and the DSS investigation arise from the same factual background. This chronological and factual background began in early 2006 with a brief relationship between the Applicant and the minor child's mother. As a result of the brief relationship, the minor child's mother became pregnant, and the victim in the criminal case was born. As early as 2007, Applicant's attorney/client relationship with his trial attorney, Ken Shabel, began when he was hired to assist Applicant with obtaining visitation with his daughter. At that time, Applicant lived in Virginia (with Cara Lintner, the mother of his other children). His daughter lived in South Carolina with her mother and step-father. Initially, Applicant's lawyer was successful with his representation of Applicant. He obtained visitation rights for Applicant with his daughter. Months later, however, the child's mother brought a Family Court action to terminate Applicant's parental rights (TPR). After a trial, Mr. Shabel was again successful stopping the effort to terminate Applicant's parental rights and, subsequently, visitation with his daughter was restored.³

After a sexual abuse report between the Applicant and his daughter was made in 2011, Mr. Shabel continued to represent Applicant. Mr. Shabel served as Applicant's attorney in the

² The record in this PCR case is voluminous. In comparison to other non-capital PCR cases, the present record is substantial in size. As will be discussed herein, once the PCR hearing concluded in May of 2019, the DSS file (which previously could not be located) was produced and made part of the record of this case. Subsequently, briefing of the DSS issue was made part of the record. Once a preliminary ruling was issued by this Court and circulated, comments and objections were presented by the parties (pre-SCRCP Rule 59 submissions). After the formal Order of Dismissal was issued, additional briefings were submitted into the record. Prior to the issuance of this Order, Applicant's counsel submitted information concerning collateral but related complaints for disciplinary actions involving three (3) of the attorneys and the investigating law enforcement officer.

³ The factual nexus and overlap with the Family Court proceedings and the criminal case was also explored by the South Carolina Supreme Court in In the Matter of Kenneth Philip Shabel, Opinion No. 28059 (Filed September 22, 2021).

subsequent Family Court matter brought to terminate his parental rights (basis for termination was the sexual abuse allegations with the minor).⁴ Mr. Shabel also served as his attorney through various governmental investigations involving allegations of sexual abuse in South Carolina and Virginia. Additionally, he represented Applicant during the General Session criminal trial that resulted in Applicant's 2014 conviction of first-degree criminal sexual conduct with a minor. Applicant was prosecuted and convicted on a single act of placing, as the child described, "his private part in my mouth" in a bathroom close to a hotel pool located in South Carolina. (Trial pp. 141-142).

After the appeals⁵ were exhausted, the present PCR followed. Prior and subsequent to the 2019 PCR evidentiary hearing, extensive briefing was presented. The DSS file was not located until after the May 2019 PCR hearing. On May 7, 2020, this Court's initial/informal ruling was issued. Further comments were received from the parties. The formal Order of Dismissal was issued on October 8, 2020. Subsequently, the Applicant's present Rule 59(e) motion was timely filed. Additional briefings followed.

Oral arguments were received remotely by the Court on March 29, 2021. E. Charles Grose, Jr., Esq., presented the arguments on behalf of the Applicant. Megan Harrigan Jameson Esq., Senior Assistant Deputy Attorney General, presented the arguments for the State.

⁴ The record indicates Mr. Brannan (referred to as Special Prosecutor in the criminal case) became involved shortly before the TPR action that was based on the abuse allegations.

⁵ Mr. Shabel withdrew as Applicant's attorney during the appeal process when he changed jobs to work for a new law firm. His new job potentially created a conflict of interest with his work for the Applicant. He became a member of the private law firm belonging to the lawyer that the Solicitor designated as a "Special Prosecutor" to prosecute the criminal case against the Applicant.

After considering the arguments and reviewing the extensive record, this Order was issued modifying the Order of Dismissal and granting the Applicant's relief of a new trial.

PCR Specific Background

This PCR seeks to set aside the Applicant's 2014 jury conviction of first-degree criminal sexual conduct with a minor and the resulting thirty-five (35) year prison sentence. Direct appellate review was exhausted in 2016. In 2017, the initial PCR application was filed pro se. Numerous amendments to the application were filed and accepted up to the date of the PCR hearing. The PCR evidentiary hearing was conducted on May 15 through May 20, 2019. Even though the evidentiary hearing was lengthy, as mentioned, it did not end the development of the record for this PCR.

Significantly, after the evidentiary hearing, a consent order was issued on May 20, 2019, requiring DSS to produce a copy of its investigative file concerning the minor, the Applicant, and minor's family members. This Court was previously advised the DSS investigative file could not be located.⁶ It was anticipated that the consent order would merely serve as a means of clarifying the record that the DSS investigative file no longer existed. Surprisingly, the DSS file was produced. An in-camera review of the investigative file was conducted. With the consent of DSS, the investigative file was ordered released to the attorneys. Additional briefing concerning the DSS file was subsequently received. With the cooperation and consent of DSS and the PCR

⁶ Given the substantial effort by law enforcement and DSS to investigate the allegations in both South Carolina and Virginia, the fact the file was lost was very disturbing.

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parties, a redacted version of the DSS investigative file was submitted/filed under seal and made part of the record of this PCR.⁷

After the evidentiary hearing, this Court undertook an extensive review. After reviewing the DSS investigative file, the trial transcript of the criminal trial, the criminal trial's exhibits, and the PCR hearing exhibits (including multiple reviews of five (5) forensic interviews contained in video discs), this Court issued its preliminary ruling on May 7, 2020. The preliminary ruling was contained as part of a SCRCF Form 4C. This Court's ruling included a request that the Attorney General submit a proposed formal order. After reviewing and editing the proposed order, a final order denying the application was signed and filed on October 8, 2020. The present SCRCF Rule 59(e) motion before this Court followed.

Decision

After considering the arguments presented by the parties and an extensive review of the entire record, this Court's prior Order of Dismissal dated October 8, 2020, is modified as set forth herein. The October 8, 2020, Order of Dismissal is incorporated by reference. Unless modified as set forth herein, the provisions of the October 8, 2020, Order of Dismissal, along with this Order, are the final ruling of this Court on the Applicant's request for post-conviction relief. For the reasons stated herein, the application is granted and a new trial is ordered.

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⁷ Subsequent to being notified by the State and Applicant that the redacted DSS file was not in the Clerk's file, this Court secured from DSS a redacted file. The DSS file is now part of the Clerk of Court's file.

5



Discussion

Threshold Matter⁸

Applicant raised what he termed a “Threshold Matter” wherein he asserted this Court denied him his statutory and constitutional right to have a judicial officer make findings of fact and conclusions of law because the Court asked one of the attorneys to submit a proposed final order. This Court disagrees. A PCR trial court's requesting one party to submit a proposed order does not create a statutory or constitutional violation. See, Fishburne v. State, 427 S.C.505, 832 S.E.2d 584 (2019)⁹.

While the exact effort by this Court in reaching its rulings is not documented in the record, the effort was substantial. Additionally, this Court employed the same order preparation process stated in Fishburne. In issuing its prior ruling, this Court finds no basis to support the proposition that Applicant's procedural, statutory, or constitutional rights have been breached or violated or compromised because of the method used to prepare its' prior formal order in this PCR.

This Court finds no violation of S.C. Code Section 17-27-80, no violation of Article I, Section 8 of the South Carolina Constitution, and no violation of SCRCP Rule 52. Also, see Hall v. Catoe, 360 S.C. 353, 601 S.E 2d 335 (2004). The sections of the formal Order of Dismissal

⁸ The headings contained within the discussion section are intended to mirror the headings used by Applicant in his 59(e) motion.

⁹ The Supreme Court has never prohibited a PCR trial judge from requesting a proposed order. This is especially true in a non-capital case. A court requesting a proposed order is only part of the process of issuing a statutorily and constitutionally proper final order. See, Fishburne, where the majority noted that the attorney preparing the proposed order is obligated to be “meticulous in doing so”, the opposing attorney “should bring to the attention” of the judge omissions, and the judge is obligated to “carefully review” the order prior to signing a final order. Even after the first formal order is signed, a PCR Applicant has, as further noted in Fishburne, the right to file a SCRCP Rule 59(e) motion to alter or amend or raise issues not properly ruled upon. *Id.*

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referenced by Applicant as being "identical" to proposed order offered by the Attorney General are identical because they are a correct statement of this Court's opinion and decisions in this matter. The sections of the proposed order that differed from the formal Order of Dismissal were altered because this Court felt they needed to be altered to properly reflect this Court's rulings. Again, this Court views Applicant's arguments that the processes used by this Court in finalizing its prior order violated Applicant's rights meritless.¹⁰

Footnote 2

In his 59(e) motion, Applicant claims that the Family Court matters stated in Footnote 2 of the Order of Dismissal were overlooked as a consideration on the issue of trial counsel's need to consult expert witnesses and to present a more vigorous defense. After considering the arguments, this Court finds no need to alter or amend the Order of Dismissal for the reasons asserted by the Applicant.

Trial counsel's participation as the Applicant's attorney in the Family Court litigation was explored in the prior order. His service as the Applicant's lawyer for six (6) to seven (7) years preceding the 2014 criminal trial provided trial counsel access to critical and detailed factual information about the criminal allegations. His long-time service as Applicant's attorney provided him access to extensive information about the motivation of the minor child's family. Because of this prior work, trial counsel was aware of factual details that supported his proposed narrative against the child's family he desired the jury to hear.

¹⁰ This Court notes that the Fishburne informal PCR order preparation process was used and expanded by the Applicant and State in this case as a "formal" process similar to the Rule 59(e) process. In their respective Rule 59(e) filings, general references were made to the order writing process when addressing substantive issues and new positions were asserted. In this case, Fishburne was used by the attorneys as a "formal" pre-59(e) review before the 59(e) motion was filed.

7



Trial Counsel's prior involvement and representation of the Applicant in the various Family Court matters were broadly successful until the disclosure of abuse was reported by the grandfather. Counsel had secured visitation rights with the child and stopped the efforts to terminate his parental rights. Applicant eventually secured unsupervised visitation with the child and the right to have the child visit him in Virginia. Due in part to trial counsel's success in the Family Court, an independent therapist eventually recommended a global family (including Applicant) counseling approach to better incorporate Applicant into the minor child's life. Three days after recommending the Applicant, as part of a family therapy, the child's grandfather left a phone message with the child's treating therapist stating "would like to talk to you about a situation they've uncovered." (Trial p. 215). These facts and narrative were presented during the criminal trial. Trial counsel was also aware that the initial disclosure did not result in an immediate report to DSS or law enforcement. But rather, the initial report outside the family was a hearsay report of abuse by the minor child's grandfather to the Family Court guardian ad litem and treating counselor. Nevertheless, because of trial counsel's knowledge that a disclosure was made, trial counsel's broad strategy significantly changed to include defending the Applicant from the potential of a criminal liability. During the PCR hearing, trial counsel explained the differing burdens of proof between a Family Court trial and a criminal trial in General Sessions. He also explained his effort to minimize the negative effects of the Family Court proceeding upon his defense of his client in the criminal trial.

Because of his involvement in the Family Court litigation, trial counsel had unquestionable knowledge of the family's efforts to prevent access to the child by the guardian ad litem. As mentioned previously, he had knowledge of the DSS investigation into both the South Carolina and Virginia allegations. Moreover, because of his involvement with the Family

8

Court matter, trial counsel was able to make strategic decisions in the Family Court litigation that limited its effect on the criminal case. Critical factual matters were known by trial counsel when he made his decisions to not present the forensic video interviews to the jury. Obviously, these same facts were known to counsel when he did not consult with expert witnesses about the forensic interviews.¹¹

This Court notes that Applicant's trial attorney knew of the DSS investigation prior to the criminal trial but did not have access to the DSS investigative file until after his PCR evidentiary hearing. After performing an in-camera review of the DSS file and considering the position of the parties about the content of the DSS, this Court finds no need to alter its prior order.

Weik v. State

Applicant also asserts that the prior order did not address the Weik v. State, Ard v. Cateo, and Edwards v. State, decisions. Applicant asserts that this Court failed to properly consider these cases in deciding the issues of what constituted a "reasonable investigation" by trial counsel. Applicant believes that trial counsel should have consulted with and retained expert witnesses. He asserts that not retaining/consulting with experts, trial counsel never learned how experts may help with defending the Applicant.

¹¹ Applicant's PCR theory includes that his lawyer was constitutionally deficient in his representation because he did not consult and call experts at trial to discuss the forensic interviews and present the forensic videos to the jury. While this Court believes the Order of Dismissal is correct, to clarify, this Court's opinion remains that counsel did not err in presenting the forensic interviews to the jury. The value of the videos of the forensic interviews to either the state or defense is, as a factual matter, questionable and debatable. Previously, this Court noted the confusing nature of the child's conduct and her words. Viewing the videos was critical and material to forming this Court's opinion. If the videos had been presented at trial as incriminating evidence, most likely expert testimony would have been needed to explain, among other things, to the jury the child's conduct, her inconsistent and exculpatory statement about Danny D (the Applicant), the interviewer's methodology of questioning, and the child's statements about the inappropriate conduct of the male child from her class. Nevertheless, the risk to the defense of presenting the child's forensic interviews to jury is high. Again, the videos were not presented by either the State or the defense to the jury. This Court's opinion remains that no error was made by trial counsel for not presenting the forensic interviews to the jury.

9



Weik, Ard and Edwards are instructive for analytical purposes. Broadly, they represent points of law already considered in the Order of Dismissal. A significant difference in these cases to the present one is that trial counsel, due to his prior involvement representing Applicant for many years in Family Court, possessed the factual information that formed his strategic decisions when preparing his defense. Did Applicant's trial attorney know the contents of the forensic video? Yes, he did. Was he aware of the factual background of that proceeded and followed the making of the videos? Yes, he was. The desire to not have the jury view the minor child's forensic interviews was a strategic decision based on counsel's knowledge of the content within the videos. This Court cannot find Applicant's trial attorney's decision to be unreasonable or based on a lack of factual knowledge. After reviewing these cases and considering the arguments, the Order of Dismissal requires no alteration.

Expert Witnesses & Child Advocacy Center Interviews

Applicant raises the analysis in the Order of Dismissal that involved the decision to not publish the minor's forensic interviews to the jury and to not call expert witnesses to discredit the minor child's testimony and methodology of the Child Advocacy Center when conducting the interviews. In reading his motion, Applicant appears to approve of this Court's findings of the suggestiveness of the forensic interviews and of this Court's favorable view of the Applicant's PCR experts' testimony, including their establishing best practices for conducting child forensic interviews. While Applicant asserts that this Court's rulings require a conclusion of unreliability of the minor's testimony, this assertion was not presented to the trial judge and not specifically requested in the PCR hearing.

As this Court also referenced in its Order, the Child Advocacy Center's forensic interviewer asserted her methodology and interview tactic were proper. During the PCR hearing,

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her demeanor was adamant in support of her position. If the videos had been presented during the criminal trial, this Court reasonably infers her testimony would have reflected a similar passion for her work and opinions. (See supra, note 11). She agreed with the Applicant's PCR position that the minor's interviews should have been published to the jury. She asserted, as trial counsel feared, the jury would conclude from viewing the videos a young child having knowledge of and talking about age-inappropriate sexual matters. Whether the videos reflect what was asserted by the forensic interviewer would have been a question of fact for the jury, if the videos had been published to the jury. The videos also support the factual conclusions offered by Applicant's experts that the forensic interviewer's methodology was improper and that the child was led by the interviewer into giving certain answers. Again, whether the jury accepted Applicant's experts' conclusions would have been a factual matter for the jury to decide.

The interpretations of the child's conduct and statements contained in videos were factual matters and arguments trial counsel avoided by not publishing the videos to the jury. For PCR purposes, the decision to publish (or not) the videos to the jury is viewed by this Court through a Strickland analysis that examines trial counsel's decision that determines if counsel's performance fell below an objective standard of reasonableness. This Court does not view the decision to not publish the videos to the jury as unreasonable when applied to the Strickland standard. Also, see Thompson v. State, 423 S.C. 235, S.C. S.E.2d 487 (2018). Applicant has not met his burden of proof on this issue.

Even if trial counsel had convinced the trial judge to allow him to present the videos to the jury and to allow competing experts to testify as to the content of the videos, this Court cannot rule that the jury would have rejected or accepted the opinions of either the Applicant's

experts or of the forensic interviewer. For PCR purposes, this Court views its prior opinions sufficient.¹²

Special Prosecutor

Applicant raises; again, the Special Prosecutor issues in his 59(e) motion. In the motion, he references that this Court expressed its opinion about an email taken from the Special Prosecutor's records that the private family court matter was a higher concern over the criminal prosecution. This Court's opinion has not changed.¹³ After, once again, reviewing the nature of the alleged initial disclosure of abuse reported in the DSS investigative file, the trial testimony and the PCR hearing testimony, this Court finds no need to alter the Order of Dismissal. Also, as stated in the Order of Dismissal, pg. 23, footnote 11, the issue of the appointment of the Special Prosecutor was addressed in In the Matter of N. Douglas Brannon, Op. No. 27933 (filed Dec. 18, 2019). Thus, this Court finds Applicant is not entitled to relief of any claim pertaining to the appointment of a Special Prosecutor.

State v. Daniels

In his 59(e) motion, Applicant acknowledges this Court rejected the analysis offered by the Attorney General concerning State v. Daniels, 401 S.C. 251, 737 S.E.2d 473(2013).

Applicant disagrees, however, with this Court's opinion that trial counsel did not err by not

¹² Applicant seems to contend this Court was required to conduct a separate hearing about the reliability of the victim's testimony; a taint hearing (Reply brief p.3). Applicant asserts factors from S.C. Code Section 17-23-175(B) should have been applied by this Court to determine the child's testimony was unreliable. No such hearing was previously requested to trial judge or to this Court.

¹³ This Court's opinion is supported further because the record indicates that the referral to the Child Advocacy Center for the forensic video interviews was not made by the Sheriff's Office investigator, but rather privately. See, S.C. Code Section, 63-7-310, Persons Required to Report. Thus, the motivation for the referral was not related to the law enforcement's investigation. 63-7-310 requires certain persons to make reports to law enforcement when the person has "reason to believe" a child has been subject to abuse.

objecting to the initial jury instruction and this Court's opinion that Applicant failed to establish prejudice.

As stated in the Order of Dismissal (p.29), Applicant was correct that "the trial court's statement and his attorney's statement crossed into the Beaty sphere of improper statements." This Court agreed these statements "shifted the jury's focus away from the State's obligation of meeting its burden of proof." To clarify, the better practice would have been for trial counsel to object to the trial court's statement. Likewise, trial counsel's use of the "truth seeking" comments should not have been made to the jury. Under South Carolina jurisprudence that exists today, trial counsel should definitely object to a trial court's use of the "search for truth" terminology and it would be clearly an error for trial counsel to argue such terminology to the jury. See, State v. Beaty, 423 S.C. 26, 813 S.E.2d 502, which was not issued by the Supreme Court until April of 2018. Nevertheless, the remaining parts of the Order of Dismissal on this issue are correct. Also, see Infra, State's Closing Argument, analysis of the prejudice element related to trial Counsel's failure to object to Special Counsel's closing argument. To the extent this clarification amends or alters the Order of Dismissal, it is so ordered.¹⁴

Meredith Thompson-Loftis and Footnote 13

In his Rule 59(e) motion, Applicant also questions the Order of Dismissal pages 32-37, involving trial counsel's failure to move for a continuance to have an expert review the records of

¹⁴ This Court notes that notwithstanding the above, because trial counsel failed to object to the trial court's use of a "search for the truth" terminology and because trial counsel erred in using the same terminology when explaining the purpose of a criminal trial, the significance or weight of the Special Prosecutor's improper closing argument when performing a Smalls analysis, increased the prejudicial effect of the improper closing argument. (See, Infra pp. 20-23).

Meredith Thompson-Loftis. This Court's opinion is that the Order of Dismissal is correct. While the late production of some of Ms. Thompson-Loftis's records is concerning, Applicant's trial attorney properly raised the issues with the trial judge (Trial pp 24-29). Pages 32 – 37 of this Court's prior order provided a detailed statement of trial counsel's efforts to object to the late production of the records, the arguments presented by both sides, and the trial court's rulings.

In regard to footnote 13 on page 36, this Court adds that the DSS records confirmed this Court's opinion of Cara Lintner's potential hostility toward the Applicant that existed at the time of the criminal trial. Even though Ms. Lintner was investigated by law enforcement, she was never charged with any crime that involved her conduct with the child. For clarity purposes, nothing in the record before this Court suggests that Ms. Lintner's conduct was opined as criminal. Even though she may not have assisted the State in their prosecution, Ms. Lintner, once again as reflected in DSS files, was potentially hostile towards Applicant.

To the extent the above items clarifies the Order of Dismissal, it is so ordered. Otherwise the Order of Dismissal as it relates to the Thompson-Loftis and Footnote 13 issues remains.¹⁵

Improper Bolstering

Applicant also takes issue with the Order of Dismissal as it relates to his assertion that trial counsel allowed improper bolstering to occur with certain witnesses: the forensic interviewer, Webber, and the counselors, Roseborough and Thompson-Loftis.¹⁶

¹⁵ The relatedness of Footnote 13 to the Meredith Thompson-Loftis testimony was not clear to this Court. Nevertheless, Applicant is correct that this Court's use of the words "inconclusive and speculative" in referencing Ms. Lintner's involvement with the minor child suggests some doubt remains that Ms. Lintner committed or was involved with an act of sexual abuse with the minor. No such evidence exists in the present record that Ms. Lintner committed, participated, knew, or otherwise condoned any act of abuse.

¹⁶ Roseborough (pre-disclosure) and Thompson-Loftis (post-disclosure) were counselors who treated the child. Even though a medical doctor did not testify at trial, the State represented to the Trial Court as a pre-trial matter that, after a physical examination of the child by a doctor, no physical or medical evidence of abuse was found. (Trial pp. 34-38).

This Court notes that in its prior analysis, the testimony about Ms. Webber was referenced as not necessary. This Court did not make the same, "not necessary" observation as to Ms. Roseborough¹⁷ or Ms. Thompson-Loftis. The "not necessary" observation related solely to the introductory comments concerning Ms. Webber's background. Since Webber was presented as a fact witness, her credentials were not necessary and counsel should have objected to them being presented to the jury. In isolation, his failing to object was not prejudicial to Applicant. Ms. Webber made the initial report to law enforcement. Thus, a valid factual reason for her testimony existed. In addition, the testimony of these three witnesses could not be considered "improper" bolstering under South Carolina jurisprudence existing at the time of Applicant's trial when their qualifications were presented. See State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). See, State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part, where bolstering is explained).

To the extent improper bolstering occurred with the testimony of Ms. Thompson-Loftis' qualifications as an expert, trial counsel did object. Trial counsel properly objected when she was offered as an expert in "child abuse diagnosis" and the trial judge limited her qualifications to a "family counseling and child therapy" expert. Nevertheless, Applicant notes that she went on to testify to, without objection, to the following:

Special Prosecutor: When did you first meet [the child]?

Thompson-Loftis: [The child] first came to my office back in May 2011.

¹⁷ Ms. Roseborough was the child's initial treatment therapist. Her treatment resulted in the recommendation that all parties, including the Applicant, join in therapy for the child's benefit. The child did not make a disclosure of abuse to her. Within a few days after joint therapy with the Applicant was requested by Roseborough, the grandfather called Roseborough's office to report "a situation they uncovered." (Trial p. 215). Her trial testimony was that, after consulting with the family's then private attorney, her treatment services ended and she referred the child on to the Child Advocacy Center. (Trial pp. 203-204). The record does not indicate the grandfather's report resulted in a report to DSS or law enforcement.

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Special Prosecutor: Okay, Do you have any idea how or why she appeared in your office? Was she referred there?

Thompson-Loftis: She was...I used to work for the Child's Advocacy Center in Spartanburg, so I also do a tremendous amount of victim assistance, which means I treat people who qualify for victim services. And since I took that, Ms. Webber referred [the child] to see if I could provide therapy for her under the victim's assistance and I agreed, and [the child] was brought for her session in May 2011.

Special Prosecutor: Okay, And the lady who just testified before you, Tab Webber, is this the one who referred [the child] to you, is that correct?

Thompson-Loftis: Yes.

Xxxx

Special Prosecutor: ...Now, in cases where there is abuse of any kind, is it typical for a child after the Children Advocacy Center interviews to change therapists?

Thompson-Loftis: I think once a determination has been made or a recommendation has been made, I typically see most forensic interviews resulting in therapy or further therapy, and I don't think it's unusual for someone to be referred to different therapist, based upon the type of treatment they provide, or based upon the types of insurance panels they [sic] are on. There could be a number of reasons.

Special Prosecutor: Okay, so what this jury already knows is that [the child] then went to the Children's Advocacy Center, and then [the child] came to see you. Is that unusual in the typical case of abuse?

Thompson-Loftis: No, not at all. (Trial p. 259 – 260).

Ms. Thompson-Loftis subsequently testified generally to define "partial disclosure", "delayed disclosure", and "coaching." She further testified as to her working with the child "seventy-one times." She bolstered the child generally when she stated, among other things, she had seen a lot of "transformation" in the child from her therapy. (Trial p. 270). She referred to the child as remarkable. See Anderson and Makin, Infra, for Supreme Court's warning against use of such expert witnesses for dual purposes. She was also questioned about the child's disclosure of sexual abuse.

Special Prosecutor: At any time during your treatment of [the child] up through December 30, 2013, did she make a disclosure of sexual abuse to you?

Thompson-Loftis: Yes, she did. (Trial p. 270).

Applicant asserted the above established a link between Ms. Webber, who contacted law enforcement and recommended therapy for the child to the testimony of Ms. Thompson-Loftis who accepted the child for therapeutic treatment under "victim services." Applicant also supports his improper bolstering position by referencing Ms. Thompson-Loftis' testimony, "being that a majority of my clients are trauma victims, or have been in the past, I have quite an extensive amount of forensic and sexual abuse training, Post-Traumatic Stress training." Applicant also notes that trial counsel felt the testimony of Ms. Webber and Mrs. Thompson-Loftis had the effect of vouching for the child's credibility. (Reply pp 11-14).

This Court's opinion is that trial counsel was not constitutionally deficient based on South Carolina jurisprudence that existed at the time of his trial for not objecting to the testimony Applicant asserts. Our Supreme Court has made it clear, trial counsel should object to this type of testimony when it is presented before a jury as a means to indirectly bolster testimony. State v. Anderson was not decided until 2015. 413 S.C. 212, 776 S.E.2d 76. State v. Anderson, set forth better practice to be used by prosecutors. The better practice is not to have the individual who treated the alleged victim testify, but rather to call an independent expert as a "blind" expert. Also, see State v. Makin, 433 S.C. 949, 860 S.E. 2d 666 (2021) where the Supreme Court explained that an expert who testifies as a treating expert and an expert as to general characteristics of abuse is not per se improper. However, the Supreme Court warns against the practice.¹⁸

¹⁸ As in the Makin case, the present PCR is a close call on the bolstering issue. In the event this Court's decision on this issue is reversed, based upon State v. Douglas, 380 S.C. 499, 505, 671, S.E.2d 606, 610 (2009) (Pleicones, J., dissent) and Infra the Smalls analysis of State's Closing Argument, trial counsel's failure to object to improper

DSS Records

The Applicant also takes exception to the Order of Dismissal's finding that Applicant failed to establish the State (the solicitor's office) was in possession of the DSS file or that the file had material information not already known to counsel. This Court finds that the Order of Dismissal is proper.

Nevertheless, this Court continues to be troubled by the investigating officer's change in testimony at the evidentiary hearing. Applicant references the cases of State v. Pulley, 423 S.C. 371, 85 S.E. 2d 461 (2018); Cotheran v. Brown 357 S.C. 210, 592 S.E. 2d 629 (2009); McMaster V. Dewitt, 411 S.C. 138, 767 S.E. 2d 451 (Ct. App. 2014); and State v. Durant, 430 S.C. 98, 844 S.E. 2d 49 (2020) (citing Brady, 373 U.S. 83 (1963)), in an effort to persuade this Court that the investigating officer's testimony was "sham" and that a Rule 5 discovery violation occurred. This Court continues to not be persuaded. Applicant has not met his burden of proof to establish a Rule 5 violation occurred. This Court's concerns relate to the officer's inconsistent testimony as to her role in making, or not, a referral of the case to the Child Advocacy Center, regarding her involvement in the investigation, and the whereabouts (misplacement or loss) of the DSS file.

What happened to the DSS file remains a mystery to this Court. No explanation was offered. The file seems to have simply vanished for a period of time that is material to this matter. The evidence before this Court does not rise, however, to the level of prosecutorial misconduct or a discovery violation.¹⁹ Additionally, having reviewed the DSS file on several

bolstering would meet the Strickland standard of prejudice. Again, this Court notes that no physical evidence was presented to establish guilt.

¹⁹ Even though this Court was made aware that the officer is no longer employed with the Spartanburg County Sheriff's Office, the issue of her employment status was not presented to this Court. Nevertheless, very similar to the suggestion Ms. Lintner was involved in abuse, the record before this Court does not support a link between the reason for the officer no longer being employed by the Sheriff's office and her involvement in the underlying matters.

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occasions, the Applicant has not established the element of prejudice. The material evidence in the DSS file appears to have been known to trial counsel or was not explained to this Court. Notwithstanding, this Court is disturbed by the mystery behind the loss or unexplained misplacement of the DSS file and its unavailability.²⁰

State's Closing Argument

Applicant also takes exception with the Order of Dismissal's ruling concerning the State's closing argument. This Court's prior ruling was that trial counsel was not constitutionally ineffective for failure to object to the State's closing argument that included an emotional narrative (Trial pp. 305-308) that ended with the jury being told it "takes care of good" (Trial p. 308) people. This Court noted that during the hearing, trial counsel testified he did not believe the closing was objectionable and, accordingly, did not object. After further review and reconsideration, this Court alters its original decision to find that Special Prosecutor's argument was improper and trial counsel erred by not objecting to the argument. Applying the Strickland standard, an objection should have been made by trial counsel.

As referenced by Applicant in the present motion, this Court expressed concerns as to the constitutionality of certain statements made by the Special Prosecutor during the closing argument. The overall emotional tenor of the prosecutor's argument was to define the Applicant as different from the members of the jury because he was a "bad" person.²¹ Since the jury was told "you" are "good" people, "you" take care of "good" people and the child was also a "good" person, the accused was not worthy of the jury's obligation of reviewing the evidence objectively

²⁰ This Court also notes that its opinions and conclusions about the DSS file and its contents were made without the benefit of live witnesses. The DSS file was not produced, even though subpoenaed, until after the PCR hearing.

²¹ The child was quoted as calling the Applicant as bad. For clarity, quoting the child's comment is not unconstitutional. Multiple times, however, the Special Prosecutor stated the Applicant was a "bad" guy, and the jury was told "the police, they arrest the bad people." (Trial pp. 303-304).

and fairly. (Trial p. 306).²² The constitutional problem with the Special Prosecutor's closing argument is not that grown men who commit a sexual battery on children are not bad. The argument unconstitutionally negates the presumption of innocence.²³ It is also constitutionally impermissible for a solicitor to argue to a criminal jury that simply because a man is "accused" or "arrested", no matter how serious a charge, that he is a "bad person" and thus, unworthy of fair review of the State's evidence to establish his guilt.²⁴

In the Order of Dismissal, this Court referenced that the Special Prosecutor acknowledged during the PCR hearing that his motive in making this type of argument was to appeal to the jury's sympathies. His motives were also to appeal to jury's emotions. The Special Prosecutor's words and demeanor at the PCR hearing were candid and clear that he had the intent to appeal to and invoke the passions or the emotions of the jury. An unofficial version of the PCR transcript reflects the following colloquy between PCR Counsel and the Special Prosecutor.

PCR Counsel: You are familiar with case law about closing arguments that prohibit making an emotional appeal to jurors to decide the case on something other than the elements of the crime?

Special Prosecutor: Yes sir, I am aware of that but I know that I have tried cases for years and saw [the solicitor] stand in front of the box with people in

²² This phrasing beseeches the jury to become an advocate for the victim, thus asking them to depart from their constitutional duty to consider the facts of the case impartially.

²³ See *supra*, note 21 and 22.

²⁴ When a prosecutor asks the jury to put themselves in the place of the victim, or to speak for the victim, such argument is improper and constitutes reversible error. *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Gilstrap*, 205 S.C. 412, 32 S.E.2d 163 (1994). *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995). Such arguments ask the jurors to become advocates for the victim. Such arguments ask the jury to ignore their obligation to exercise calm and reasonable judgment. *State v. Reese*, 359 S.C. 260, 597 S.E.2d 169 (Ct.App. 2004), *reversed in part; affirmed on this ground*, 370 S.C. 31, 633 S.E.2d 898 (2006). Such argument, which suggests to jurors to put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. See 75A Am.Jur.2d *Trial* § 650 (1991) *as referred in Reese*.

tears and telling that story²⁵ so yes, I am aware of that case law but I am also aware of what happens in the courtroom on a daily basis.

PCR Counsel: Did you ever object *** when he made that argument?

Special Prosecutor: Dozens of them [arguments]. I did not.

PCR Counselor: Did you think it was objectionable?

Special Prosecutor: It might have been but that's not for me to um. It might have been but I knew that I had gone and been just as passionate as him or I was about to go and be more passionate than him so I mean those are [...] for trial strategy. [The solicitor] is a passionate trial lawyer and I try to be one myself.

PCR Counselor: Right and you started to say it's not for you to decide whether it would be appropriate or not?

Special Prosecutor: I would believe that would be correct.

Again, this Court notes, the Special Prosecutor's comments were candid. He spoke honestly. This Court views Special Prosecutor's candid comments during the PCR hearing as evidence respecting the judicial process.

Thus, in this case, the PCR hearing establishes that Special Counsel had the intent of making an appeal to the jury's emotions or passions when he made his argument.

This Court's prior decision was based on a flawed analysis. The objectionable statements made by Special Counsel were unconstitutional, even without knowing Special Counsel's intent, because they shifted the role of the jury away from being fair and impartial arbitrators of the facts. Additionally, the statements were crafted to have the jury view the

²⁵ Presumably the "story" contained in the closing argument is one where he explains to his young daughter that juries take care of "good" people. The closing argument contains no other "story." (Trial pp. 307-307).

evidence through an unconstitutional lens. This Court concludes and finds that these statements should not have been made to the jury. These statements were constitutionally improper. Trial counsel should have objected. The acknowledgement during the PCR hearing that Special Counsel's intent was to present a closing argument that invoked the emotions and passions of the jury further supports the conclusion that the arguments were improper and that an objection should have been made by trial counsel.

Since trial counsel did not object, the record contains no argument by trial counsel or curative instruction from the trial judge to the jury that corrected the argument. Because no objection was made, the trial record also does not reflect an independent warning as part of the judge's charge on the law to the jury that their verdict must not be based on passion or emotions.

Our Supreme Court has long held that in its closing, a solicitor has the right to state his/her version of the testimony and to comment on the weight to be given such testimony. Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). A solicitor's closing argument must not, however, appeal to the personal biases of the jurors nor be calculated to cause the juror's passions or prejudices, and its content should stay within the record and reasonable inferences to it. Simmons v. State 331, S.C. 333, 503 S.E.2d 164 (1998). A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The State's closing argument must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Vasquez, citing State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). A solicitor's closing argument is bound to the rules of fairness, as was explained in Vasquez when the Supreme Court quoted State v. Northcott, 372 S.C. 207, 641 S.E.2d 873 (2007), quoting State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981); a solicitor should prosecute vigorously, the closing argument must be carefully tailored so as not to appeal to

personal bias of the juror nor be calculated to arouse the juror's passion or prejudice. Vasquez at 458.

This Court's prior analysis was too narrow and, thus, flawed. The prior order narrowly measured the constitutionally improper sections of the argument against other sections of the argument that were legally and factually correct. Upon reconsideration, this limited and narrow analysis is not consistent with South Carolina's Strickland case precedent. See, Smalls and Thompson. Additionally, this Court's prior analysis was wrong because it could be read as condoning constitutionally improper closing arguments that are calculated to alter the jury's constitutional role away from a neutral fact finder.²⁶

Having found Counsel erred by not objecting to the argument, this Court is required to address the second prong of Strickland ----- prejudice. To satisfy the prejudice prong of Strickland, an Applicant must demonstrate there is a reasonable probability that, but for Counsel's errors, the results of the trial would have been different. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) and Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018). In examining Strickland prejudice, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Id.

²⁶ 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 (2004) (citing State v. Copeland, 321 S.C. 318, 324 S.E.2d 324, 468 S.E.2d 620, 624 (1996) and State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)). Our Supreme Court "strongly disapproves" of closing argument calculated "to improperly arouse the passions and prejudices of jurors, urging them to abandon their sworn role as fair and impartial arbiters of the facts and view the evidence from an improper perspective." Id. 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. The effect of such argument is potentially to cause jurors to decide a case based on passion and prejudice instead of a reasoned, impartial consideration of the evidence presented to them. Id. State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965), to explain that such an argument "tends to completely destroy and nullify all sense of impartiality in a case of this kind."

reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Based on the following, this Court makes such a finding.

In Smalls and Thompson, the Supreme Court has provided additional clarity to longstanding rules and provided guidance to trial courts when applying the Strickland prejudice analysis to PCR cases. In determining whether an Applicant has proven prejudice, a PCR court should consider the specific impact that Counsel's error had on the outcome of the trial. See Smalls citing Strickland at 695 – 96 explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case. Smalls at 174.

[I]n addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury...In deciding whether [the Applicant] 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 providing prejudice. See Strickland, 466 U.S. at 696... (stating "a verdict only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.")

In the context of the required Smalls analysis, the record of the present PCR does not establish that the State's case at trial consisted of "overwhelming evidence of guilt" as defined by Strickland and Smalls. At trial, the only evidence of the Applicant's guilt was the testimony of minor victim. (Trial pp 135 – 140 direct testimony, pp. 141 – 148 cross examination, pp.148 and pp. 149 redirect).²⁷ As the State indicated to the trial judge, there was no medical or physical evidence of abuse to present to the jury. (Trial p. 35). There also was no DNA evidence or other physical evidence to establish the Applicant's guilt. See Smalls citing Ford v. State, 314 S.C. at 247-48, 442 S.E. 2d at 605-06. There were not multi-witnesses as to the events. *Id.*, citing

²⁷ Solicitor Leskanic's examination of the child and trial counsel's cross examination appears proper. No challenge was offered in this PCR to Solicitor Leskanic's or trial counsel's examinations of the child.

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Huggler v. State, 360 S.C. 627, 634-35, 602 S.E. 2d 753, 757 (2004). The Applicant's guilt was established at the trial only from the testimony of the minor child.²⁸

Our Supreme Court has ruled that to be "overwhelming" the evidence must include something conclusive such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of "a reasonable probability --- the fact finder would have had "a reasonable doubt cannot possibly be met."

Smalls. Even though a finding of "overwhelming" evidence does not exclude an applicant from establishing prejudice, a finding of overwhelming evidence, or a lack thereof, does affect a court's Strickland analysis.

Not finding "overwhelming" evidence of guilt in the trial record, the analysis turns to the specific impact of trial counsel's failure to object to the solicitor's improper argument to determine if Applicant has met his burden of proving prejudice; i.e., a reasonable probability the result of the trial would have been different without counsel's error. This Court finds that trial counsel's failure to object to the solicitor's improper closing argument was prejudicial to the Applicant and there exists a reasonable probability the trial would have been different without counsel's error. This Court finds counsel's error undermines confidence in the outcome of the trial and that a reasonable probability exists for a different outcome.

²⁸ Since the victim did not testify before this Court during the PCR hearing, Supreme Court rules limit this Court's ability to weigh the total effect of her testimony. Her testimony and the other trial witnesses can only be viewed from the written trial transcript if they do not also testify during a PCR hearing. As referenced in Thompson, since the victim did not testify during the PCR hearing, this Court lacks the opportunity to judge the credibility of the victim's statement outside of the written trial transcript. As directed by Thompson, this Court lacks the ability to comment on the victim's credibility, favorably or not, beyond what is found in the trial transcript. Id. 247. The transcript reads that trial counsel raised issues related to issues to the child's credibility. (Trial pp. 141-148).

More specific, in the trial, the evidence of the Applicant's guilt was from the minor child's testimony. Therefore her believability was central to the State's case. Likewise, trial counsel's strategy in defending the Applicant from the allegations also weighed significantly on the believability of the child. Moreover, once the Applicant asserted his Fifth Amendment right, the jury's role as an impartial fact finder became magnified. Also, with the State being successful in limiting any evidence of alternative causes for the child's anxiety other than the allegations of abuse, the credibility of her allegations of guilt magnified even further. The jury could not weigh the credibility of one part of testimony against another part of her testimony. Thus, the jury would not be evaluating the evidence of guilt based on competing evidence.

Therefore, the closing argument altering the jury's constitutional role had an even greater prejudicial effect when applying Strickland. The solicitor's closing argument unconstitutionally shifted the jury role away from being an impartial arbiter of the facts. Therefore, Applicant's trial counsel's error in allowing the argument to go unchallenged was prejudicial.²⁹ By not objecting, the trial record is void of the trial judge being given any opportunity to correct the error through his ruling on the objection. Also, because no objection was raised, the trial judge was denied an opportunity to instruct the jury against the improper influence of emotion and passion when evaluating the evidence.

²⁹ The record of this PCR contains no evidence to suggest that the child was nothing other than a good person. The difficulty this Court has with its decision to grant a new trial is due to the great empathy it has for the child. The stress of testifying in a trial before a jury is a stressful event. The stress of the moment is no doubt greater for a seven (7) year old child. This Court can infer courage and bravery to the child when offering her testimony. There is no better example of the stress placed on the child than the decision to provide the child with an emotional support prop of a teddy bear to hold while on the witness stand before the jury. (Trial p. 148).

Notwithstanding, the Supreme Court's longstanding rule is that a trial jury, no matter the seriousness of the charge, is to be an impartial arbiter of facts. Without such a jury, a constitutionally fair trial is impossible. (See supra, note 26).

As stated previously, in the State v. Daniels portion of this Order (supra, pp 12 – 13), the prejudicial weight of the improper argument and of counsel's error by not objecting increased because of the improper statements concerning a jury's role that occurred at the beginning of the trial. Thus, the presentation of the evidence in the trial was "bookended" with unconstitutional statements that altered the jury's role from being an impartial fact finder when determining if the State had met its constitutional obligations of proving guilt. The weight of counsel's error significantly increased the prejudicial element under Strickland since the jury was presented unconstitutional references as to their role as impartial fact finders.

Compounding and intensifying the prejudicial harm caused by trial counsel's failure to object to the Special prosecutor's argument, trial counsel used the prohibited Beaty "seeking the truth" and "search for the truth" language when he began his closing argument. Moreover, he concluded his closing with the same prohibited "search of the truth" language. (Trial. p. 314).

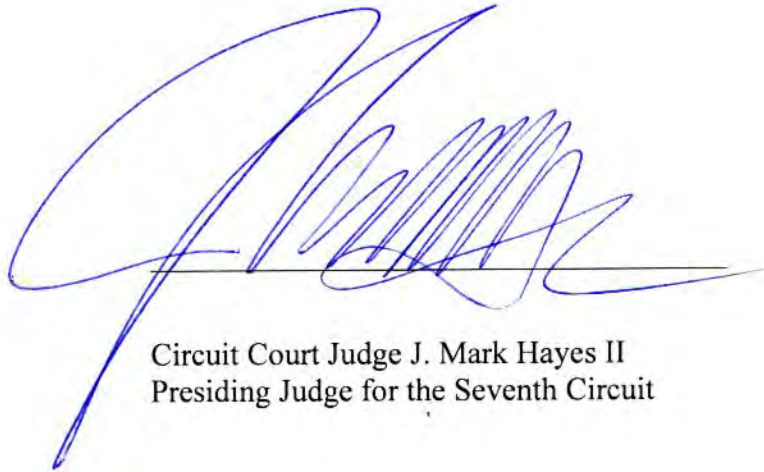
Based on the above, the prior Order of Dismissal is modified as reflected herein. With the Applicant having met his burden of proof, his application is granted.

Therefore, the present application for Post-Conviction Relief is granted and a new trial is ordered.



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IT IS SO ORDERED.



Circuit Court Judge J. Mark Hayes II
Presiding Judge for the Seventh Circuit

November 12, 2021
Spartanburg, South Carolina

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CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX



ALAN WILSON
ATTORNEY GENERAL

November 29, 2021

The Honorable Amy W. Cox
Spartanburg County Clerk of Court
Post Office Box 3483
Spartanburg, SC 29304-3483

Re: **Daniel Spade, #358974 v. State of South Carolina**
2017-CP-42-2372

Dear Ms. Cox:

Enclosed please find Respondent's Motion to Reconsider, Alter, or Amend the Court's Amended Order and Grant of Post-Conviction Relief and a New Trial Pursuant to Rule 59(e), SCRCPP, in the above-captioned post-conviction relief case, for filing in your office. Please let me know if anything additional is needed for assist in this filing.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

MHJ/jj

cc: The Honorable J. Mark Hayes, II, Circuit Court Judge (by email and U.S. Mail)
E. Charles Grose, Jr., Esquire (by email and U.S. Mail)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Daniel W. Spade, SCDC # 358974	)	Case No.: 2017-CP-42-02372
	)	
Applicant,	)	RESPONDENT'S MOTION TO
	)	RECONSIDER, ALTER, OR AMEND
v.	)	THE COURT'S AMENDED ORDER
	)	AND GRANT OF POST-CONVICTION
State of South Carolina,	)	RELIEF AND A NEW TRIAL
	)	PURSUANT TO RULE 59(e), SCRCP
Respondent.	)	
_____	)	

This matter comes before this Court by way of Applicant Daniel W. Spade's application for post-conviction relief following his conviction by a jury of his peers for first-degree criminal sexual conduct with a minor for the sexual assault of his four-year-old daughter. Following his unsuccessful attempt to obtain a reversal of his conviction on direct appeal, Applicant sought post-conviction relief by filing a *pro se* application. He then retained the services of E. Charles Grose, Jr., who filed several amended applications on Applicant's behalf. Respondent, the State of South Carolina, made its return to the application and requested an evidentiary hearing to resolve the claims as set forth in his *pro se* and three subsequent amended applications.

Following a lengthy evidentiary hearing spanning the course of five days¹, this Court denied relief, finding Applicant had failed to carry his heavy burden of establishing any constitutional deprivations or other violations necessary for a grant of post-conviction relief as to any of his numerous allegations. This Court issued a written order of dismissal memorializing these findings in compliance with S. C. Code Ann. § 17-27-80 that was filed on October 8, 2020.

Thereafter, Applicant, through counsel, filed a motion to reconsider, alter, or amend

¹ This Court heard motions pertaining to this matter on May 14, 2019, with the evidentiary hearing beginning on May 15, 2019, and concluding on May 20, 2019, following a break for the intervening weekend.

pursuant to Rule 59(e), SCRCP. Respondent made its return to this motion. On March 29, 2021, this Court convened a hearing on this motion and took the motion under advisement at the conclusion of the hearing

On November 12, 2021, this Court issued a new order, captioned “SCRCP Rule 59(e) Order Modifying in Part the Order of Dismissal Dated October 8, 2020 And Granting a New Trial,” wherein this Court reversed its denial of relief and granted Applicant a new trial in the court of general sessions based on a determination that trial counsel was constitutionally ineffective for failing to object to a portion of the State’s closing argument. Respondent received written notice of the order granting relief on November 15, 2021, when the order was sent to Respondent by the Spartanburg County Clerk of Court.

Respondent now makes the following motion pursuant to Rule 59(e), SCRCP, asking this Court to reconsider its amended order granting Applicant post-conviction relief and grant of a new trial in the court of general sessions.

I. PROCEDURAL HISTORY

During its February 2014 term, the Spartanburg County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor following an investigation into allegations he sexually assaulted his four-year-old biological daughter during an overnight visit at a hotel in Spartanburg County (2011-GS-42-4171). Applicant retained the services of Kenneth Shabel, Esquire, who had been representing him in an on-going custody dispute involving the same minor child, and Shabel’s law partner Shawn Campbell, Esquire, to represent him in this criminal matter. Seventh Circuit Solicitor Barry J. Barnette, Assistant Solicitors Jennifer Jordan and Kimberly Leskanic, and Special Prosecutor N. Douglas Brannon prosecuted the case. On February 24, 2014, Applicant proceeded to a jury trial before the Honorable R. Keith Kelly, circuit court judge. The

jury convicted Applicant as indicted. Judge Kelly sentenced Applicant to imprisonment for thirty-five years.

Applicant filed a timely notice of appeal and was represented by C. Rauch Wise, Esquire.² who raised five grounds. The South Carolina Court of Appeals affirmed Applicant's conviction by unpublished opinion on July 6, 2016. State v. Spade, Op. No. 2016-UP-352 (S.C. Ct. App. filed July 6, 2016). Applicant subsequently filed a petition for rehearing, and, following the denial of rehearing, filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. On June 16, 2017, the Supreme Court denied the petition for certiorari. The Remittitur was returned to the circuit court on June 22, 2017.

II. CURRENT PROCEEDINGS

On July 13, 2017, Applicant filed a *pro se* application for post-conviction relief, initiating this current action. Applicant then retained E. Charles Grose, Jr., to represent him in this action, and, through counsel, filed three subsequent amendments to his application on October 2, 2017, December 24, 2018, and May 14, 2019. Respondent filed a return to the application and requested an evidentiary hearing.

An evidentiary hearing on this action was convened May 15, 2019³, before the Honorable J. Mark Hayes, II, circuit court judge. Applicant was present and was represented by counsel Grose. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson and Assistant Attorney General Johnny Ellis James, Jr. At the start of the hearing,

² Trial counsel Kenneth Shabel originally assisted in the appeal but withdrew as counsel for Applicant when he changed law firms and began practicing law with Special Prosecutor Brannon. Counsel Shabel filed a motion to be relieved as counsel with the Court of Appeals on March 21, 2016, and his motion was granted on May 6, 2016.

³ The Court convened for a motion hearing related to this matter on May 14, 2019.

Applicant also filed and submitted a “Memorandum in Support of Application for Post-Conviction Relief,” which had not previously been provided to Respondent or the Court. At the hearing, Applicant proceeded forward on the following claims from his third amended application, absent allegation number 15, which Applicant expressly withdrew.

A. Ineffective assistance of counsel during the guilt phase for:

1. “Failing to request a continuance in order to have time to review and evaluate the child’s mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information.”
2. Not only failing to object to the trial judge instructing the jurors that their role is to “search for the truth” and make sure “justice is done,” which impermissibly diminishes and shifts the burden of proof, but also adopting that language in closing argument, thereby diminishing and shifting the burden of proof.”
3. “Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child’s allegations.”
4. “Failing to investigate, develop, and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting the case.”
5. Failing to request a ruling on Mr. Spade's contention that the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor’s commission pursuant to S.C. Code Ann. § 1-7-470.
6. “Failing to move for disclosure of exculpatory information in the possession of the [Special] Prosecutor, N. Douglas Brannon.
7. “Failing to investigate, develop, and present evidence that would have established that testimony about the child’s panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony.”
8. “Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child’s credibility.”
9. “Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualification as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis

as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. *See, e.g., S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011)."

10. "Failing to admit the videotaped interview from the Children's Advocacy Center that contained exculpatory information."
11. "Failing to investigate, develop, and present evidence that venue was not in Spartanburg County."
12. "Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County."
13. "Failing to request a jury instruction on venue."
14. "Failing to object to the Special Prosecutor's improper closing argument that appealed to the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest 'bad people,' he (as Special Prosecutor) tells the complaining witness' story, and 'the jury takes care of good people.' Tr. 305-07."
15. "Advising Mr. Spade not to present any evidence, including but not limited to his own testimony."
16. "Excluding evidence from the forensic computer examination that was exculpatory."
17. "The cumulative effect of trial counsel's errors denied Mr. Spade his right to a fair trial."
18. "Failing to obtain through discovery, by subpoena, or court order relevant Department of Social Services records."
19. "Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony."
20. "Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."
21. "Failing to present expert testimony to confront the State's witnesses and demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."

22. "Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with his daughter P.J. Law enforcement determined these allegations by P.J. to be unfounded. This ground is based on the deposition testimony of Cara Lintner."⁴

B. Ineffective assistance of counsel during the sentencing phase for:

23. "Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing."

24. "Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed."

C. Ineffective assistance of appellate counsel, in that

25. "Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County."

D. Denial of due process because of prosecutorial misconduct, in that:

26. "Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County."

27. "Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County."

28. "Eliciting false testimony regarding venue."

29. "Failing to correct false testimony regarding venue."

30. Failing to disclose relevant Department of Social Services records obtained by Spartanburg count Sherriff Investigator Nicki Cantrell

31. Failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and LE found them to be unfounded.

At the evidentiary hearing, Applicant presented the following witnesses:

⁴ Applicant did not introduce transcripts of the depositions of Cara Lintner and John Hall during this proceeding. Neither deposition is part of this record.

- Dr. Maggie Bruck, Ph.D, who was admitted as an expert in child abuse disclosure, forensic interview techniques, treatment of child sexual abuse victims, and suggestibility;

- Meredith Thompson-Loftis, who was the victim's counselor;

- Appellate counsel C. Rauch Wise;

- Seventh Circuit Solicitor Barry Barnette;

- Dr. Michael Lamb, Ph.D., who was admitted as an expert in psychology with a specialty in child interviews;

- Trial counsel Kenneth Shabel;

- Applicant's brother-in-law Josh Trumpower;

- Applicant's close friend Michael Mizak;

- Alexandria Wolf, the victim's former guardian ad litem in the family court proceedings, and

- Special Prosecutor Douglas N. Brannon.

Respondent presented the following witnesses:

- Investigator Nicki Cantrell, formerly with the Spartanburg County Sheriff's Department;

- Trial counsel Shawn Campbell

- Tabitha Weber, MSW, LISW-CP, the Clinical Director and Forensic Supervisor of the Children's Advocacy Center of Spartanburg, Cherokee, and Union Counties who was admitted as an expert in the field of child abuse assessment and treatment.

Numerous exhibits were also introduced during the hearing, including the videotaped forensic interviews of the victim conducted by Weber.

Following the hearing and on Applicant's motion, the Court issued an order requiring the South Carolina Department of Social Services (DSS) to provide the court with a complete copy of any file or records regarding the underlying custody action involving Applicant, the minor victim, and her parents (mother and adoptive father) within ten days of receipt of the order. On June 11,

2019, the DSS file was hand-delivered to the Court by a DSS attorney.

Upon receipt the file from DSS, this Court instructed both parties to conduct an in-camera review of the DSS file, which occurred in chambers at the Spartanburg County Courthouse on July 3, 2019, with counsel Grose and Senior Assistant Deputy Attorney General Jameson. Thereafter, both parties requested the Court release the records, subject to a protective order. On July 30, 2019, the Court conducted a telephone status conference on this request, with counsel Grose and Senior Assistant Deputy Attorney General Jameson appearing on behalf of the parties and DSS represented by Robert Rhoden, Esquire and. By order signed and filed August 16, 2019, this Court issued an order releasing the DSS file to the parties, with special instructions that DSS was to redact any personal identifying information before providing a copy to the parties, that counsel for the parties shall maintain the file subject to the strictest confidence and not make any copies other than as needed for litigation, and that the parties shall not give copies of the file to anyone absence approval of the Court.

On October 31, 2019, following the issuance of this order and the delivery of the DSS file to the parties, the Court requested the parties submit any additional memorandums on the DSS file and the issues raised at the PCR hearing on or before December 17, 2019. On that date, the State submitted its "Post-Hearing Memorandum in Support of the Denial of Post-Conviction Relief" and Applicant submitted a "Supplemental Memorandum of Law regarding the DSS Records."

On May 7, 2020, this Court issued a ten-page Form 4 denying post-conviction relief on all grounds and instructing the State to prepare a proposed order in accordance with the Form 4 within thirty days. On June 8, 2020, Respondent submitted a proposed order pursuant to the Court's instructions. On the same date, Applicant's counsel requested time to review the proposed order with Applicant and submit written objections to the proposed order and the Court granted this

request. On July 7, 2020, Applicant submitted “Objections to Attorney General’s Proposed Order and Proffer of Attorney General’s Proposed Order.”

On October 8, 2020, the Court issued an order of dismissal, denying and dismissing the post-conviction relief action in full.

On October 19, 2020, Applicant served a timely Rule 59(e), SCRCP motion. Respondent made its return to the motion on January 13, 2021. On March 29, 2021, this Court convened a hearing on Applicant’s motion. Applicant was present and represented by counsel Grose. Respondent was represented by Senior Assistant Deputy Attorney General Jameson. Following the hearing, this Court took this motion under advisement.

On November 12, 2021, this Court issued an amended order, reversing its previous denial of post-conviction relief and granting Applicant a new trial in the court of general sessions. This order makes new substantive findings of fact and conclusions of law pursuant to Section 17-27-80 and now determines Applicant received constitutionally deficient representation during trial based on trial counsel’s failure to object to a portion of the State’s closing argument and that this failure to object likely changed the outcome of the trial, i.e., that Applicant would have been acquitted of the sexual assault of his four-year-old daughter but for trial counsel’s decision not to object to a story told by the prosecutor in his closing argument.

Because this is an amended order with new substantive findings and ultimately changing the ultimate outcome of this case, Respondent now makes the following motion to reconsider, alter, or amend this new order pursuant to Rule 59(e), SCRCP.

III. ARGUMENT IN SUPPORT OF RECONSIDERATION

In its amended order, this Court grants Applicant post-conviction relief as to a sole⁵ issue—that trial counsel was constitutionally ineffective for failing to object to what this Court’s concludes was an improper closing argument by Special Prosecutor Brannon that “unconstitutionally negates the presumption of innocence.” (Amended Order p. 20). This Court finds that this argument regarding the role of the jury in protecting good people from bad people somehow unconstitutionally shifted the burden of proof away from the State and told the jury not to view the evidence objectively and fairly, but, rather, “beseeches the jury to become an advocate for the victim, thus asking them to depart from their constitutional duty to consider the facts of the case impartially.” (Amended Order p. 2 FN 22).

This Court further finds that because this argument was impermissible, trial counsel should have objected. This Court then concludes Applicant was prejudiced by trial counsel’s failure to object for several reasons. First, this Court finds that because trial counsel did not object, the trial court did not give an instruction to the jury that the verdict must not be based on passions or emotions. Second, this Court finds that there is a reasonable probability that Applicant would have been acquitted but for counsel’s failure to object to this portion of the State’s closing argument because the primary evidence introduced against Applicant was the minor victim’s testimony. This Court elaborates that “[t]here were not multi-witnesses as to the events”⁶ nor was there DNA or

⁵ To the extent that this Court finds Applicant established prejudice, but not deficiency, as to Applicant’s allegation that trial counsel was ineffective for failing to object to bolstering from State’s witnesses, Respondent respectfully requests this Court either remove entirely or clarify its position in FN 18 of the amended order, as the footnote in question finding prejudice does not comport with the body of the amended order unequivocally finding Applicant failed to find trial counsel deficient as to this allegation.

⁶ Respondent notes in the overwhelming majority of child sex abuse cases, the abuser performs his or her heinous acts not in front of an audience, but, rather, in secrecy while the child is isolated from those who can protect him or her, and, therefore, there generally are not “multi-witnesses” to

other physical evidence, thereby making the credibility of the minor victim crucial and “[c]ompounding and intensifying the prejudicial harm caused by trial counsel’s failure to object to the Special [P]rosecutors argument[.]” (Amended Order p. 27).

Respondent respectfully notes this Court’s findings and conclusions are not supported by the record or case law and urges this Court to reconsider its grant of post-conviction relief and a new trial to Applicant.

Standard of Review for Assessing Claims of Ineffective Assistance of Counsel

Initially, Respondent notes this Court’s determination that Applicant met his burden of establishing trial counsel was constitutionally ineffective does not comport with the recognized standard of review for granting relief in post-conviction relief matters, which requires an applicant to meet a heavy burden of establishing both that his or her counsel performed in a manner that no competent attorney would have performed and that there is a reasonable probability that the applicant would not have been convicted but for counsel’s error or omission. Respondent respectfully urges this Court to reconsider its ruling in light of the established standard for granting post-conviction relief.

Applicant, like all those seeking post-conviction relief, bears the burden of proving his allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. This Court, like any post-conviction relief court, must then

the atrocious sex acts committed on children. The lack of additional eyewitnesses to the abuse does not make this case unique, but, rather, commonplace. See State v. Smith, 406 S.C. 215, 220, n. 7, 750 S.E.2d 612, 614 (2013) (“Child abuse differs from other types of crimes in several respects. Specifically, the crime of child abuse often occurs in secret, typically in the privacy of one’s home. The abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time. Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help.” (quoting State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 484-485 (2008) (Toal, C.J. dissenting))).

apply the two-part test outlined in Strickland v. Washington, 466 U.S. 668 (1984), to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. 466 U.S. at 687. To obtain relief, a post-conviction relief applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel’s deficient performance. Id. at 687–88; Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is “necessarily linked to the practice and expectations of the legal community.” Padilla v. Kentucky, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” Strickland, 466 U.S. at 690. The reviewing post-conviction relief court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance” demanded of attorneys in criminal cases. Id.

Because of the difficulties inherent in making such an evaluation, this Court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonably professional assistance.” Butler, 286 S.C. at 445, 334 S.E.2d at 816. “The burden of rebutting this presumption ‘rests squarely on the defendant,’ and ‘[i]t should go without saying that the absence of evidence cannot overcome [i]t.’” Dunn v. Reeves, 594 U.S. ___, 141 S. Ct. 2405, 2410 (2021)

(alteration in original) (quoting Burt v. Titlow, 571 U.S. 12, 22–23 (2013)). In fact, “even if there is reason to think that counsel’s conduct ‘was far from exemplary,’ a court still may not grant relief if ‘[t]he record does not reveal’ that counsel took an approach that *no competent lawyer would have chosen*.” Id. (alteration in original) (emphasis added) (quoting Titlow, 571 U.S. at 23–24).

“When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). This Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as he or she did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109–10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough, 540 U.S. at 6; see Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Review of counsel’s actions is hallmarked by deference, as “it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a post-conviction relief court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Strickland, 466 U.S. at 689. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688–89; see id. at 691 (“Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”). “Defense lawyers have ‘limited’ time and resources, and so must choose from among ‘countless’ strategic options.” Dunn, 594 U.S. ___, 141

S. Ct. at 2410 (quoting Harrington, 562 U.S. at 106–107). “Such decisions are particularly difficult because certain tactics carry the risk of ‘harm[ing] the defense’ by undermining credibility with the jury or distracting from more important issues.” Id. (quoting Harrington, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Strickland, 466 U.S. at 689.

The second, or “prejudice” prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694; see id. at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt”). Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.” Richter, 562 U.S. at 112 (emphasis added); see Strickland, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

In determining prejudice, this Court must consider the totality of the evidence before the jury. Id. at 695. It is not sufficient “to show [counsel’s] errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to deprive the defendant of a fair trial.” Id. at 687. “An error by counsel, even if professionally unreasonable, does not warrant

setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Id. at 691.

The Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90; see also Weaver v. Massachusetts, ___ U.S. ___, 137 S.Ct. 1899, 1912 (2017) (quoting Premo v. Moore, 562 U.S. 115, 112 (2011) (“For this reason, the rules governing ineffective-assistance claims “must be applied with scrupulous care.”)). Post-conviction relief courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant’s burden of proving both Strickland components is heavy in light of the strong presumption that counsel’s conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel’s conduct “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the “benchmark” of the right to counsel is the “fairness of the adversary proceeding”); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) (“[T]he threshold issue is not whether [the applicant’s] attorney was inadequate; rather, it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory.”).

With this standard in mind, Respondent will address below why Applicant was unable to meet this high burden placed upon him and why this Court should reconsider its grant of relief.

Trial Counsel was Not Deficient for Failing to Object to this Portion of the Closing Argument

Respondent respectfully notes that this Court's finding that trial counsel was constitutionally deficient for failing to object to the portion of the State's closing argument is not supported by prevailing professional standards required of competent attorneys.

Special Prosecutor Brannon gave the State's closing argument in this case. He began by discussing the elements of first-degree criminal sexual conduct, the State's burden of proof, and reviewing the evidence presented to meet the State's burden of proof as to the elements of the crime. (Tr. 298-301). Special Prosecutor Brannon then discussed the defense theory of the case—that Applicant was merely a man trying to be a dad despite enormous opposition from the victim's mother—and tied it to his own experiences as a father while making comparisons to properly admitted evidence presented to the jury. (Tr. 301-305). Then, more than two-thirds into his closing argument, Special Prosecutor Brannon tells a story of when his daughter came to him and asked him, "daddy, who takes care of the good people?", to which Special Prosecutor Brannon ultimately responds that the jury takes care of the good people. (Tr. 305-307). Special Prosecutor Brannon then summarizes the evidence presented one more time before concluding his argument:

Ladies and gentlemen, I submit to you that we have proved each and every element of this crime beyond a reasonable doubt. [Victim] put it best when she was asked "who is Danny D?" She said "he's a bad guy."

Ladies and gentleman, you are good people. You take care of the good people. [Victim] is in your hands. He's guilty. Thank you.

(Tr. 308).

Initially, Respondent notes the portion of the closing argument that Applicant takes issue with was confined to evidence in the record and argument based on that evidence, and, accordingly, is not inherently improper or unconstitutional as a matter of law.

Closing arguments are a basic and important element of the adversarial fact-finding process in a criminal trial, and such arguments serve “to sharpen and clarify the issues for resolution by the trier of fact in a criminal case” while also providing both the solicitor and defense counsel with an opportunity to advocate for their respective positions, argue for certain inferences to be drawn from the evidence presented, and identify the weaknesses in the other side’s positions. Herring v. New York, 422 U.S. 853, 862 (1975). When presenting a closing argument, a solicitor generally possesses “wide latitude” as to the substance of his remarks to the jury and is fully permitted to prosecute with earnestness and vigor. Bates v. Lee, 308 F.3d 411, 422 (4th Cir. 2002); Berger v. United States, 295 U.S. 78, 88 (1935) (“[A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so.”); see also United States v. Isaacs, 493 F.2d 1124, 1164 (7th Cir. 1974) (“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.” (citations and internal quotations omitted)).

Pursuant to the wide latitude afforded in regard to the substance of a closing argument, the solicitor—amongst other things—is allowed to state and discuss the State’s version of the testimony, to comment on the weight to be given to such testimony, and to point out the matters the jury should and should not consider in arriving at a verdict. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); see State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975) (“[The prosecuting attorney] may argue with reference to any matters which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.” (citation and internal quotations omitted)).

However, prosecutors must confine their arguments to the record and the reasonable inferences that may be drawn therefrom. Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 477 (2016) (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). When a court is reviewing a post-conviction relief claim that a prosecutor's argument violated an applicant's due process rights, the court "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." Id. (quoting Darden v. Wainwright, 477 U.S. 168, 181, (1986) (internal quotations and citations omitted)).

Our Supreme Court has stated:

Improper comments do not automatically require reversal if they are not prejudicial to the defendant. On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record . . . The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *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.*

Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (emphasis added) (citations omitted); see also Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) ("The relevant question is whether the solicitor's comments [in closing argument] so infected the trial with unfairness as to make the resulting conviction a denial of due process.").

While "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony[.]" prosecutors are "bound to rules of fairness in their closing arguments[.]" Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (quoting Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Brown v. State, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009) (quoting 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.” Von Dohlen, 360 at 609–10, 602 S.E.2d at 744

Here, the argument made by Special Prosecutor Brannon does not rely on inadmissible evidence, but, rather, is based on properly admitted evidence and reasonable inferences to this evidence. He is merely commenting on the properly admitted evidence, which including the minor victim calling Applicant a “bad guy” when she was asked who Applicant was on the witness stand. (Tr. 137). Special Prosecutor Brannon’s tale of a conversation with his daughter and tying it to the evidence presented and the proper role of the jury—to evaluate the evidence properly admitted and determine whether that the State met its burden of establishing Applicant’s guilt beyond a reasonable doubt—is not *per se* impermissible and counsel is not *per se* deficient for failing to object to this portion of the State’s argument.

In reaching its determination that this argument was impermissible, this Court places significant emphasis on the testimony of Special Prosecutor Brannon during the evidentiary hearing, which this Court characterizes as an acknowledgement that this portion of the argument was knowingly improper and specifically intended to arouse the passions of the jury. Respectfully, this is a mischaracterization of the testimony provided at the evidentiary hearing.

During his testimony, Special Prosecutor Brannon was asked by the State about his closing argument, which he stated he “plagiarized” from former Seventh Circuit Solicitor Harold W. “Trey” Gowdy, III. (PCR Tr. May 20, 2019 p. 101). On re-direct examination, Applicant’s counsel and Special Prosecutor Brannon had the following exchange:

Q. And she asked you about the closing argument.

A. Yes, sir.

Q And, and I understand you would testify that you got that story from former Solicitor Gowdy?

A. That's correct.

Q. Okay. Are you familiar with case law about closing arguments that prohibit making an emotional appeal to jurors to decide the case on fact or on something other than the elements of the crime?

A. I'm -- I -- yes, sir, I, I -- I'm aware of that. But I also know that I tried cases for years, and saw Mr. Gowdy stand in front of the 12 people in the box with tears running down their face and telling that story. So, yes, I'm aware of that, that case law. But I'm always aware of what happens in the courtroom on a daily basis.

Q. And, and did you ever object when or did you have a trial with Solicitor Gowdy when he made that argument?

A. Dozens of them, yes.

Q Did you ever object---

A. I did not.

Q ---to it?

Do you think it's an objectionable argument?

A. Well, it might of been. But that's not for me to -- it might of been. But I knew that either I had just gone and had been just as passionate as him or I was about to go and was gonna try to be more passionate than him. So, I mean those are, those are calls for trial strategy, and Tr[e]y's a passionate lawyer, and I try to be one myself.

Q. All right. And, and I believe you started to say it's not for you to decide whether that's a proper argument or not?

A. I believe that would be correct.

(PCR Tr. May 20, 2019 p. 119-120).

From the record, it is clear Special Prosecutor Brannon intended to give a *passionate* closing argument. However, there are no prohibitions against a prosecutor arguing with vigor, and no case law requiring the State's closing argument to sterile, antiseptic, and free from emotion.⁷

⁷ In State v. Durden, 264 S.C. 86, 212 S.E.2d 587, 590 (1975), the South Carolina Supreme Court set forth examples of permissible closing arguments by prosecutors:

Special Prosecutor Brannon's commentary that he intended to be just as passionate, if not more, passionate, than trial counsel during his closing argument is not impermissible—in contrast, it is being an effective advocate.

Importantly, Special Prosecutor Brannon did not testify that he made a knowingly improper argument. In contrast, he testified that as a defense attorney, he has prosecutors make this argument in cases where he is on the opposing side representing a defendant and he unequivocally stated he has *not* objected to this argument.

While Applicant would have this Court view the Special Prosecutor's remarks in the most damaging manner possible, the United States Supreme Court gave the admonition in Donnelly v. DeChristoforo that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly v. DeChristoforo, 416 U.S. 637, 647(1974). Respectfully, this Court's findings that Special Prosecutor Brannon

'So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and it may employ any legitimate means for impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and for enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.'

(citation omitted) (emphasis added).

knowingly made an argument intending to impermissibly arise the passions of the jury is not supported by the record.

Next, Respondent urges this Court to reconsider its finding that trial counsel was constitutionally deficient for failing to object to this portion of the closing argument. As described above, Applicant carries the burden of overcoming the rebuttable presumption that counsel's performance was reasonable and to do so, he must establish that trial counsel's performance, whether it be through an act or omission, is so inherently unreasonable that "no competent attorney would have chosen." Dunn v. Reeves, 594 U.S. at ___, 141 S. Ct. at 2410 (quoting Burt v. Titlow, 571 U.S. at 22–23). As this portion of the closing argument was not *per se* impermissible, Applicant cannot meet his high burden of establishing trial counsel was constitutionally ineffective for failing to object.

Applicant Cannot Meet His High Burden of Establishing Prejudice for Failing to Object

Finally, Respondent respectfully urges this Court to reconsider its finding that Applicant established there is a reasonable probability that he would not have been convicted but for trial counsel's failure to object to the questioned portion of the State's closing argument. Notwithstanding Respondent's prior arguments that Applicant cannot establish that the closing argument in question was impermissible or that counsel was deficient for failing to object to this argument, Respondent also respectfully asserts this Court erred in determining Applicant established the requisite prejudice for a grant of post-conviction relief.

A criminal defendant or convicted person seeking collateral review is not entitled to relief based upon the closing argument of a prosecutor unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly, 416 U.S. at 643. See also Humphries, 351 S.C. at 373, 570 S.E.2d at 166 ("Improper comments do not automatically

require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument”). “[I]t is not enough that the remarks were undesirable or even universally condemned.” Darden, 477 U.S. at 181.

The United States Supreme Court has consistently held this is a very high standard for a petitioner seeking collateral review to meet. In Darden, the United States Supreme Court held that a closing argument considerably more inflammatory than the one at issue here did not warrant habeas relief, despite the prosecutor referring to the defendant as an “animal” and expressing a desire to see the defendant “with no face, blown away by a shotgun,” amongst other comments to which Darden argued were objectionable. Darden, 477 U.S. 168.

Applying this high standard to the present case, Respondent submits Applicant cannot show prejudice under Strickland resulting from trial counsel’s failure to object to the Special Prosecutor’s closing argument, as the innocuous comments that Applicant was a “bad guy” did not so infect the trial with unfairness to warrant relief.

Moreover, Respondent respectfully notes the record is replete with admonitions to the jury from the trial court that the jury’s verdict must be fair and impartial and the State firmly held the burden of proof, thereby eliminating any possible prejudice from the portion of the closing argument which this Court found impermissibly shifted the burden of proof away from the State. (Tr. 115, 316, 317, 319, 328). Specifically, the trial court explicitly instructed the jury at the outset of trial that arguments from counsels were not evidence. (Tr. 115). The jury was repeatedly told its verdict must be based solely on the evidence presented from the witness stand and exhibits and was properly instructed on how to evaluate the credibility of witnesses. (Tr. 115, 316, 317, 319, 323, 328). The jury was instructed by the trial court that Applicant was presumed innocent, which

was then described to the jury as akin to Applicant being cloaked in a “robe of innocence place about his shoulders . . . which remains with him from the moment of his arrest and continues until it has been stripped from him, from his shoulders, by evidence satisfying you of his guilty beyond a reasonable doubt.” (Tr. 318-319). The jury was repeatedly instructed as to the State’s burden of proof. (Tr. 316-330). Respectfully, this Court’s finding that Applicant established prejudice from trial counsel’s failure to object because the jury did not receive a special instruction that its verdict must be free from passion is not supported by the record in light of the repeated instructions the jury received explaining the verdict must be based solely on the evidence presented from the witness stand and the other proper jury instructions given by the trial court.

Moreover, there is no conceivable way the result of Applicant’s trial would have been different but for counsel’s failure to object to this closing argument. As discussed above, the Special Prosecutor’s argument was not *per se* impermissible, was not calculated to arouse the passions of the jury, and did not rise to the level of denying Applicant a fair trial.

Respondent moves this Court to reverse its amended decision and deny post-conviction relief where Applicant failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984), and its progeny.

IV. CONCLUSION

Based on all the foregoing, as well as the arguments set forth at the evidentiary hearing and in Respondent’s post-hearing memorandum, proposed order of dismissal, return to Applicant’s motion to reconsider, and other previous arguments, Respondent respectfully requests this Court affirm its original denial and dismissal of post-conviction relief, as Applicant failed to meet his heavy burden of establishing counsel performed in a way no competent attorney would and that

there is a reasonable probability the outcome of the trial would have been different but for counsel's failure to object to a portion of the State's closing argument.

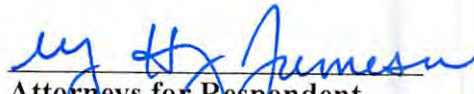
Respectfully submitted,

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Senior Assistant Deputy Attorney General

By:


Attorneys for Respondent
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November 29, 2021

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	Case No. 2017-CP-42-02372
Daniel W. Spade,	)	
Applicant,	)	
	)	Response in Opposition to State's Rule 59(e),
vs.	)	SCRCP Motion
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

To: The Honorable J. Mark Hayes, II, Presiding Judge, Seventh Judicial Circuit

By written order dated November 11, 2021, this Court modified, in part, the order dated October 8, 2020 and granted Daniel W. Spade a new trial ("Order"). On November 29, 2021, pursuant to Rule 59(e), SCRCP, the State moved to reconsider, and to alter or amend this Court's amended order granting post-conviction relief and ordering a new trial ("Motion"). This response follows.

1) The first nine pages of the Motion recount the extensive procedural history of this case. Mr. Spade addressed the procedural history in prior pleadings, and there is no reason to address the procedural history in this pleading.

2) In footnote 5 of the Motion, at p. 10, the State complains about footnote 18 of the Order. Mr. Spade agrees with this Court that he established *Strickland*¹ prejudice regarding trial counsel's failure to object to improper bolstering. For the reasons set forth in prior pleadings and during the hearing on his Rule 59(e) motions, Mr. Spade maintains he also established deficient performance.

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

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3) In footnote 6 of the Motion, at pp. 10-11, the State seemingly suggests there should be a lower standard of proof in child sexual abuse cases. Regarding the special prosecutor's improper closing argument, this Court correctly applied the Supreme Court's precedent in *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). This Court, accordingly, should decline the State's request to adopt a lower standard of proof.

4) Pages 11-15 of the Motion discuss the standard of review for assessing ineffective assistance of counsel claims. Mr. Spade addressed the procedural history in prior pleadings and during the hearing on his Rule 59(e) motion, and there is no reason to address this standard in this pleading.

5) Pages 16-22 of the Motion argue trial counsel was not deficient for failing to object to the portion of the special prosecutor's closing argument that told the jurors they take care of the good people like the child complaining witness in this case. The State's argument boils down to two arguments: (a) the closing argument was limited to the evidence, and (b) the special prosecutor did not intend to make an improper closing argument. The record supports this Court's findings that the special prosecutor's argument "shifted the role of the jury away from being fair and impartial arbitrators of the facts" and "were crafted to have the jury view the evidence through an unconstitutional lens." Order, at 21-22. This Court, accordingly, should decline the State's request to reconsider this portion of the Order.

6) Pages 22-24 of the Motion argue Mr. Spade cannot meet his burden of establishing prejudice under *Strickland*. This Court, however, properly applied *Smalls* when assessing prejudice and, accordingly, should decline the State's request to reconsider this portion of the Order.

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CONCLUSION

For the reasons set forth in Mr. Spades objections to the State's proposed order, his Rule 59(e) Motion, during the hearing on the Rule 59(e) motion, and this pleading, this Court should deny the State's Rule 59(e) motion.

IT IS SO MOVED.

Respectfully Submitted,

By s/E. Charles Grose, Jr.

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January 24, 2022
Greenwood, South Carolina

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SOUTH CAROLINA
JAN 27 2022

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THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	Case No. 2017-CP-42-02372
Daniel W. Spade,	)	
	)	
Applicant,	)	
	)	
vs.	)	
	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

I certify that I have served a copy of this pleading on the State of South Carolina, by emailing at copy to counsel, at the AIS email address, as reflected below:

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By s/E. Charles Grose, Jr.

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January 24, 2022

The Honorable Amy W. Cox
Clerk of Court, Spartanburg County
PO Box 3483
Spartanburg, SC 29304-3483

Re: *Daniel W. Spade v. State of South Carolina*
Case Number 2017-CP-42-02372

Dear Ms. Cox:

Enclosed for filing please find Mr. Spade's Response in Opposition to State's Rule 59(e), SCRCF Motion, along with a certificate of service.

Thank you for your attention to this matter. If you have any questions or require additional information, please contact me.

With kindest regards, I am

Yours very truly,

s/E. Charles Grose, Jr.
E. Charles Grose, Jr.

cc: The Honorable J. Mark Hayes, II (via Email and US Mail)
Mr. Daniel W. Spade (via US Mail)
Megan Harrigan Jameson, Esquire (via Email and US Mail)

AMY W. COX
CLERK OF COURT
SPARTANBURG COUNTY

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Daniel W. Spade, SCDC #358974

Applicant

vs.

State of South Carolina,

Respondent

) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL
) CIRCUIT
)

) Case No.: 2017-CP-42-02372
)

) Order
) Denying the State's Motion to
) Reconsider, Alter or Amend the Court's
) Prior of November 12, 2021 Order
) Which
) Granted a New Trial by Modifying in
) Part the Court's Prior Order of
) Dismissal Dated October 8, 2020.

This Post-Conviction Relief (PCR) case arises from the applicant's 2014 conviction of first-degree criminal sexual assault with a minor. The minor is applicant's biological daughter. The factual and legal background of this PCR is extensive because its relevancy extends back to a brief relationship the minor's biological mother had with applicant and the subsequent related family court matters.

The initial PCR application was filed in 2017. Prior to the evidentiary hearing, the application was amended several times to include thirty-one (31) different allegations of ineffective assistance of counsel. The PCR hearing was conducted between May 14, 2019 to May 20, 2019.

As mentioned, the factual information in the record of this PCR is extensive. The background dates back to January 2006 when the applicant and the minor child's mother met and the minor's birth in [REDACTED] of that same year. The record also includes several contested family court proceedings involving the minor child's mother and step-father's desire to terminate the applicant's parental rights and applicant's efforts to establish visitation with the minor. The

1 

record also contains a lengthy and substantial Department of Social Services (DSS) file that reflects DSS and law enforcements investigations.¹

The record in this PCR also contains numerous post PCR trial briefings and arguments on a variety of issues; including, the missing DSS file, order preparation and motions for reconsideration. The thirty (30) month record since the PCR evidentiary hearing also includes the briefs and oral arguments related to the applicant's Rule 59(e) that occurred on March 29, 2021.

This matter now comes before the Court on the State's Motion for Reconsideration.² In the present motion, the State seeks to have this Court reconsider, alter or amend its prior Order dated November 12, 2021. The November 12, 2021, Order granted the applicant a new trial by modifying this Court's initial Order of October 8, 2020. The October 8, 2020, Order had denied the applicant's request for post-conviction relief. As will be discussed herein, the State's motion has been appropriately considered and is denied.³

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JAMES W. COOPER

¹ The DSS file was not available for the PCR evidentiary hearing. This Court's impression was that the DSS file was unavailable because it was lost. Subsequent to the hearing, an order of this Court was issued, resulting in DSS producing the file. A redacted copy is filed under seal and part of the record.

² The present motion is the second SCRCR Rule 59(e) for reconsideration motion addressed by this Court. During the more than thirty (30) months since the evidentiary hearing to the filing of the present motion; this Court, has reviewed hundreds of pages of materials, conducted multiple reviews of the child's forensic interviews, conducted the hearing related to the missing DSS file and received multiple written submissions on various factual and legal issues.

This Court notes that applicant raised SC Constitution Article I, Section 8, SC Code Section 17-27-80 and SCRCR Rule 52 concerns as to the methodology used by this Court in issuing its October 8, 2020. Even though this Court felt its initial Order preparation did not violate the directives of Fishburne v. State, 427 S.C. 505, 832 (2019), the November 12, 2021, Order was written by this Court without reliance on proposed Orders from either party. While this Court's opinion was that it's Order preparation methodically did not violate Fishburne, the constitutional, statutory, and procedural issues raised by applicant were eliminated from this case. The present Order is also issue by this Court without reliance on proposed Orders from either party.

³ As allowed by SCRCR Rule 59(f), this Court exercises its discretion to determine this motion without oral arguments. After reviewing the State's motion, the applicant's response and given this Court's extensive history in this matter, this Court does not believe additional oral arguments will be of assistance in ruling upon the present motion.

ISSUE PRESENTED BY THE STATE

The sole challenge to the November 12, 2021, Order is related to the trial counsel's failure to object to the State's closing argument. The objectionable closing argument was presented to the jury by a private attorney⁴ appointed as a Special Counsel to assist the State in the criminal trial. This Court found the argument constitutionally improper because it shifted the role of the jury away from being fair and impartial arbiters of the facts. The State disagreed with this Court's finding that the argument was improper, disagreed with the Court's finding that trial counsel should have objected to closing argument and disagreed with this Court's analysis finding prejudice. In the motion, the state asserted this Court's "findings and conclusions are not supported by the record or case law".⁵

In response, applicant asserted the State's motion should be denied. Applicant maintained that this Court was correct in finding that the Special Prosecutor's closing argument "shifted the role of the jury away from being a fair and impractical arbitrator of the facts" and "were crafted to have the jury view the evidence through an unconstitutional lens". Applicant

⁴ The private attorney had represented the minor child's mother and step-father in a related Family Court action where in the applicant's parental rights were terminated.

⁵ A second issue is, arguably, found in Footnote 5 (page 10) of the State's motion. In Footnote 5, the State seeks to have Footnote 18 (prior order page 17), of the November 12, 2021, Order removed from the November 12, 2021, Order or, at least, clarified.

Footnote 18 of the November 12, 2021, Order stated that the issue of improper bolstering was a "close call". This Court went on to make a finding of prejudice on the issue of improper bolstering in the event the Court's finding that no improper bolstering occurred was reversed on appeal.

As to the issue raised in Footnote 5 of the State's Motion concerning Footnote 18 of November 12, 2021, Order, applicant agreed with the Court's finding of prejudice regarding trial counsel's failure to object to improper bolstering. Notwithstanding, applicant went on to contend that he had also established trial counsel deficient performance to the allegations of improper bolstering for the reasons set forth in prior pleadings and during the prior 59(e) motions.

This Court has reviewed Footnote 18 of the November 12, 2021, Order and finds it is proper. The issue of bolstering as to witness Thompson-Loftis (State v. Makin analysis) and/or the Advocacy Center's forensic interviewer Weber (Douglas, Emsie, Cromer and Dawkins) is a close call. For clarity purposes, this Court found prejudice existed in the event this Court was incorrect and that Trial Counsel should have objected to the presentation of either or both of these witnesses. After having reconsidered this issue, including but not limited to the arguments presented during the reconsideration hearing on March 29, 2021, this Court believes its finding of prejudice is a proper and is an efficient use of Court resources given the questionable use of the forensic interviewer as a fact witness at trial when the forensic interviews were not presented to the jury and the manner in which Thompson-Loftis (Makin) was used at trial.

also maintained that this Court properly applied a Smalls⁶ analysis when prejudice was determined.

Having considered the arguments, the prior filings in this matter and, again, reviewed applicable portions of the record, the State's motion to alter or to amend this Court's November 12, 2021, Order is denied.

SCRCP RULE 59(e)

The purpose of SCRCP Rule 59(e), to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

To preserve issues for the appellate review, "after an order is filed, counsel has an obligation to review the order and file a 59(e) motion if the order fails to set forth findings and the reasonings for those findings. Simmons v. South Carolina, 416 S.C. 584, 788 S.E.2d 220 (2016). One of the reasons for this preservation requirement is that it prevents a party from keeping an ace card up its sleeve – intentionally or by chance – in hopes an appellate court will accept the card. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.C. 406, 526 S.E.2d 716 (2000). A party cannot use Rule 59(e) to present to the trial court an issue the party could have raised previously but did not. See, Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995); Crary v. Djebelli, 321 S.C. 38, 467 S.E.2d 128, 131-32 (Ct. App. 1995) rev'd on other grounds, 329 S.C. 385, 496 S.E.2d 21 (1998). Also, a party should not use a 59(e) motion to assert a position which is inconsistent with positions previously taken in the same action on the record or issues the party had previously conceded on the record. See, Steven & Wilkinson of South Carolina v. City of Columbia, 409 S.C. 563, 762 S.E.2d 693 (2014).

⁶ Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In the prior analysis, this Court also relied on Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018).

DISCUSSIONS

As previously noted, the State's position in the present motion is that this Court's findings and conclusions related to Special Counsel's closing, trial counsel's failure to object, and the finding of prejudice, are not supported by the record or case law. After reviewing the motion and the applicant's response, the relevant portions of the record and the applicable case law, this Court finds the State's positions are without merit. Therefore, the motion is denied.

In addition to the State's motion having no merit, this Court notes prior to receiving the present motion, the State and the applicant agreed that Smalls was the controlling authority when determining prejudice related to the closing argument. When summarizing its position during oral arguments, the State presented to this Court:

We totally agree that Smalls is the appropriate analysis, that your Honor needs to look at for prejudice in the State of South Carolina, not a cumulative error.

The present motion is void of any reference to Smalls or the requested Smalls analysis.

Also, the State asserted to this Court that it did not challenge this Court's finding that Special Counsel's motivation for his closing was to appeal to the jury's sympathies. While the State's position was that the analysis was not limited to the Special Prosecutor's motivation, the State agreed with this Court's prior position and that the record supported this Court's views as to Special Counsel's motivation. The State's comment during the hearing was that it did not wish to "impugn" State's PCR counsel's "credibility" by challenging Special Counsel's motivation.⁷ The audio recording of the prior oral arguments indicates the following was presented to this Court:

State – Again we go back to the closing argument the state asserts Mr. Brannon testified as to his motives for making the statements the inquiry does not end there, you have to look at the entire record. and the state cited in our Return Smalls. We totally agree

⁷ After reviewing the State's motion, this Court felt the need to obtain an unofficial audio transcript of the March 29, 2021, oral arguments.

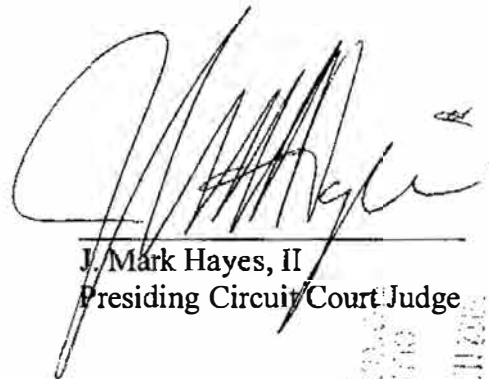
Smalls is the appropriate analysis that your honor needs to look at for prejudice in the state of South Carolina, not a cumulative error analysis. Smalls actually I think heightens the need to compare the specific prejudice or the deficiencies, compare it to the record as a whole and determine whether or not prejudice was established. And the State will rely on it in its return.⁸

As reflected in the prior Order, this Court performed the analysis using Smalls that was requested by the State and agreed to by applicant. Pages 19 to 27 of the November 12, 2021, Order, contains this Court's analysis of the closing argument presented by the Special Counsel. This Court finds no reason to modify this Court's factual or legal analysis or the conclusions reached in the November 12, 2021, Order relating to the closing argument.

CONCLUSION

Having reviewed and considered the State's SCRPC Rule 59(e) motion, the applicant's response, the prior orders, the filings, and transcripts, the State's motion is, again, without merit and is denied.

It Is So Ordered.



J. Mark Hayes, II
Presiding Circuit Court Judge

Spartanburg, South Carolina

This 11th day of March, 2022.

⁸ In the State's motion pp 19 to 20, a portion of Brannon's PCR hearing testimony is quoted in an effort to explain the State's disagreement with this Court's finding that the argument made at trial was not unconstitutional. Having witnessed and heard this testimony of the Special Counsel during the PCR hearing, the more reasonable and accurate conclusion of the quoted testimony is that, being a private attorney, Special Counsel incorrectly viewed the role of zealous advocacy of a private attorney in a criminal trial as constitutionally the same as the role of a solicitor.