

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Sep 25 2020

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
J. Derham Cole, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2020-000806

George S. Branham, II, ...Petitioner,

v.

State of South Carolina, ...Respondent.

APPENDIX – VOLUME II OF II

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for Petitioner George Branham, II

Alan Wilson
Attorney General

Samuel L. Key
Assistant Attorney General

Post Office Box 11549
Columbia, Sc 29211
(803) 734-3727

*Attorneys for Respondent State of South
Carolina*

INDEX

Volume I

Record on Appeal¹

Cover Page to Record on Appeal.....	vi
Index to Record on Appeal	vii
Trial Transcript (August 22-25, 2020)	
Cover Page	1
Court Reporter's Index	2
Alma Dent (<i>In Camera</i>)	
Direct examination by Ms. Barry.....	29
Cross-examination by Mr. Kirincich	34
Re-Direct Examination by Ms. Barry	39
Re-Cross Examination by Mr. Kirincich	43
Debbie Elliott (<i>In Camera</i>)	
Direct Examination by Ms. Barry	46
Cross Examination by Mr. Kirincich	48
Re-Direct Examination by Ms. Barry	51
Re-Cross Examination by Mr. Kirincich	63
Re-Direct Examination by Ms. Barry	66
Re-Cross Examination by Mr. Kirincich	67
Debra Scott (<i>In Camera</i>)	
By. Ms. Barry.....	68
Michael Lyons (<i>In Camera</i>)	
Direct Examination by Mr. Moak	89
Cross Examination by Mr. Kirincich	91
Re-Direct Examination by Mr. Moak	95

¹ The cover page and index to the Record on Appeal are numbered vi-vii. The rest of the Record on Appeal is included in this Appendix in a manner that retains its original page numbering.

Open Statements

By Mr. Moak.....	106
By Mr. Kirincich.....	113

Jessica Scott

Direct Examination by Mr. Moak.....	120
Cross Examination by Mr. Kirincich.....	142
Re-Direct Examination by Mr. Moak.....	159
Cross Examination by Mr. Kirincich.....	165

Child

Direct Examination by Ms. Barry.....	167
Cross Examination by Mr. Kirincich.....	175
Re-Direct Examination by Ms. Barry.....	182

Jessica Scott (*In Camera*)

Direct Examination by Mr. Kirincich.....	185
Cross Examination by Mr. Moak.....	188

Dr. Foy Connell

Direct Examination by Mr. Moak.....	192
Cross Examination by Mr. Kirincich.....	202
Re-Direct Examination by Mr. Moak.....	213
Re-Cross Examination by Mr. Kirincich.....	217

Debbie Elliott

Direct Examination by Ms. Barry.....	218
Cross Examination by Mr. Kirincich.....	242
Re-Direct Examination by Ms. Barry.....	254

Rebecca Scheffer

Direct Examination by Mr. Moak.....	260
Cross Examination by Mr. Kirincich.....	276
Re-Direct Examination by Mr. Moak.....	281

Amanda Webb

Direct Examination by Mr. Moak.....	282
Cross Examination by Mr. Kirincich.....	287

Michael Lyons	
Direct Examination by Mr. Moak.....	288
Cross Examination by Mr. Kirincich.....	296
Dr. Kathy Saunders	
Direct Examination by Ms. Barry.....	304
Cross Examination by Mr. Kirincich.....	330
Re-Direct Examination by Ms. Barry.....	336
Re-Cross Examination by Mr. Kirincich.....	342
Dr. Kathy Saunders (<i>In Camera</i>)	
Direct Examination by Mr. Kirincich.....	347
George Stanley Branham II	
Direct Examination by Mr. Kirincich.....	365
Cross Examination by Ms. Barry.....	388
Direct Examination by Mr. Kirincich.....	399
Cross Examination by Ms. Barry.....	401
George Stanley Branham Sr.	
Direct Examination by Mr. Kirincich.....	406
Cross Examination by Mr. Moak.....	411
Closing Argument	
By Mr. Moak.....	418
By Mr. Kirincich.....	434
By Ms. Barry.....	448
Charge of the Court.....	455
Verdict of the Jury	472
Sentence of the Court.....	488
Certificate of Court Reporter	489
Indictment	490
Sentencing Sheet.....	492

Motion for New Trial.....	493
Motion for Reconsideration	497
Order Denying Motion for New Trial.....	499
Order Denying Motion for Reconsideration	500

Volume II

Certificate of Counsel	501

Post-Conviction Relief Materials

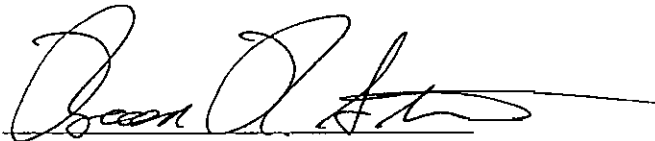
Order for Discovery (July 14, 2015).....	502
Order Substituting Counsel (April 17, 2018).....	504
Order of Dismissal (February 12, 2019).....	505
Order Denying Rule 59(e), SCRCP Motion (May 20, 2020)	528
Application for Post-Conviction Relief (August 4, 2014)	529
Motion for Discovery and Production of Documents (June 23, 2015).....	575
Motion for Production of New Trial Transcript (June 23, 2015)	578
Return to Application for Post-Conviction Relief (January 30, 2015)	581
Amended Application for Post-Conviction Relief (January 22, 2016).....	588
Rule 59(e), SCRCP Motion & Proffer of Proposed Orders (February 24, 2019)	
Motion	592
Proffer of George Branham’s Proposed Order	610
Proffer of State’s Proposed Order.....	669
Letters to PCR Court	
October 28, 2019.....	696
December 23, 2019	697

January 6, 2020	755
Return to Rule 59(e), SCRC Motion (February 10, 2020)	761
Evidentiary Hearing Transcript (February 4, 2016)	777
Dr. Olga Rosa	
Voir Dire Examination by Ms. Goldberg	783
Voir Dire Examination by Mr. Mitchell	785
Direct Examination by Ms. Goldberg	787
Cross-examination by Mr. Mitchell	793
Redirect Examination by Ms. Goldberg	797
Examination by the Court	799
George Branham	
Direct Examination by Ms. Goldberg	800
Cross-examination by Mr. Mitchell	806
Redirect Examination by Ms. Goldberg	813
Examination by the Court	813
Jason Kirincich	
Direct Examination by Ms. Goldberg	814
Cross-examination by Mr. Mitchell	837
Redirect Examination by Ms. Goldberg	851
Closing Arguments	
By Ms. Goldberg	853
By Mr. Mitchell	873
By Ms. Goldberg	889
Court Reporter's Certificate	898

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

This 26th day of October, 2012

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF KERSHAW	)	DOCKET NO.: 2014-CP-28-703
GEORGE S. BRANHAM, II,	)	
SCDC # 347471	)	
Applicant,	)	
v.	)	ORDER FOR DISCOVERY/ PRODUCTION OF DOCUMENTS
STATE OF SOUTH CAROLINA,	)	
Respondent,	)	

JOYCE HODGKINS
CLERK OF COURT
KERSHAW COUNTY, S.C.

2015 JUL 16 AM 10:29

FILED FOR RECORD

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on August 4, 2014. The State submitted a Return on January 30, 2015. Kristy Goldberg, Esquire, was appointed to represent the Applicant by Order dated August 8, 2014.

Applicant, through counsel, has requested and received funding for an expert to review medical records, photographs, and the forensic interview video for the purpose of obtaining a second opinion to compare to that offered by expert witnesses at trial. Counsel for the applicant has reviewed a copy of trial counsel's file and which is missing some documents. Counsel for the applicant has requested to obtain color copies of the items entered into evidence during the jury trial so that the retained expert can evaluate these documents in formulating a second opinion. To ensure that all relevant documents are reviewed, Applicant has requested a Court Order for the production of the following case documents pursuant to S.C. Code Ann. §17-27-150(a) (2008).

This Court finds that the above listed documents and case materials are necessary for counsel to properly prepare his case and to present his claims.

IT IS THEREFORE ORDERED that counsel for the Applicant is allowed obtain color copies of any photos, documents and videos entered into evidence in the jury trial

GP

x

of State v. George Branham. It is also ordered that counsel for the Applicant may provide these documents to Dr. Olga Rosa, the expert who will be retained to review the documents and provide a second opinion.

IT IS ALSO ORDERED, that this matter be continued until the next regularly scheduled term of court, which at this time is the week of December 7, 2015.

AND IT IS SO ORDERED this 14 day of July, 2015.


G. THOMAS COOPER, JR.
Presiding Judge
Fifth Judicial Circuit

Cowan, South Carolina

7-14, 2015

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW	)	
	)	Case No. 2014-CP-28-00703
George Stanley Branham, II,	)	
Applicant	)	Order Substituting Counsel
	)	
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

This matter came before the Court on the motion of George Branham, II for an order substituting Charles Grose as his counsel of record. I find this motion should be granted.

Therefore, it is ordered that Charles Grose is substituted for Kristy Goldberg as counsel of record for Mr. Branham.

4/17, 2018
Spartanburg, South Carolina



J. Derham Cole
Presiding Judge, Fifth Judicial Circuit

W so move:

 2-16-18
George Branham II



E. Charles Grose, Jr. 2/16/2019
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-28-00703

George Stanley BRANHAM, II, SCDCID#
347471

The STATE of South Carolina,

Applicant

Respondent

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

IT IS ORDERED AND ADJUDGED: ☒ Formal order is attached; ☒ Statement of Judgment by the Court:

This matter came before this court on an application for post-conviction relief filed pursuant to *South Carolina Code Annotated Section 17-27-10 et seq.*

Based upon the record of the case, the evidence presented at the evidentiary hearing held in this matter, the argument of counsel, and consideration of the applicable statutory and case law, this court finds that the applicant's request for **post-conviction** relief should be and is therefore **denied** and the **application** is **dismissed** with prejudice for failure of the applicant to establish deficient performance of counsel and/or prejudice resulting from counsel's performance.

Dated at Spartanburg, South Carolina, this **12th** day of **February, 2019**.



PRESIDING JUDGE, J. Derham Cole

This judgment was entered on the _____ day of **February, 2019**, and a copy mailed first class this day of **February, 2019** to attorneys of record or to parties (when appearing pro se) as follows:

Kristy G. Goldberg, Esq.
1720 Main Street, Suite 303
Columbia, South Carolina 29201

J. Clayton Mitchell, Esq.
Post Office Box 11549
Columbia, South Carolina 29211-1549

E. Charles Grose, Esq.
404 Main Street
Greenwood, South Carolina 29646

Kelly Oppenheimer, Esq.
Post Office Box 11549
Columbia, South Carolina 29211-1549

ATTORNEY(S) FOR THE APPLICANT

ATTORNEY(S) FOR THE RESPONDENT

CLERK OF COURT, Janet C. Hasty

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

George Stanley Branham, II, #347471,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2014-CP-28-00703

ORDER OF DISMISSAL

FILED FOR RECORD
2019 FEB 15 AM 10:30
JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed August 4, 2014. Respondent made its Return on January 30, 2015, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel filed an amended application for post-conviction relief on January 22, 2016. An evidentiary hearing was convened on February 4, 2016, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Kristy G. Goldberg, Esquire. Respondent was represented by Assistant Attorney General J. Clayton Mitchell, III of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. Applicant was indicted during the July 2011 term of the Kershaw County Grand Jury for first-degree criminal sexual conduct with a minor (2010-GS-28-0448). Jason D. Kirincich, Esquire represented Applicant on this charge. On August 22-25, 2011, Applicant proceeded to a jury trial before the Honorable Clifton Newman, where he was convicted as indicted. Judge Newman sentenced Applicant to fifty years imprisonment for first-degree criminal sexual conduct with a minor.

A Notice of Appeal was filed with the South Carolina Court of Appeals. Breen Richard Stevens, Esquire, of the South Carolina Commission on Indigent Defense, Office of Appellate

Defense perfected an appeal on Applicant's behalf. In his *Anders*¹ brief, Applicant raised the following issue:

Whether the trial court reversibly erred resulting in a violation of [Applicant's] Due Process right to present a complete defense by prohibiting [Applicant] to introduce evidence of a prior false allegation of abuse made by Child complainant's older sibling against [Applicant] thus depriving [Applicant] of the ability to show that Child's family had a history of coaching alleged sexual assault victims?

Applicant subsequently filed a *pro se* brief. The South Carolina Court of Appeals issued an order dismissing Applicant's appeal without argument on September 4, 2013, and granted counsel's request to withdraw. *State v. Branham*, Op. No. 2013-UP-346 (S.C. Ct. App. Filed September 4, 2013). Applicant filed a petition for rehearing, which was denied on October 24, 2013. The Remittitur was issued on December 5, 2013.

In his amended application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

- a. Ineffective assistance of trial counsel for failure to object to hearsay statements. Tr. 135 and 136.
- b. Ineffective assistance of trial counsel for asking questions regarding prior allegations of sexual misconduct against the defendant, alerting the jury to this fact without the opportunity to explain to the jury the result or circumstances of such allegations. Tr. 157-158.
- c. Ineffective assistance of counsel for failing to object to the qualification of witness Debbie Elliott as an expert in child abuse assessment and forensic interviewing.
- d. Ineffective assistance of counsel for failing to object when witness Debbie Elliott offered testimony in front of the jury that was not limited to foundational information for introduction of the interview videotape. Specifically, counsel failed to object when this witness offered information

¹ *Anders v. California*, 386 U.S. 738 (1967).



regarding techniques involved in conducting the interview, theories regarding types of disclosures, and conclusions and opinions regarding the victim's credibility and ability to understand the difference between the truth and a lie.

- e. Ineffective assistance of counsel for failing to retain and consult with a forensic pediatrician for a second opinion regarding the medical and photograph evidence.
- f. Ineffective assistance of counsel for failure to object when Dr. Saunders testified regarding hearsay information obtained from prior medical records not offered in trial. Tr. 323-324.
- g. Ineffective assistance of counsel for failure to object when the Judge charged that "testimony of an alleged victim in a criminal sexual conduct case need not be corroborated" and the Solicitor put special emphasis on this during closing arguments. Tr. 427 and 456.
- h. Ineffective assistance of counsel for failing to object to the Solicitor's improper pitting of the witnesses. Tr. 401-402.
- i. Ineffective assistance of counsel for failing to object to prior consistent statements of the witnesses as impermissible hearsay which bolstered the witness testimony. Inadmissible prior consistent statements of the witnesses were offered without objection through:
 - a. The admission of written reports and medical records. Tr. 265 and 191.
 - b. Through the testimony of witnesses. Tr. 125, 266, 268-271, 313-314.
- j. Ineffective assistance of counsel for failure to object to the replay of the forensic interview video in the jury room.

In addition to those allegations set forth in his amended application for post-conviction relief, Applicant also proceed on an additional claim of cumulative error to which the State consented.

 3

STATEMENT OF FACTS ADDUCED AT TRIAL

On December 8, 2009, Victim, Victim's mother, Jessica Scott, and Ms. Scott's other children were living with Applicant. Trial Tr. 121, 123, 169. That night, Applicant had been at a neighbor's house drinking. Trial Tr. 123. Ms. Scott, Victim, and Ms. Scott's other children were all sleeping in Ms. Scott's bed together. Trial Tr. 123-24, 171. When Applicant returned home, at about two o'clock, he came into the bedroom and woke Ms. Scott. Trial Tr. 124. They spoke for a while, and then Ms. Scott returned to bed. Trial Tr. 124.

Later, Victim woke up to use the restroom. Trial Tr. 171. While she was in the hall, just outside of the bathroom, Victim was lying on the ground, and Applicant was on top of her. Trial Tr. 172. Applicant had pulled down his pants, as well as Victim's. Trial Tr. 172. Applicant then proceeded to have sexual intercourse with Victim. Trial Tr. 172-73, 175.

When Ms. Scott realized Victim was no longer in her bed, she got up to look for her. Trial Tr. 124. She walked into the kitchen and could see Applicant in the hallway, lying on top of Victim with his pants around his ankles. Trial Tr. 124. Ms. Scott could see Victim's pants were also down. Trial Tr. 124. When Ms. Scott confronted Applicant, Applicant jumped up, pulled his pants up, and told Ms. Scott he was trying to make Victim go to the bathroom. Trial Tr. 124, 127, 130. Applicant also told Ms. Scott he was just to check to see if Victim had wiped herself well after using the bathroom. Trial Tr. 130, 131. Ms. Scott took Victim to the bathroom, and Victim proceeded to use the bathroom. Trial Tr. 124, 130-31. She then took Victim back into her bedroom, and Victim informed her Applicant was trying to have sexual intercourse with her. Trial Tr. 125. Ms. Scott then called 911. Trial Tr. 125.

Ms. Scott's mother arrived in the early hours to take Victim to the hospital because Victim was complaining of vaginal pain. Trial Tr. 133, 314. While there, Dr. Foy Connell examined Victim. Trial Tr. 196. Dr. Kathy Saunders also examined Victim a couple of days after the abuse. Trial Tr. 312. Upon examination of Victim, there was attenuation of the hymen, which was consistent with past penetration. Trial Tr. 197, 203, 317-18. Although there were no signs of tearing, bruising, or bleeding, the opening of Victim's vagina appeared to be dilated, which was indicative of prolonged abuse. Trial Tr. 197, 203, 210, 332. Because Victim's vagina was widened at the time of the exams, penetration could have occurred between hours and days of the exam. Trial Tr. 214. Victim's genitalia were also red and irritated. Trial Tr. 209, 317. There was a

small amount of clear discharge present as well. Trial Tr. 318, 320. In addition, there was some avascularity along the posterior rim of Victim's vagina, which was also consistent with past penetration. Trial Tr. 322.

TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented testimony from Dr. Olga Rosa, trial counsel, Jason D. Kirincich (hereinafter "Counsel"), and Applicant testified on his own behalf. This Court also had before it a copy of Applicant's trial transcript, the records of the Kershaw County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant first presented testimony from Dr. Olga Rosa. Dr. Rosa testified she currently works with the Department of Pediatrics at the University of South Carolina School of Medicine, where she has been employed since October 2004, and at Palmetto Health Children's Hospital. PCR Tr. 7. Dr. Rosa testified she currently works as a pediatrician and is the director of the statewide medical response system to child abuse and neglect. PCR Tr. 8. In her position as director, she performs medical evaluations and assessments for children that are referred to the program for suspected abuse and neglect. PCR Tr. 8. Furthermore, she directs, coordinates, and develops the medical response system throughout South Carolina for child abuse and neglect. PCR Tr. 8. She testified she attended medical school at the University of Puerto Rico School of Medicine and did her residency program in pediatrics at the University Children's Hospital in San Juan, Puerto Rico. PCR Tr. 7. She further testified that she completed a fellowship in forensic pediatrics at Bryan University School of Medicine in Providence, Rhode Island. PCR Tr. 7. Dr. Rosa testified she has been retained to consult in child abuse and neglect cases before and has previously been qualified as an expert in general pediatrics and in child abuse pediatrics. PCR Tr. 8-9. She testified in such cases she has either based her opinion on a physical examination of the child or on the medical records of that child. PCR Tr. 10. Following Dr. Rosa's testimony as to her credentials and practice, she was offered and qualified as an expert in child abuse pediatrics. PCR Tr. 9-10.

Dr. Rosa testified she reviewed the trial transcript, focusing on the physicians involved in Applicant's case, as well as the medical records for Victim, including the visits to the Care House



of the Pee Dee for medical assessment, to the Kershaw Emergency Room, and to Lexington Medical Center, as well as the CD of the forensic interview. PCR Tr. 10-11. She testified about ninety percent of diagnosis is based on medical history and the report from the patient. PCR Tr. 22-23. She testified she also reviewed some photographs of Victim's hymenal tissue in preparation for this evidentiary hearing. PCR Tr. 11. She testified she agreed with Dr. Saunders, who testified at Applicant's trial and took these photographs of Victim, as to the appearance of redness and shape of the hymen but that she disagreed with Dr. Saunders regarding the avascularity area or scar tissue on the posterior hymen. PCR Tr. 15-17. She testified the genital area can heal quickly and that the lack of acute trauma at the time these photographs were taken does not rule out past penetration. PCR Tr. 19-20. She testified she believed that Victim had been sexually assaulted. PCR Tr. 21. She further testified had she been called to testify at Applicant's trial, she would have testified that Victim had a normal physical exam but that it would have been her opinion that Victim had been sexually abused. PCR Tr. 23.

After Dr. Rosa's testimony, Applicant testified on his own behalf. Applicant testified he was first represented by Cornelius Riley, Esquire, who was relieved before trial, and that Counsel became his attorney two to three months before his trial. PCR Tr. 25. Applicant testified Counsel only met with him once while he was in jail and that they reviewed the CD of the forensic interview. PCR Tr. 25. Applicant further testified he does not recall discussing trial strategy with Counsel. PCR Tr. 26. Applicant testified the Ms. Scott, testified at his trial as to what she saw the night of the alleged assault and that she made a statement to the police. PCR Tr. 31, 34. Applicant denied ever making a comment to the police that he was just helping Victim wipe. PCR Tr. 31-32. Applicant testified although he testified at trial, he was unable to speak on his defense. PCR Tr. 27-28. Applicant further testified his testimony at trial indicated he believed Victim was abused and encouraged Ms. Scott to report the abuse and to seek treatment. PCR Tr. 32. He further testified he did not admit to the allegations against him. PCR Tr. 31-32.

Applicant testified Counsel asked Ms. Scott about a second allegation made against Applicant by a different child, which Counsel and Applicant discussed in advance of trial and discussed using this as a trial strategy. PCR Tr. 27. Applicant further testified he wanted to show there was a history of coaching between Victim's father and the children who were making allegations against Applicant, and Victim's father coached these children into making false



allegations so that he could get back at Applicant for being in a relationship with Ms. Scott. PCR Tr. 27-28. Applicant testified he and Counsel discussed this strategy well in advance of his trial. PCR Tr. 28. He testified the child who made the false allegation against him admitted he was coached by his father to make a false allegation against Applicant. PCR Tr. 28-29. He further testified he had the documentation of this false allegation, and he gave Counsel the documentation but that the jury was unable to hear the end result of this allegation. PCR Tr. 29. Applicant testified he was able to testify at trial Victim could be influenced to make false allegations against him. PCR Tr. 33-34. Applicant also testified he knew Ms. Scott had a drug problem, but he was not able to tell the jury that the night of the alleged assault they had gotten into an argument regarding her drug use, which led to Ms. Scott making these allegations against him. PCT Tr. 36-37. He further testified he was able to testify at trial that he and Ms. Scott had an argument over drugs, but she testified that they argued over cigarettes. PCR Tr. 35-36. Applicant testified the solicitor and the trial court prevented him from testifying about certain things because the court ruled they were hearsay. PCR Tr. 37.

Applicant also testified he did not discuss with Counsel the possibility of having a medical expert to consult on his case, and he was unaware that he could get funding for a medical expert. PCR Tr. 29. Applicant further testified, to his knowledge, Counsel did not consult any medical expert or request funding for any kind of expert. PCR Tr. 29. Applicant testified he does not believe that Counsel should have allowed the video of the forensic interview to be played in the jury room but that the video was entered into evidence. PCR Tr. 29-30.

Following Applicant's testimony, Counsel testified. Counsel testified he has been working at the Kershaw County Public Defender's Office since 2007. PCR Tr. 38. He testified he began representing Applicant between March and May of 2011. PCR Tr. 38. He testified he met with Applicant numerous times, particularly in the week before his trial. PCR Tr. 39. He further testified he helped Applicant prepare a defense. PCR Tr. 40. He elaborated Applicant gave him a list of several people that he wanted to be called as character witnesses. PCR Tr. 40. Furthermore, Counsel testified he and Applicant developed a strategy that Victim's family coached Victim in order to avoid exposing Ms. Scott's drug use and because the family did not like Applicant. PCR Tr. 40. He elaborated he and Applicant discussed the possibility of coaching, he



based his strategy off of his discussions with Applicant, and he requested records from Victim's school regarding abuse she experienced in class. PCR Tr. 40.

Counsel testified he first asked about prior allegations against Applicant during an in-camera pre-trial hearing of Ms. Elliott, and the trial court told Counsel he could go into those allegations if he wanted, but they were clearly not part of Applicant's case. PCR Tr. 41-43. Counsel further testified he never asked the court for an instructional ruling or order regarding Counsel's ability to ask about past events or whether there was prior evidence of coaching. PCR Tr. 42. From this, Counsel testified, he had a reason to believe that the trial court would not allow Counsel to go into issues of prior allegations. PCR Tr. 42. Counsel further testified that at Applicant's trial, he did ask Ms. Scott if anyone in her family had ever made a false allegation of sexual abuse against Applicant, and the trial court sustained the State's objections to those questions. PCR Tr. 43. He further testified he was able to argue that Ms. Scott was not credible, and Victim had been influenced. PCR Tr. 63-64. Counsel testified he did not recall making arguments regarding the admissibility of any testimony regarding the coaching of Victim. PCR Tr. 44. Counsel testified his strategy was to discredit Ms. Scott, who was an eyewitness to the alleged assault. PCR Tr. 75. Further, he testified the State tried to use a statement made by Applicant to the police, in which Applicant explained he was trying to help Victim wipe because she had problems with cleaning. PCR Tr. 62. Counsel testified he does not specifically remember challenging this statement, but Applicant was able to testify that he never made that statement to the police. PCR Tr. 62. Counsel further testified he did not object when Ms. Scott testified about various doctors' diagnoses of Victim. PCR Tr. 57.

Counsel testified Applicant readily admitted that Victim had been abused and there was no reason for Counsel to believe that Victim had not been abused. PCR Tr. 69.

Counsel testified he did not object to the forensic interviewer, Debbie Elliott, being offered as an expert and that this decision was not based on trial strategy, but the law was unclear at the time of the trial as to the admissibility of these types of experts. PCR Tr. 45, 74. Counsel testified at the time of Applicant's trial, he had seen the State offer forensic interviewers as experts and challenges of bolstering were not successful. PCR Tr. 64. He further testified he objected neither to Ms. Elliott's description of the competency exercise she performs to determine if a child understands the difference between a truth and a lie nor to her emphasis that Victim tell the truth

and there was no strategic reason for him not objecting. PCR Tr. 46-47. He testified he did not object to Ms. Elliott's testimony that she could tell if the victim was lying, but an interviewer is permitted to describe a child's behavior and demeanor. PCR Tr. 49, 66. Counsel testified he did not object when Ms. Elliott testified at trial as to what Victim told her, and he did not object when she testified that it was her opinion Victim was not affected by any third party influence or coaching. PCR Tr. 49. He further testified he objected neither when Ms. Elliott testified it was her opinion Victim had been chronically sexually abused by Applicant nor when she recommended that the victim have no contact with Applicant. PCR Tr. 50. Counsel further testified he did make an argument that the videotape of the forensic interview should not be admitted into evidence because it was inadmissible hearsay and bolstering, but he did not make the same argument as to Ms. Elliott's actual testimony. PCR Tr. 50. He testified he did not object to allowing the jury to watch the video of the forensic interview again. PCR Tr. 60.

Counsel testified he neither hired a medical expert nor consulted with an independent expert, but he did meet with Dr. Saunders prior to trial in order to review the photographs and her trial testimony. PCR Tr. 53. He testified he wanted to hire an expert to perform a psychosexual exam on Applicant in order to show that criminal sexual conduct was not in Applicant's nature and to mitigate Applicant's responsibility. PCR Tr. 53-54, 68. He testified he did ask the court for an expert, but the trial court denied his request. PCR Tr. 54.

He further testified he did not object to the medical records that were entered, and he did not object to Dr. Saunders's account of her review of Victim's medical records and of what she was told by Victim and Victim's father. PCR Tr. 57-58. He also testified he did not object to Ms. Scott's testimony regarding what diagnoses Victim had received from previous doctors. PCR Tr. 57. Counsel testified he attempted to ask Dr. Saunders about prior reports of abuse by Applicant from Victim's siblings, but after an in-camera review of this testimony and argument regarding the admissibility of these prior allegations, the trial court ruled that reference to these other allegations were inadmissible. PCR TR. 72-73. He also testified Dr. Connell, who evaluated Victim on the night of the alleged assault, testified at trial there were no signs of tearing, bruising, or bleeding, which was inconsistent with Dr. Saunders's testimony, and it was his strategy to try to exploit those differences. PCR Tr. 70-71. Counsel further testified he was able to articulate the fact that there was no physical injury to the jury. PCR Tr. 71.



Counsel testified Applicant testified at his trial, and Counsel did not object to the State's questions asking Applicant if he thought other witnesses were lying. PCR Tr. 59.

Counsel also testified he did not object to the trial court's reference to the statute that dictates that in a sexual assault case, the victim does not have to be corroborated. PCR Tr. 59-60. He further testified he believes that this instruction to the jury regarding corroboration of the victim is correct. PCR Tr. 73.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must

have prejudiced the applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

*Counsel's alleged failure to object to hearsay statements made by
Victim's mother*

Applicant alleges Counsel was ineffective for failing to object to statements made by Victim's mother, Ms. Scott, regarding the doctors' diagnoses of Victim. Specifically, Applicant contends Counsel should have objected when Ms. Scott testified the doctors told her Victim's hair was falling out due to stress. Trial Tr. 135. Applicant further contends Counsel was ineffective for failing to object when Ms. Scott testified the doctors told her Victim's vagina was red, irritated, and had urinary tract infections. Trial Tr. 136. This Court finds Applicant has failed to establish any prejudice resulting from Counsel's alleged deficiencies and that this allegation must be denied and dismissed with prejudice. The South Carolina Rules of Evidence provide that an expert witness may base his or her opinion upon those facts or data in a particular case even if those facts and data may not be admissible in evidence, if reasonably relied on by experts in the field. Rule 703, SCRE. Dr. Saunders testified at Applicant's trial and was qualified as an expert in forensic child sexual assault examination. Dr. Saunders testified she uses medical records as a guide when examining a child who may have been subject to sexual abuse. Trial Tr. 312. Furthermore, Applicant's own expert, Dr. Olga Rosa, testified at the evidentiary hearing that medical diagnoses are based approximately ninety percent on a patient's medical history. PCR Tr. 22. Because the State's expert at trial testified to previous doctors' diagnoses of Victim, any alleged deficiency by Counsel in failing to object to these statements during the testimony of Ms. Scott could not have had any impact on the result of the proceeding and was entirely cumulative to other properly admitted evidence. Based on the foregoing, this Court finds that this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure in asking questions regarding prior
allegations of sexual misconduct against Applicant*

Applicant alleges Counsel was ineffective for asking questions regarding prior allegations of sexual misconduct against Applicant, thereby alerting the jury to this fact without the opportunity to explain to the jury the result or circumstance of these allegations. Specifically, Applicant contends Counsel was ineffective for asking Ms. Scott whether Victim's older sibling alleged he had been abused and whether anyone in her family had ever made a false allegation of sexual abuse against Applicant. Trial Tr. 157. Applicant testified he and Counsel discussed bringing up prior allegations of assault made against Applicant prior to the trial. PCR Tr. 27. Applicant further testified he wanted to elicit information about these allegations to show a history of coaching by Victim's father. PCR Tr. 27-28. He further testified the jury was not able to hear the end result of these prior allegations. PCR Tr. 29. Counsel testified his defense strategy was to allege that Victim's family was lying about these allegations and to allege coaching of Victim by her family. PCR Tr. 40-41, 61. Furthermore, Counsel testified he based this strategy off of his discussions with Applicant. PCR Tr. 68. This Court finds that this strategy was valid and prudent based on all testimony presented; and, therefore, Counsel's performance was not deficient. *See Edwards v. State*, 392 S.C. 449, 456-57, 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). The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689. Accordingly, we must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). This Court finds that counsel's performance went well beyond the standard of reasonableness according to professional norms, and, therefore, Applicant has failed to establish any deficiency regarding this allegation. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to the qualification of the
State's expert in child abuse assessment and forensic interviewing*

12

Applicant alleges that Counsel was ineffective for failing to object to the qualification of witness Debbie Elliott as an expert in child abuse assessment and forensic interviewing. Counsel testified forensic interviewers had been offered as experts prior to and around the time of Applicant's trial but now he can definitely surmise that his failure to object to Ms. Elliott's qualification as an expert witness was a mistake. PCR Tr. 45, 64. Evaluating attorney performance, however, "requires that 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. Counsel's performance must be evaluated based on the reasonable professional practices at the time of Applicant's trial. In *State v. Douglas*, the South Carolina Court of Appeals held the trial court did not abuse its discretion in finding a forensic interviewer had "'acquired by study or practical experience such knowledge of the subject matter of [her] testimony as would enable [her] to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge'" when the interviewer had previously been qualified in family court, circuit court, and federal court as an expert witness in interviewing child sexual assault victims, had received specialized training in the RATAC method, and had been certified as a forensic interviewer using the RATAC method. 367 S.C. 498, 519, 626 S.E.2d 59, 70 (Ct. App. 2006), *reversed on other grounds by State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009). In holding that it was unnecessary for the trial court to admit the forensic interviewer as an expert, the Supreme Court of South Carolina, in dicta, noted although it was unnecessary to admit the forensic interviewer in that case as an expert, there may be a case in which qualification of an expert in the field of forensic interviewing would be proper. *Douglas*, 380 S.C. at 503 n. 2, 671 S.E.2d at 609 n. 2. Moreover, the Court noted many states at that time had upheld the qualification of expert witnesses in the field of forensic interviewing. *Id.* (citing *Kilby v. Commonwealth*, 52 Va. App. 397, S663 S.E.2d 540 (2008); *Golden v. State*, 984 So. 2d 1026 (Miss. Ct. App. 2008); *State v. Speers*, 98 P.3d 560 (Ariz. Ct. App. 2004); *In re A.H.*, 259 Ga. App. 608, 578 S.E.2d 247 (Ga. Ct. App. 2003); *State v. Thompson*, 799 A.2d 1126 (Conn. Ct. App. 2002) (some internal citations omitted)). At the time of Applicant's trial, in 2011, it was common practice to admit forensic interviewers as experts in the field of forensic interviewing.

Furthermore, any objections to the qualifications of such witnesses were generally unsuccessful. Because forensic interviewers were offered as expert witnesses without objection at that time, Applicant cannot establish any deficiency.

Moreover, a witness providing non-scientific testimony must meet a two-prong test: (1) the qualifications of the witness must be sufficient and (2) there must be a determination that the expert's testimony will be reliable. *State v. White*, 382 S.C. 265, 676 S.E.2d 684. At Applicant's trial, Ms. Elliott testified as to her extensive experience as a forensic interviewer in child abuse cases, specifically that she had conducted approximately 5,000 interviews over the course of eight-and-a-half years and had been qualified as an expert in the field of forensic interviewing and of child abuse assessment approximately fifty times. Trial Tr. 218-20. From this, the reliability of Ms. Elliott's testimony can be established, and Counsel cannot be found deficient as a result. Based on the foregoing, this Court finds Applicant has failed to meet his burden in establishing any deficiency or prejudice. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to witness Debbie Elliott's
testimony regarding techniques involved in conducting the
interview, theories regarding types of disclosures, and Victim's
credibility and ability to understand the difference between a truth
and a lie*

Applicant alleges Counsel was ineffective for failing to object when Ms. Elliott testified to information, which was not limited to foundational information for introduction of the interview tape. Applicant specifically alleges Counsel was ineffective for failing to object when Ms. Elliott offered information regarding techniques involved in conducting the interview, theories regarding types of disclosures, and conclusions and opinions regarding Victim's credibility and ability to understand the difference between a truth and a lie. Applicant argues under *Kromah*,² Counsel was ineffective for allowing testimony that bolstered Victim's credibility. In *Kromah*, the Supreme Court of South Carolina held although the trial court erred in admitting the forensic

² *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

interviewer's testimony concerning the credibility of the victim, any error was harmless. *Kromah*, 401 S.C. at 360, 737 S.E.2d at 501. The Court specified forensic interviewers should avoid the following types of statements: "[(1)] that the child was told to be truthful; [(2)] a direct opinion as to a child's veracity or tendency to tell the truth; [(3)] any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a 'compelling finding' of abuse; [(4)] any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or [(5)] an opinion that the child's behavior indicated the child was telling the truth." *Id.* at 360, 737 S.E.2d at 500. It is proper, however, for a forensic interviewer to testify to: (1) the time, date, and circumstances of the interview; (2) his or her personal observations regarding the child's behavior or demeanor; and (3) the events that occurred within the personal knowledge of the interviewer. *Id.* At the time *Kromah* was decided, it was a significant departure from practices commonly employed by both prosecuting and defense attorneys, specifically those techniques that were employed at the time of Applicant's trial. Therefore, this Court finds that *Kromah* is inapplicable in the present case. "The relevant timeframe for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies [his] original statements." *Thornes v. State*, 310 S.C. 306, 310, 426 S.E.2d 764, 765 (1993). *Kromah* was decided two years after Applicant's trial. Therefore, Counsel's performance must be analyzed under the reasonable professional norms at the time of Applicant's trial. Counsel testified he had seen the State offer forensic interviewers as experts prior to Applicant's trial and that challenges to these experts' testimonies as bolstering were generally ineffective. PCR Tr. 64. Because allowing forensic interviewers to testify at the time of Applicant's trial was common practice and arguments that this testimony was bolstering were generally ineffective, Counsel cannot now claim that he made a mistake in failing to object to Ms. Elliott's testimony. Therefore, this Court finds Applicant has failed to establish any deficiency.

Even if Counsel were deficient for failing to object to Ms. Elliott's testimony, Applicant cannot have suffered any resulting prejudice. The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the trial. *Franklin v. Catoe*, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n.3 (2001), *cert denied*, 535 U.S. 1114 (2002); *see also Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of

15

guilt). At Applicant's trial, Ms. Scott testified on the night of the abuse she woke up to see Applicant in the hallway lying on top of Victim with his pants down. Trial Tr. 124. She further testified Victim's pants were also down. Trial Tr. 124. In addition to Ms. Scott's testimony, both medical experts who examined Victim testified that there was attenuation of the hymen, which was consistent with past penetration³. Trial Tr. 197, 203, 317-18. Based on the foregoing, this Court finds that the evidence against Applicant was overwhelming and, therefore, Applicant cannot establish any prejudice. This Court finds that this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to retain and consult with an
independent medical expert*

Applicant alleges Counsel was ineffective for failing to retain and consult with a forensic pediatrician for a second opinion regarding the medical and photograph evidence. This Court finds Counsel's testimony with regards to this allegation is very credible while Applicant's testimony is not credible. Applicant testified he was unaware that he could get funding for a medical expert and did not have any knowledge as to whether or not Counsel ever consulted a medical expert. PCR Tr. 29. Counsel also testified he neither hired nor consulted a medical expert but that he did meet with the State's expert, Dr. Saunders, prior to Applicant's trial. PCR Tr. 53. He testified he reviewed the photographs with Dr. Saunders, and they also reviewed her testimony. PCR Tr. 53. Counsel explained he knew that Dr. Connell's testimony differed from Dr. Saunders's testimony in that Dr. Connell did not find signs of physical injury whereas Dr. Saunders did find signs of physical injury. PCR Tr. 70-71; Trial Tr. 197, 203, 210, 317, 324, 339. He testified it was his strategy to exploit these differences, and he was able to bring out the fact that there was no physical injury in front of the jury. PCR Tr. 71. He further testified he did ask the trial court for funding for another expert, but the trial court denied his request, explaining that the defense could hire every expert the State hires but that the defense would just hire an expert that has a different opinion than the State's expert. PCR. Tr. 54. When counsel fails to procure expert witnesses, his representation is not rendered deficient when trial counsel vigorously cross-examined the State's

³ It is important to note that Applicant's own expert at the evidentiary hearing testified that it would have been her opinion that the victim was subject to sexual abuse. PCR Tr. 24.

witnesses and attacked the accuracy of the evidence. *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing *Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991)). Counsel was able to elicit testimony from both Dr. Connell and Dr. Saunders that there was no physical injury, scarring, or bruising to Victim. Trial Tr. 210, 322, 344. Counsel was also able to elicit testimony from both experts as to different causes of redness and swelling of Victim. Trial Tr. 209, 331. Based on the foregoing, this Court finds that Counsel was not deficient for failing to consult an expert witness, as he was able to vigorously cross-examine both of the State's experts and highlight the differences in their findings.

Moreover, this Court finds Applicant suffered no resulting prejudice from this alleged deficiency. In support of his allegation Counsel was ineffective for failing to retain and consult a medical expert, Applicant presented the testimony of Dr. Rosa. Dr. Rosa testified she agreed with Dr. Saunders regarding the presence of redness and shape of Victim's hymen, but she disagreed with Dr. Saunders regarding the avascularity area or scar tissue on the posterior hymen. PCR Tr. 15-17. She further testified the lack of acute trauma at the time Victim was examined does not, however, rule out past penetration. PCR Tr. 19-20. Ultimately, Dr. Rosa testified she believed Victim had been sexually assaulted and would have testified to that opinion had she been called as a witness at trial. PCR Tr. 21, 23. Although Dr. Rosa disagreed with some of Dr. Saunders's description of the symptoms and appearance of Victim's hymenal tissue, Dr. Rosa did agree with Dr. Saunders's opinion that Victim had been sexually assaulted. Because Applicant's own expert did not refute the opinion presented by State's experts at trial, Applicant has wholly failed to establish he suffered any prejudice—as the result of the proceeding would not have been any different had Counsel retained an independent medical expert. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to hearsay testimony made by
the State's expert*

Applicant alleges Counsel was ineffective for failing to object to Dr. Saunders's testimony regarding information obtained from prior medical records of Victim that were not offered into evidence at Applicant's trial. Applicant alleges these statements were impermissible hearsay. Hearsay is an out-of-court statement made by the declarant offered to prove the truth of the matter

asserted. SCRE 801(c). Hearsay statements are generally inadmissible unless an exception to the rule applies. SCRE 802. A statement that is made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations are admissible upon the court's discretion. SCRE 803(d).

At trial, Dr. Saunders testified the victim's father, Mr. Scott, reported to her Victim had presented to the emergency room at least twice with vaginal bleeding and painful urination, which was thought to be a urinary tract infection (UTI). Trial Tr. 323. She further testified urine cultures were taken and that upon her review of those cultures, there was no growth and no infection present. Trial Tr. 323-24. Here, Dr. Saunders testified to statements that were made to her by Mr. Scott. These statements indicated Victim's prior medical history and symptoms and were ultimately used by Dr. Saunders in her diagnosis. Therefore, these statements fall within an exception to the hearsay rule and Counsel cannot be found deficient for failing to object to them. This Court finds this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to the trial court's jury charge
and the State's closing argument regarding that charge*

Applicant alleges Counsel was ineffective for failing to object when the trial court charged that "testimony of an alleged victim in a criminal sexual conduct case need not be corroborated" and when the State put "special emphasis" on this charge during its closing arguments. The trial court charged the jury:

In passing upon credibility, you may take into consideration many things, such as the demeanor or manner of testifying, whether the witness had reason to be biased or prejudiced, whether a witness' testimony was contradicted on the one hand or supported and corroborated on the other hand. However, the testimony of an alleged victim in a criminal sexual conduct case need not be corroborated.

Trial Tr. 456. Counsel testified that the trial court's instruction was a correct statement of the law. PCR Tr. 73. South Carolina Code § 16-3-657 explicitly provides that "the testimony of the victim need not be corroborated in [criminal sexual conduct] prosecutions." S.C. Code Ann. § 16-3-657. In 2016, however, the Supreme Court of South Carolina held a jury charge reflecting this statute

was an impermissible charge on the facts. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). Consequently, *Stukes* “overrule[d] the precedent to the contrary.” *Id.* at 498, 787 S.E.2d at 482.

Although, after *Stukes*, the trial court’s charge would be error, “the relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies [his] original statements.” *Thornes*, 310 S.C. at 310, 426 S.E.2d at 766. Moreover, trial counsel has never been required to anticipate or discover changes in the law that differ from the law at the time of trial. *Id.* at 309-10, 426 S.E.2d at 765. *Stukes* was decided in 2016, approximately five years after Applicant’s trial. Therefore, because the trial court’s jury charge was an appropriate charge on the law at the time, Counsel cannot be found to have been deficient, nor can Applicant have suffered any prejudice. This Court finds that Applicant has failed to show any deficiency resulting from Counsel’s alleged failure and that this allegation must be denied and dismissed with prejudice.

Counsel’s alleged failure to object to the State’s pitting of the witnesses

Applicant alleges Counsel was ineffective for failing to object to the solicitor’s improper pitting of the witnesses. “Improper pitting constitutes reversible error only if the accused is unfairly prejudiced.” *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2 445, 447 (1998). Here, the State did question Applicant as to whether or not Ms. Scott, Victim, and Investigator Lyons were lying. Trial Tr. 402. However, Applicant was still able to attack the credibility of Ms. Scott by testifying to Ms. Scott’s history of drug use. PCR Tr. 35-36. Counsel also testified he was able to argue that Ms. Scott was not credible and Victim had been influenced in making this allegation against Applicant. PCR Tr. 63. Furthermore, Counsel’s entire trial strategy centered around the idea Victim and her family were lying in order to get Applicant out of the picture. Therefore, this Court finds that Applicant was not prejudiced from Counsel’s failure to object to the pitting of witnesses, as Applicant was able to attack the credibility of those witnesses through other means. This allegation must be denied and dismissed with prejudice.

Counsel’s alleged failure to object to prior consistent statements of the witnesses as impermissible hearsay

Applicant alleges Counsel was ineffective for failing to object to prior consistent statements as impermissible hearsay that were offered through the admission of written reports and medical records, as well as through the testimony of witnesses. At trial, Victim testified Applicant had “messed with” her genitals with his genitals. Trial Tr. 171. She further testified, on the night of this particular incident she woke up to go to the bathroom, which was down the hall from her mother’s bedroom. Trial Tr. 171. While she was in the hall, Applicant pulled her pants down, as well as his own, got on top of her, and proceeded to have sexual intercourse with her. Trial Tr. 172-73. Victim testified this had occurred numerous times. Trial Tr. 174. A nurse who filled out the emergency room report, which was admitted into evidence, also testified when she asked Victim what happened, Victim responded: “Mom caught [Applicant] trying to touch me in the hallway. [Applicant] has touched me with his nuts a lot of times. I bled one time—not last night. Mom saw him with his pants down and my pants down as usual.” Trial Tr. 266, 268-71. Ms. Scott and Dr. Saunders testified similarly. Trial Tr. 125, 314. The presence of overwhelming evidence of guilt negates any claim that counsel’s performance could have reasonably affected the result of the trial. *Franklin v. Catoe*, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n.3 (2001); *see also Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). As aforementioned, the State presented the eyewitness testimony of Ms. Scott, as well as physical findings that were consistent with sexual abuse. Therefore, this Court finds that Applicant has failed to establish any resulting prejudice and this allegation must be denied and dismissed with prejudice.

Counsel’s alleged failure to object to the replay of the forensic interview video

Applicant alleges Counsel was ineffective for failing to object to the replay of the forensic interview video in the jury room. This Court finds Counsel’s testimony concerning this allegation is very credible while Applicant’s testimony is not credible. During deliberations, the jury sent the trial court a note asked to view the forensic interview again. Trial Tr. 467. Both parties agreed to provide the jury with a laptop so that they could review the video, which was done. Trial Tr. 467, 470. Applicant testified he believes this was ineffective because it “placed prejudicial emphasis on [Victim’s] testimony.” PCR Tr. 29-30. Counsel testified he made an argument that

the video should not have been admitted because it was inadmissible hearsay and bolstering, but he did not object to its replay in the jury room. PCR Tr. 50, 60. In its discretion, the trial court may permit the jury at their request to review testimony after beginning their deliberations. *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). Had Counsel objected to the videotape of the forensic interview being sent back to the jury room, the trial court would have had the discretion to have the evidence published to the jury or to send it back with them into the jury room. Therefore, this Court finds that either of these decisions would have placed an equal level of emphasis on Victim's testimony. Consequently, this Court finds that even if Counsel was deficient for failing to object, any error was harmless and Applicant cannot have been prejudiced as a result. This claim must be denied and dismissed with prejudice.

Cumulative error

Applicant alleges that the cumulative effect of Counsel's alleged errors constitutes ineffective assistance of counsel. "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina." *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002); *see also Lorenzen*, 376 S.C. at 535 n. 3, 657 S.E.2d at 779 n.3. Moreover, the Fourth Circuit has held that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively" and, therefore, does not recognize a cumulative error analysis. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). This Court finds that a cumulative error analysis would be inappropriate and therefore finds that this allegation must be denied and dismissed with prejudice.

CONCLUSION

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

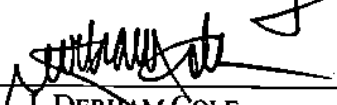
This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an

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 that 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. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 12 day of February, 2018.



J. DERHAM COLE
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF **KERSHAW**
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE - PCR

CASE NO. **2014-CP-28-00703**

George Stanley **BRANHAM**, II, SCDCID#
347471

The **STATE** of South Carolina,

Applicant

Respondent

CHECK ONE:

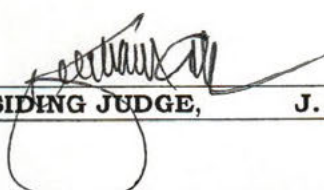
- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

IT IS ORDERED AND ADJUDGED: ☐ Formal order is attached; ☒ Statement of Judgment by the Court:

This matter came before this court on an application for post-conviction relief filed pursuant to *South Carolina Code Annotated Section 17-27-10 et seq.* The Court entered an order denying the application for relief. Applicant has filed a **MOTION to RECONSIDER** pursuant to **RULE 59(e), SCRPC**.

Based upon a review of the record and the applicable statutory and case law, this Court finds that the final order issued in this case satisfies the requirements of S. C. Code Section Ann. 17-27-80 and Rule 52(a), SCRPC, and therefore the applicant's **MOTION** should be and **IS** therefore **DENIED**.

Dated at Spartanburg, South Carolina, this **20th** day of **May, 2020**.


PRESIDING JUDGE,

J. DERHAM COLE

This judgment was entered on the _____ day of **May, 2020**, and a copy mailed first class this _____ day of **May, 2020** to attorneys of record or to parties (when appearing pro se) as follows:

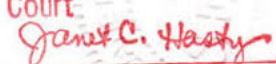
E. CHARLES GROSE, Esq.
404 Main Street
Greenwood, South Carolina 29646

ATTORNEY(S) FOR THE APPLICANT

SAMUEL L. KEY, Esq.
Post Office Box 11549
Columbia, South Carolina 29211-1549

ATTORNEY(S) FOR THE RESPONDENT

CLERK OF COURT, **JANET C. HASTY**

ATTEST True, Correct & Certified
Copy of Original on File in this
Court.

Clerk of Court Kershaw County

FORM 5

STATE OF SOUTH CAROLINA)

County of KERSHAW)George Stanley Branham II 347471,)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2014-CP-28-703

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution, 990 Wisacky Highway,
Bishopville, South Carolina 29010
2. Name and location of Court which imposed sentence Kershaw County Court of
General Sessions
3. Name(s) of co-defendant(s) (if any) Not applicable
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-28-00448; Criminal Sexual Conduct with a minor
 - (b) _____

5. The date upon which sentence was imposed and the terms of the sentence:
- (a) August 25, 2011; 50 (fifty) years
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty xxx
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgement of conviction or the imposition of sentence? Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. The South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each Court to which you appealed:
- i. Appeal DISMISSED pursuant to Anders v. California, 386 U.S. 738
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. September 4, 2013
- ii. _____
- iii. _____
- (d) if known, citation of any written opinion or orders entered pursuant to such results:
- i. State v. Branham, Appellate Case No. 2011-203389; Unpublished Opinion No. 2013-UP-346

2013 AUG -4 PM 12:42
CLERK OF COURT
Kershaw County, S.C.

- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Not applicable
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) SEE ATTACHED APPENDIX A
- (b) same as above
- (c) same as above
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHED APPENDIX A
- (b) same as above
- (c) same as above
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina law? No
- (b) _____
- (c) _____

NOTE. I do not have post-conviction counsel at this time. Further I do not yet have a copy of trial counsel's file, access to discovery, access to funds for expert and investigative services, or any ability to conduct an investigation. Given these limitations, I cannot provide further information regarding additional claims for post-conviction relief, although I believe there are other viable post-conviction claims available to me. With the exception of the specific issues included in this application at this time, I do not waive the attorney-client privilege to any extent, and I request that my trial counsel not provide any portion of my files to any representative of the attorney general's office outside the scope of these specific claims.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion, or application:

(a) the specific nature thereof:

i. Appeal to the South Carolina Court of Appeals

ii. same as above

iii. same as above

iv. same as above

(b) the name and location of the Court in which each was filed:

i. The South Carolina Court of Appeals; Columbia, South Carolina

ii. same as above

iii. same as above

iv. same as above

(c) the disposition thereof:

i. Appeal DISMISSED pursuant to Anders v. California, 386 U.S. 738

ii. same as above

iii. same as above

iv. same as above

(d) the date of each such disposition:

i. September 4, 2013

ii. same as above

iii. same as above

iv. same as above

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. State v. Branham, Appellate Case No. 2011-203389; Unpublished Opinion No. 2013-UP-346

ii. same as above

CLERK OF COURT
SOUTH CAROLINA
COLUMBIA
SEP 11 2013
PM 12:42

iii. same as above

iv. same as above

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion, or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. Not applicable

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) The grounds set forth in (10) have not been previously presented because they were not appropriate for direct appeal or for a petition for a writ of certiorari to the United States Supreme Court.

SEE ATTACHED APPENDIX A

(b) same as above

(c) same as above

NOTE. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007). The South Carolina Supreme Court has made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also: S.C. Code Ann. §17-27-80.

Therefore, Applicant respectfully requests that this Court ensure that specific findings of fact and conclusions of law are entered, and that arguments and testimony of each witness are properly addressed.

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? No
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgement of conviction the
imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petition, motions
or applications with respect to this conviction, which you have
filed? Yes

18. If you answered "yes" to one or more or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
- i. Jason D. Kirincich, Kershaw County Courthouse, 1121 Broad Street,
Camden, South Carolina 29020
- ii. Breen Richard Stevens, Benjamin John Tripp, Division of Appellate
Defense, 11330 Lady Street, Suite 401, Columbia, South Carolina
29201-3332
- iii. _____
- (b) the proceedings at which each attorney represented you:
- i. Trial
- ii. Direct Appeal
- iii. _____

19. State clearly the relief you seek in filing this application:

Applicant seeks relief from his conviction and sentence
by way of: vacate sentence and conviction and remand for
a new trial.

20. Are you now under sentence from any other court that you have not challenged?

Applicant is not under sentence from any other court.

STATE OF SOUTH CAROLINA)
)
 County of _____)

VERIFICATION

2014 AUG -4 PM 12:42
 CLERK OF COURT
 Kershaw County, S.C.

I, George Stanley Branham II, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

George S. Branham II

SWORN to and subscribed before me this 25
 day of July, 2014.

Debra Sims (L.S.)
 Notary Public

My Commission Expires: 11-4-2015

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, George Stanley Branham II, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

George S. Branham II
Applicant

SWORN or affirmed to and subscribed before me this

25 day of July, 2014.

Dana Sims
Notary Public

My Commission Expires: 11-4-2015

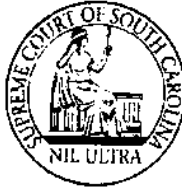
2014 AUG -4 PM 12:42
CLERK OF COURT
KERSHAW COUNTY, S.C.

APPENDIX A

10(A) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when counsel failed to inform the Applicant of his right to request substitute counsel due to a conflict of interest and for failure to obtain a written waiver from the Applicant.

11(A) Applicant was represented at trial by Assistant Public Defender, Jason D. Kirincich, who was a subordinate of Applicants former appointed trial counsel, chief Kershaw County Public Defender, Cornelius J. Riley, Esquire. Mr. Riley was reprimanded by the Supreme Court of South Carolina - Office of Disciplinary Counsel - in regards to his unethical conduct towards the Applicant (See Exhibits A-1 & A-2), and under the "Rules of Professional Conduct", Rule 407.1.10, no lawyer in a firm shall knowingly represent a client that another member of the firm would be prohibited from representing (SOURCE: "South Carolina Criminal Trial Techniques Handbook, 2010). Mr. Riley watched over his subordinates representation of the Applicant through the entire trial as counsel failed to object on all possible grounds to inadmissible hearsay, inflammatory and irrelevant evidence, along with other erroneous issues. To assume that the deficient performance of trial counsel was not influenced by Mr. Riley's hard feelings toward the Applicant would be illogical, and the Applicant was certainly prejudiced by counsel's failure to inform him of his right to request substitute counsel due to the conflict of interest because the Applicant would have chosen substitute counsel in order to gain an impartial and effective representation, and the result of Applicants trial would likely have been different.

EXHIBIT A-1



The Supreme Court of South Carolina
OFFICE OF DISCIPLINARY COUNSEL

Lesley M. Coggiola
Disciplinary Counsel

William C. Campbell
Assistant Disciplinary Counsel

Post Office Box 12159
Columbia, South Carolina 29211

Telephone: (803) 734-2038
Fax: (803) 734-1964

December 7, 2010

PERSONAL & CONFIDENTIAL

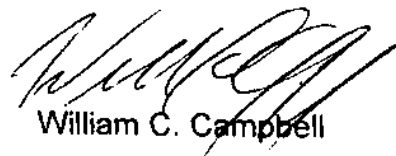
George S. Branham, II
Kershaw County Jail
101 Bramblewood Plantation Road
Camden, SC 29020

Re: Lawyer: Cornelius J. Riley, Esquire
Case Number: 10-DE-L-0852

Dear Mr. Branham:

This office previously informed you of its intent to dismiss the complaint you filed in connection with the above-referenced matter. You were given thirty days to submit your written request for a review of that decision. No request was received from you. Accordingly, the complaint in this matter is dismissed pursuant to the provisions of Rule 19(d)(1) of RLDE. As required by these rules, a copy of this letter is being sent to Mr. Riley as notice of the dismissal of this complaint.

Sincerely,



William C. Campbell

WCC/

cc: Cornelius J. Riley, Esquire

EXHIBIT A-2

A. 542
THE STATE OF SOUTH CAROLINA



PUBLIC DEFENDER
FIFTH JUDICIAL CIRCUIT

DOUGLAS S. STRICKLER
Circuit Public Defender
C. J. (NEIL) RILEY
Chief County Public Defender
JASON D. KIRINCICH
Assistant Public Defender

POST OFFICE BOX 1557
CAMDEN, SOUTH CAROLINA 29021
(803) 425-7237
FAX: (803) 425-8807

TO: George S. Branham Jr., KCDC
FROM: Neil Riley
DATE: March 10, 2011

You're fired. I have reassigned your case to Mr. Kirincich.

Good luck.

pg. 14 of 46



The Supreme Court of South Carolina

OFFICE OF DISCIPLINARY COUNSEL

Lesley M. Coggiola
Disciplinary Counsel

William C. Campbell
Assistant Disciplinary Counsel

Post Office Box 12159
Columbia, South Carolina 29211

Telephone: (803) 734-2038
Fax: (803) 734-1964

June 9, 2011

PERSONAL AND CONFIDENTIAL

George S. Branham, II
Kershaw County Jail
101 Bramblewood Plantation Road
Camden, SC 29020

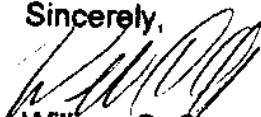
RE: NOTICE OF FINAL DISPOSITION
Lawyer: Cornelius J. Riley, Esquire
Matter Number: 11-DE-L-0328

Dear Mr. Branham:

You previously filed a complaint with the Commission on Lawyer Conduct concerning Cornelius J. Riley, Esquire. This matter was concluded on June 9, 2011. Your complaint was not dismissed, but the disposition is confidential under the provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

This constitutes final disposition of the proceedings in this matter. Your cooperation with the Commission and this office is appreciated.

Sincerely,



William C. Campbell

10(8) Applicants due process right to respond to adverse testimony as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated along with Applicants right to effective assistance of counsel and the right to be present "at every stage of the trial", as guaranteed by the Sixth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to object to the replay of the videotaped forensic interview in the jury room during deliberations.

11(8) During Applicants trial, the complaining witness testified in person in open court, Tr., pg. 167, line 8 thru pg. 183, line 23. The video recorded forensic interview that was conducted with the complaining witness was also played in open court; Tr., pg. 237, line 25, and the forensic interview was viewed for a second time by the jury during deliberations in the jury room; Tr., pg. 467, Line 11 thru pg. 470, line 7.

The trial court abused Its discretion in permitting the replay of the video in the jury room during deliberations, and counsels failure to object was unreasonable. Permitting the replay of the video in the jury room during deliberations was equivalent to allowing a live witness to testify for a third time, which placed prejudicial emphasis on the complaining witnesses' testimony.

Videotape testimony is unique. Often, videotapes are substitutes for live testimony and therefore distinct from audiotapes, and it serves as the functional equivalent of a live witness because it enables the jury to observe the demeanor of the witness while hearing their testimony. See: United States v. Binder, 769 F.2d 595 (1985) (videotape is the functional equivalent of live testimony and not analogous to an audiotape). If it is appropriate to allow the jury to hear the testimony of a witness a second time at all, the preferred procedure would require the preparation of a transcript of videotaped testimony and a rereading of that testimony to the jury in the courtroom with all parties present. Certainly it would have been impermissible to allow a live witness to enter the jury room to repeat his or her testimony. Trial counsels failure to object to the replay of the video amounted to a deficient performance that prejudiced the Applicant because shortly after

hearing the testimony of the complaining witness for a third time, the jury returned a verdict of guilty. Therefore, but for counsel's unprofessional errors, along with the trial courts abuse of discretion, the result of the proceeding would likely have been different.

10(C) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to object under S.C.R.Evid. 801(d)(1) to hearsay testimony from a Forensic Interviewer that was improperly corroborative of the alleged victim, and for failing to object to her opinion testimony that improperly bolstered the alleged victim's credibility, and counsel was also ineffective for eliciting testimony from the Interviewer that vouched for the alleged victim's credibility.

11(C) Trial counsel rendered ineffective assistance by failing to object to "hearsay testimony that was improperly corroborative of the alleged victim while substantially exceeding the limitation of time and place", as set forth in Rule 801(d)(1)(D).

The Forensic Interviewer, at the invitation of the Solicitor, testified without objection that it was her conclusion that " [redacted] had been chronically sexually abused by Bubba, George Branham"; Tr., pg. 239, line 24 thru pg. 240, line 1. Also, at the invitation of the Solicitor, the Interviewer testified that she found the alleged victim's disclosure credible, See Infra.

Ms. Berry, Tr., pg. 255, line 25:

Q: In your expert opinion after interviewing over 5,000 children, did you find her disclosure credible?

Ms. Elliot; Tr., pg. 256, line 2:

A: I did.

Also while under direct examination by Ms. Berry, the Interviewer testified without objection as follows, Tr., pg. 231, Line 2 thru pg. 232, line 12:

Q: Did you go through the Competency Assessment prior to your interview with Breanna?

A: That was part of the interview, in the rapport section. When I brought her in, I went over the rules of the room and most importantly stressed her need to tell me the truth about everything. And I conducted the truth-lie competency exercise

with her. And she completed it, answered every question correctly.

Q: So you determined that she was telling the truth?

A: That she understands the difference between truth and lie and the consequences of lying.

Q: In your opinion, was competent?

A: Yes.

The Interviewer also testified without objection that it was her expert opinion that the disclosure from was not affected by suggestibility or coaching in any way; Tr., pg. 234, lines 2 - 4.

The Forensic Interviewer also gave testimony under direct examination of Ms. Berry, without objection, that substantially exceeded the limitations of time and place set forth in Rule 801(d)(1)(D) as follows:

Some of the — some of the terms that she used certainly were words that typically a 7 year old wouldn't use. Like when she said — when she talked about Bubba massaging his weiner until he finished; Tr., pg. 239, lines 15 - 18.

Nothing strategic can be conceived on a defensible basis for trial counsel's failure to object to this testimony from the Interviewer, and this highly inflammatory testimony certainly prejudiced the Applicant. The Applicant was also prejudiced when the Solicitor asked the Interviewer to read from her summary, again without objection, as follows; Tr., pg. 255, line 5:

Q: Can you read that sentence starting with, She said her . . . ;
Tr., pg. 255, line 14:

A: Okay, I'm sorry. She said she was, quote, sleeping in the bedroom peeking, and Bubba was on the ground. And so Bubba was standing and mama was on the ground on her knees like a dog. And Bubba got on her and — bottom, and mama said stuff. I asked what mama said. said, she always says, huh. I always know when they are doing it because mama says that.

The Applicant was further prejudiced by trial counsels reckless cross examination of the Interviewer where he solicited opinion testimony that vouched for the alleged victims credibility. Quote -- "I felt that she was telling me the truth"; Tr., pg. 245, line 10.

Trial counsels deficient performance in regards to this issue certainly prejudiced the Applicant, and but for counsel's errors, there is a reasonable probability the result at trial would have been different.

10(D) Applicant was denied the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to consult with or subpoena an independent medical expert for the defense to refute clearly erroneous findings of the States medical expert witness.

11(D) As mentioned above, counsel provided constitutionally ineffective assistance when his performance became deficient to the extent that he did not call a medical expert to testify as to the significance of the evidence presented by the prosecution. Counsel even failed to consult with a medical expert before trial about the prosecutions evidence. A neutral experts' interpretation of the evidence - or the lack of it - is the sort of "neutral disinterested" testimony that may well have tipped the scales and swayed the fact finders toward a verdict of "NOT GUILTY".

Applicants trial record reflects that the alleged victim was examined at the Kershaw County Medical Center a few hours after the alleged incident by Dr. Foy Connell; Tr., pg. 195, lines 13 - 15. Dr. Connell was a State Witness at Applicants trial, and testified that there were no signs of physical injuries at the time of the examination of the alleged victim; Tr., pg. 203, lines 1 - 5, and that he did not notice any scarring; Tr., pg. 210, line 20. Dr. Connell also testified that the alleged victim had no apparent distress and that she appeared well upon examination; Tr., pg. 207, lines 10 - 12. And again, Dr. Connell states that "[t]here were no signs of an acute laceration or acute bruising or acute anything at the time of examination"; Tr., pg. 203, lines 11 - 14, but noted a mildly widened introitus that appeared to be u-shaped, in which he thought was probable signs of chronic abuse. However, Dr. Saunders, also a State Witness, testified upon examination of Solicitor Barry that a wide introitus, what she believed that to mean, was just that the introitus was widened, and that that was not uncommon to her when she had examined over 8,000 patients. Dr. Connell, in retrospect, comparatively had examined only 75 patients, and he found that to be uncommon; Tr., pg. 212, lines 22 - 24. Dr. Saunders also testified "that the presentation or the shape of the alleged victims hymenal tissue was found to be annular, and that there

are several different shapes that that tissue can present in, just as we all have eyes, but they may be blue, green, or brown in color. She had the annular presentation which simply means that the opening to her vagina had a complete collar of skin all the way around the opening of the vaginal introitus or the vaginal opening." It should be noted here that "annular" is defined as 'ring-shaped' by the 2012 Edition of the American Heritage Dictionary.

Although these two witnesses conclude that abuse had occurred, their testimony clearly reflects that there was substantial contradiction in a given area of expertise. Therefore, it would have been only reasonable for defense counsel to have consulted and been prepared to call to the stand an expert for the defense. Applicants counsel could not have made an informed tactical decision that the risk that an expert might equivocate on the stand outweighed "what potential benefit might have come from [their testimony]." There is no indication in the Applicants trial record that his defense counsel had the education or experience necessary to assess physical evidence, and to make for himself a reasonable, informed determination as to whether an expert should have been consulted or called to the stand for the defense, and physical evidence should have been a focal point of defense counsels pretrial investigation and analysis of the matter. And because of the "vagaries of abuse indicia", such pre-trial investigation and analysis would have generally required some consultation with an expert. See generally: Holloday v. Haley, 204 F.3d 1243, 1251-52 (11th Cir. 2000) (holding that an attorney's investigation is not "reasonable" within the meaning of Strickland when the facts of a case supply him with "notice" that a particular line of pre-trial investigation may substantially benefit his client, and he does not pursue it.

It is obvious that the Applicant was significantly prejudiced by allowing the jury to hear the damaging testimony of the States expert witnesses unchallenged by an adverse expert witness for the defense, and but for counsel's errors, there is a reasonable probability the result of Applicant's trial would have been different.

10(E) Applicant's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and South Carolina law was violated as a result of trial counsel's failure to object to a Solicitor's recross-examination that improperly pitted the Applicant's testimony against that of three of the State's witnesses.

11(E) As indicated above, Applicants trial counsel was ineffective when his performance fell below an objective standard of reasonableness under professional norms for failing to object, to preserve for appellate review, to a Solicitor's improper recross-examination that repeatedly pitted the Applicant against three of the State's witnesses.

This "improper pitting" issue pertains to the following colloquy which occurred during recross-examination of the Applicant; Tr., pg. 401, line 10:

[Solicitor]: But you didn't tell anyone she went to the bathroom?

[Applicant]: I didn't tell anyone that she went to the bathroom?

[Solicitor]: You were trying to help her go to the bathroom -- I'm sorry. You didn't tell Jessica that she got up and you were helping her try to get in the bathroom? You deny saying that?

[Applicant]: Jessica knew that she was going to the bathroom. Jessica refused to get up with her, so I did.

[Solicitor]: And you deny telling Jessica and in the hallway that you were picking up trash? You deny that, correct?

[Applicant]: I don't recall picking up trash, no, ma'am.

[Solicitor]: You deny telling them that?

[Applicant]: I'm not going to deny it. I don't remember it.

[Solicitor]: You don't remember it because you were drinking?

[Applicant]: I had been drinking. I don't deny that either.

[Solicitor]: And you deny telling Jessica and the Police that you were helping her wipe?

[Applicant]: Yeah, I deny that.

[Solicitor]: You deny that?

[Applicant]: Absolutely.

[Solicitor]: So all these people, Jessica, , Investigator Lyons, they're all lying?

[Applicant]: Apparently.

[Solicitor]: Apparently?

[Applicant]: Yes, ma'am.

The Solicitors recross-examination, asking Applicant whether other witnesses were lying, improperly forced Applicant to attack the veracity of adverse witnesses, consequently, also forcing the Applicant to invade the exclusive province of the jury without objections from trial counsel, thus depriving Applicant of his Sixth Amendment right to the effective assistance of counsel. This was highly prejudicial and improper as explained by the following case law:

The assessment of witness credibility is within the exclusive province of the jury, i.e., State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). Therefore, witnesses are not allowed to testify whether another witness is telling the truth. See also, Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998) (holding it is improper "pitting" to ask a witness "to comment on the truthfulness of an adverse witness"); State v. Sapps, 295 S.C. 484, 485-86, 369 S.E.2d 145-46 (1988) (holding it was improper for the Solicitor to "ask [] Applicant if each of the other three witnesses were lying").

The following colloquy will show that the prejudicial effect of this improper pitting was unduly emphasized in the State's closing argument where the solicitor vouched for the credibility of the same three witnesses that she improperly pitted the Applicant against while attacking the Applicant's veracity, Tr., pg. 455, lines 3 - 8:

[Solicitor]: Investigator Lyons, he's in law enforcement nearly 30 years. What motive does he have to make up something about Bubba? None. Who has a reason to lie? Not Jessica. Not She doesn't even live with her anymore. Investigator Lyons, he's doing his job. But Bubba, Bubba does.

The prejudicial effect of this improper pitting issue was further exacerbated by the fact that the above statement (where the Solicitor vouched for the credibility of three of the State's witnesses) was the last statement the jury heard from the solicitor before starting their deliberations, and when analyzing the prejudicial effect of this issue, it must be noted that victim's credibility was extremely crucial to the outcome of Applicant's trial, which was brought into question on several points during the forensic interview, especially during the victim's demonstration of the alleged assault through the use of anatomically correct dolls, which impeached, rather than corroborated the victim's trial testimony. In fact, the Interviewer helped the victim with the dolls, Tr., pg. 247, lines 10 - 14. Further, the child is seen pointing to the answers in the truth-lie test book before the questions were asked, Tr., pg. 244, lines 10 - 15.

As to the victim's mother, who claimed to have witnessed the alleged abuse of her daughter, nothing is further from the truth. At no time in her testimony does the mother claim to have seen anything other than Applicant stand up, Tr., pg. 127, lines 12, 13. In fact, the mother even claims to have had to ask her daughter twice what he was doing to her after returning to the bedroom, Tr., pg. 125, lines 2, 3, and pg. 124, lines 19 - 22. Additionally, the mother has a criminal record, including crimes involving an inherently dishonest nature, which are admissible

for impeachment of witnesses under the South Carolina Rules of Evidence.

Even a cursory review of the mother's testimony concerning her criminal convictions - and more tellingly, her explanations for those convictions - reveals a clear inability to be truthful, Tr., pg. 137, line 22 thru pg. 138, line 21, and pg. 152, line 10 thru pg. 153, line 24.

Counsel's failure to object to the Solicitors improper recross-examination that pitted the Applicant's testimony against that of three of the State's witnesses fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result of Applicant's trial would have been different.

10(F) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution by trial counsel's failure to object to a Solicitor's comments vouching for credibility of three of the State's witnesses during her summation.

11(F) Trial counsel was ineffective when his performance fell below an objective standard of reasonableness for failing to object to a Solicitor's comments vouching for the credibility of three of the State's witnesses, one being the State's key witness. The improper vouching pertains to the following colloquy of the Solicitor's closing argument; Tr., pg. 455, lines 3 - 8:

[Solicitor]: Investigator Lyons, he's in law enforcement nearly 30 years. What motive does he have to make up something about Bubba? None. Who has a reason to lie? Not Jessica. Not . She doesn't even live with her anymore. Investigator Lyons, he's doing his job. But Bubba, Bubba does.

The Solicitor's statements were improper and prejudicial. A Solicitor may not vouch for the credibility of the State's witnesses based on personal knowledge or other information outside the record; State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). As seen in the colloquy, *supra*, the Solicitor did not support the vouching with anything within the record. Vouching for witnesses based on outside material conveys the impression to the jury that the Solicitor has evidence not presented to the jury but known by the prosecution which supports conviction. Id. It is inappropriate for the State to assure the jury of a witness's credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record. The

Solicitor's improper statements during summation led the jury to believe the government corroborated the witnesses testimony and found it credible. The prejudicial effect of trial counsel's failure to object to the Solicitor's improper vouching was compounded by the fact that these prejudicial statements were at the end of the solicitor's closing argument, which were the last statements heard by the jury before starting their deliberations.

But for counsel's errors, there is a reasonable probability the result at trial would have been different.

10(6r) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when trial counsel opened the door for 801(d)(1)(B), to allow otherwise inadmissible hearsay, during cross examination of the alleged victim.

11(6r) As mentioned above, defense counsel rendered ineffective assistance when he raised the issue of improper influence or "coaching" by asking alleged victim if she "practiced" before testifying and whether anyone had helped her with her story; Tr., pg. 176, line 22 thru pg. 177, line 3, therefore opening the door to allow otherwise inadmissible hearsay to be admitted under 801(d)(1)(B), SCRE, when all the requirements of the Rule are met. However, the requirements were not met. As a prerequisite to admissibility under 801(d)(1)(B), the party offering a prior consistent statement must demonstrate the statement was made "before the alleged fabrication, or before the alleged improper influence or motive arose." THIS WAS NOT DONE IN THE CASE AT HAND. Applicants trial record is void of any testimony offered to rebut an express or implied charge against the Declarant of recent fabrication or improper influence or motive. Further, the trial court did not admit any testimony from State Witnesses under Rule of Evidence 801(d)(1)(B). Therefore, it cannot be said that any statements were properly admitted under this Rule. See: State v. Fulton, 333 S.C. at 374, 509 S.E.2d at 827 [HN 13] ("when a prior consistent statement is offered for the purpose of rebutting an express or implied charge that the witnesses testimony is the result of a recent fabrication or improper influence or motive, the statement must predate any alleged improper influence or motive."); State v. Phillips, 623 A.2d 1265, 1268 (Me. 1993) [HN 14] ("As the party offering the prior consistent statements, it is the State's burden to establish that the statements were made before the motive arose."); State v. Carlson, 392 N.W.2d 89, 91 (S.D. 1986) [HN 15] ("Before a prior consistent statement will qualify [*398] as nonhearsay under 801(d)(1)(B), the proponent must demonstrate . . . the prior consistent statement was made prior to the time the proposed motive to falsify arose.") (emphasis added) (citations omitted).

The State made no such demonstration at the Applicants trial. However, prejudice can be found in trial counsel's cross examination where he opened the door to potentially damaging testimony, and but for defense counsel's errors, the result of Applicants trial would likely have been different.

10(H) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution by appellate counsel's failure to appeal trial counsel's objection to the introduction of the complaining witness's prior out-of-court video recorded statements during an interview.

11(H) As mentioned above, appellate counsel's representation fell below an objective standard of reasonableness when he failed to appeal trial counsel's contemporaneous objection to the improper introduction of the video under S.C. Code §17-23-175 as being inadmissible hearsay, and only being used to bolster the testimony of the State's witness; Tr., pg. 236, lines 6 ~ 9. As can be determined from the trial record, the out-of-court statement did not conform to the requirements of S.C. Code §17-23-175, and the prerequisites of the statute were not met in regards to the admissibility of the video. One of the prerequisites to the admissibility of the out-of-court statement requires that the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.

Counsel's failure to appeal trial counsel's objection to the video caused the Applicant to suffer prejudice because the out-of-court statement was inadmissible hearsay. In addition, the video recorded statement could not be relied upon as being truthful, because at one point in the video, a flip book was employed by the Interviewer in order to gauge the ability of the alleged victim to tell the truth, but the credibility of the video and the alleged victim became highly suspect when the victim was seen pointing to the correct answers before the questions were asked; Tr., pg. 244, lines 10 - 14. Furthermore, the Interviewer could be seen helping the alleged victim line up the anatomically correct dolls; Tr., pg. 247, lines 10 - 15.

But for appellate counsel's failure to brief and appeal trial counsel's objection to the video recorded out-of-court statement being introduced at Applicant's trial, there is a reasonable probability that the result of the Applicant's direct appeal would have been different; Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

10(I) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when defense counsel failed to object to a picture of the alleged victim being moved into evidence; "State's Exhibit #7".

11(I) As mentioned above, the Applicant was prejudiced when defense counsels performance became deficient and unreasonable under professional norms for failing to object to the introduction of the highly inflammatory photograph of the alleged victim; Tr., pg. 132, lines 22 - 24. Quote: "Without objection"; Tr., pg. 133, lines 3 - 5. The photo likely invoked sympathy for the child in the minds of the jury and unduly prejudiced the jury against the Applicant as the alleged perpetrator while serving no legitimate evidentiary purpose other than to arouse the sympathy of the jury and resentment for the Applicant as the accused.

The photograph did not have any probative value that could be used to substantiate any fact of consequence in the Applicants trial, and in no way made it more or less probable that the Applicant committed the crime for which he was charged, nor can it logically be deemed to have corroborated any testimony against the Applicant; see State v. Langley, 334 S.C. 643, 647, 515 S.E.2d 98 (1999) (finding evidence should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate the facts).

The prejudicial effect of this issue was compounded when the jury took the photograph to the jury room where it was viewed during deliberations. Quite naturally the photograph evoked great sympathy for the alleged victim, who was considered both blameless and defenseless. It would be unreasonable to assume that no prejudice occurred from the viewing of the photograph which had the overwhelming capacity to lure the jury into declaring guilt on the emotional basis of sympathy for the child; see State v. Bright, 323 S.C. 221, 226, 473 S.E.2d 851, 854 (Ct. App. 1996) ("unfair prejudice from the introduction of evidence occurs when it has an undue tendency to introduce a decision on an improper basis.")

Trial counsel's deficient performance prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of Applicants trial would have been different.

10(J) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to object to several instances of hearsay testimony from five of the State's witnesses that impermissibly corroborated the victim's identification of Applicant as the perpetrator and went into particular details of the alleged assault which substantially exceeded the limitations of time and place set forth in Rule 801(d)(1)(D), SCRE, thereby improperly bolstering the victims credibility.

11(J) During Applicants trial, five witnesses, Jessica Scott, Dr. Foy Connell, Debbie Elliot, Rebecca Scheffer, and Kathy Saunders, testified without objection regarding the victim's out-of-court conversations with them concerning the alleged abuse, and each witness repeated the victim's identification of the Applicant as the perpetrator. The repeated retelling and the improper corroboration of [the victim's] allegation of sexual abuse by several witnesses thus had a 'devastating impact' on Applicants trial, and the jury was not just hearing the allegations repeatedly, but were hearing it mostly from witnesses that were qualified as an Expert. A detailed discussion of the testimony of each witness is necessary for explanation of this issue:

(1) Jessica Scott:

The first witness for the State was Jessica Scott, mother of the alleged victim. Scott's testimony is highly suspect to be that of a mother that claims to have witnessed the rape of her daughter. However, even a cursory review of her testimony reveals this could not be further from the truth. Scott testified that she "realized" her daughter was not in bed with her and got up to go look for her; Tr., pg. 124, lines 8, 9. Strongly, Scott thought nothing of the fact that two of her younger children, and , were asleep in the living room and presumably not worth looking for. See: Tr., pg. 129, lines 16 - 22. Then, inexplicably, the mother that has supposedly walked in and caught her boyfriend in the act of raping her seven year old daughter, calmly takes her daughter into the bathroom so she could pee!; Tr., pg. 124, lines 17, 18. The mother then claims that after some conversation with the Applicant, "that she was going to get her daughter's pillow and Ryan off the

bed so she could put them in their room; Tr., pg. 124, line 24 thru pg. 125, line 1, and according to Scott, she asked her daughter not once, but twice what happened, Tr., pg. 124, lines 19 - 22, and pg. 125, lines 2, 3.

In the context of this issue, it is important to understand through Scott's cross-testimony and inexplicably calm reaction, that while she was present in the home that night, she was not an eyewitness to any sexual assault. This is further supported by Scott's answer when asked by the Prosecutor, "Did you actually see his privates?", Tr., pg. 127, line 13. Her answer rambles on for nine lines, and she never answered the question; Tr., pg. 127, lines 14 - 22.

Scott's own testimony shows she claims to have asked her daughter TWICE "what happened?"; Tr., pg. 124, line 21, and "what he was doing to her"; Tr., pg. 125, line 3. This shows that Scott in fact did not see anything sexual being done by, or to anyone. Further, the alleged victim had not done or said anything to prompt being questioned. It's such, Scott's testimony that, ". . . and [victim] told me he was trying to stick his private in her hole . . ."; Tr., pg. 125, lines 4, 5, constitutes inadmissible hearsay because it does not meet any exception to the hearsay rules, 801(d)(1)(D) or (B), SCRE.

(2) Dr. Foy Connell and State's Exhibit 12:

Dr. Connell is the Emergency Room Physician that examined the victim on the morning following the alleged assault. The trial court qualified him as an "Expert" in the field of emergency medicine and family practice, Tr., pg. 194, line 7 thru pg. 195, line 11.

Although qualified in these limited areas, Dr. Connell's testimony was almost exclusively in the area of sexual assault examinations.

Just prior to calling Dr. Connell to the witness stand, the State moved to introduce several items into evidence including "Emergency Room Records" marked State's Exhibit No. 12; Tr., pg. 190, line 20.

Defense counsel affirmatively stated that he did not object, Tr., pg. 215, line 23. Solicitor Moak asked Dr. Connell to read his notes from "episode description":

Dr. Connell: "Yeah. Episode Description. (reading) Mother caught boyfriend with his pants down and daughter with pants down at about zero 200 this a.m. Child reports, quote, Bubba repeatedly touching her in her private parts and nuts(sic). And putting his private part inside her private area. Patient reports one episode of bleeding that ran down her leg. She denies any bad injuries. Reports threats from Bubba to spank her or put hot-sauce in her mouth."

Q: And that was from 1 ?

A: Yes.

Tr., pg. 216, line 20 thru pg. 217, line 6.

Counsel should have objected to this admission of State's Exhibit 12 because it contains hearsay and does not meet any exception to the rules.

Counsel's failure to object to the Doctor reading the statement aloud to the jury then compounded the error.

(3) Debbie Elliott:

Elliott is a "Forensic Interviewer", employed by Carehouse of the Pee Dee, in Florence, South Carolina. She was qualified as an "Expert" in Forensic Interviewing and Child Abuse Assessment" without any objection by defense counsel, Tr., pg. 220, line 21.

To allow Elliott to be qualified as an expert witness without objection was unreasonable.

"[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of a witness qualified as an expert. The label "expert" should be jealously guarded by the

Court and never loosely bandied about"; State v. Kromah, 737 S.E.2d 490 (2013). NOTE: The South Carolina Supreme Court issued a scathing opinion of so-called "forensic interviewers" in Kromah, Section III, B(2).

At the invitation of the State, Elliott repeated what the child told her:

"She talked about the -- the incident, where mama caught them; those were her words, where mama caught them in the hall where she was -- she was laid down in the hall. She was going to the bathroom and never made it to the bathroom. And that was the time -- the time that she talked about most of all."

Since defense counsel made no objection:

Q: Solicitor: "Did she give you any indication that it happened previous?"

A: Elliott: "She did. I asked her -- I think I said, so he -- she had said something about when he -- I thought she said or she said at one point, he tried to do it. And he said, he -- he did do it. He done it a lot of times were her words. He done it a lot of times"; Tr., pg. 231, line 25 thru pg. 232, line 12.

That the above testimony amounts to inadmissible hearsay and is extremely prejudicial is obvious. That an objection should have been made on the grounds of hearsay and bolstering is equally obvious, yet counsel made none.

(4) Rebecca Scheffer and State's Exhibit 9:

Scheffer is a nurse employed at Elgin Urgent Care, Tr., pg. 261. She was qualified as an "expert" in "sexual assault nurse examination" without objection, Tr., pg. 263.

During direct examination she was asked to read from State's Exhibit 9 what the victim had told her. Scheffer testified:

"Uh-huh. She said -- after I asked her what happened. She said, Moma caught Bubba trying to touch me in the hallway. Bubba has touched with his nuts a lot of times. I bled one time -- not last night. Moma saw him with his pants down and my pants down as usual"; Tr., pg. 266, lines 13 - 17.

Scheffer then went on to testify to each question asked on the sexual assault examination protocol form that the victim answered, Tr., pg. 266.

State's Exhibit 9 is hearsay because it is nothing but the nurse repeating in writing what the victim told her happened. It clearly does not meet any exception to the hearsay rules and goes beyond time and place limitations set forth in Rule 801(d)(1)(D), SCRE, and includes details of the alleged assault and identity of the alleged perpetrator. It was unreasonable for counsel not to object to its admission.

Counsel's error was then compounded by failing to object to the nurse reading the contents aloud for the jury.

(5) Dr. Kathy Saunders:

Dr. Saunders was employed at Carehouse of the Pee Dee, in Florence, South Carolina, at the time she examined the victim, Tr., pg. 304.

As seems to be the norm in this case, Dr. Saunders was qualified as an "expert" without objection, her specialty being "forensic child sexual assault examination"; Tr., pg. 309, lines 15 - 20. (In fact, only one investigative witness, Mike Lyons, was not offered as an "expert")

Saunders qualification is especially troubling. During her sixteen year career in "child abuse medicine", 1995-2011, Tr., pg. 305, lines 21, 22, she claims to have conducted ". . .in excess of 8,000" sexual assault exams on children . . ."; Tr., pg. 309, lines 5 - 7, testified as an expert in court " . . . over a thousand times . . ."; Tr., pg. 309, Lines 8 - 14, in multiple

states no less; spent five weeks training in San Diego (initial 3 weeks plus 2 more), Tr., pg. 306, line 18 thru pg. 307, line 10; obtained her Doctorate in Nursing in 2008; obtained dual certifications in pediatrics and family practice; Tr., pg. 307, lines 22, 23, and still kept up with continuing education requirements, Tr., pg. 308, lines 10 - 19. eight thousand exams in 16 years is 500 a year or roughly ten per week on average.

To testify as an expert "over a thousand times" averages out to more than once a week for 16 years. Yet she had time to complete her Doctorate along with everything else she claims. Dr. Saunders's qualification is not the question here; the question is her credibility. Dr. Saunders claims to over 8,000 exams and over 1,000 expert witness testimonies along with everything else is just not humanly possible.

Counsel should have objected to her qualifications as an expert and highlighted these puffed-up claims to the jury.

As an expert and at the invitation of the State, Saunders testified that she was provided details of the assault prior to her examination of the victim. Those details were provided by Mark Scott, victim's father, Tr., pg. 313, lines 8 - 19. Without objection, and again, at the invitation of the State, Saunders testified:

"The history that was provided was, again, provided by her father. And the statement that I have written is that dad's girl friend, Lisa, had worked at the school where was going. And Lisa told Mr. Scott that the child had not been at school on Monday, which would have been December the 7th and that around 2:00 to 3:00 a.m., Bubba, who is Mom's boyfriend, George Branham, had come in drunk from a neighbor's house. Bubba wanted to have sex with Jessica, who was the child's mother, but she didn't want to.

had gotten out of the bed and was going to the bathroom and Bubba came -- had got up behind her and went in the hallway and

pulled the child's pants down and pulled his pants down and was having sex with the child, . . . was taken to the hospital by the maternal grandmother because she was complaining of vaginal pain. The child was referred to the Carehouse for follow-up evaluation"; Tr., pg. 313, line 21 thru pg. 314, line 12.

Just to be clear, this is Saunders testifying to what Mark Scott told her his girlfriend Lisa had told him. From there the chain is broken so there is no way of knowing where Lisa heard this from.

This testimony is unquestionably inadmissible hearsay. It is not even the victim's statement but came from an unnamed source to Lisa, then to the victim's father, Mark Scott, and then to Dr. Saunders, who then repeats it to the jury as fact.

The problem here goes beyond hearsay; the statement does not meet even the most minimal standard of competent evidence as its ultimate source is unknown.

Counsel's failure to object on these grounds was absolutely unreasonable and falls below the lowest imaginable standard of attorney performance. None of the aforementioned testimony or statements by Dr. Saunders meet the requirements of 801(d)(1), SCRE, and the statement was obviously not for the purpose of medical diagnosis, so the requirements of Rule 803(4), SCRE were equally not met.

Applicant does not concede that any exceptions to the hearsay rules were ever met and will show, as to each witness and instance, that the hearsay used at his trial was just that - hearsay - and was therefore inadmissible.

As to each of the witnesses complained of above:

(1) Jessica Scott, as noted above, did not witness a sexual assault as she claims. This is born out by her own testimony. The hearsay she repeated from the victim was not limited to time and place, so it did not meet the requirements of Rule 801(d)(1)(D), SCRE. It was not "offered to rebut an express . . . charge of recent fabrication" since the victim had not yet testified, so no allegation of recent fabrication could have been made.

Therefore, the requirements of Rule 801(d)(1)(B), SCRE, were not met. The statement was obviously not for the purpose of medical diagnosis or treatment, Rule 803(4), SCRE, since Scott is not a medical professional.

The "excited utterance" exception of Rule 803(2), SCRE, is equally not met in this particular instance. Scott testified that she had to ask her daughter twice what happened. She did not testify to observing any emotional distress to prompt the questioning. When pressed for details of what she saw, she skillfully avoided answering the questions. Further, Scott's motive and propensity to tell the truth are highly suspect. Her excuses for her criminal convictions are very telling. In one instance of obtaining money under false pretenses she claimed her "food stamp card came up missing and [she] had to report it stolen." Yet, somehow she knew that the card " . . . was traded for drugs to a drug dealer"; Tr., pg. 138. It seems odd that it was "stolen" but she knew it was used for drugs and she was charged and pled guilty to the crime. On cross-examination she claimed the Investigator forced her to write a statement incriminating herself or D.S.S. would take her children (which happened anyway); Tr., pg. 138, lines 13 - 15. Her excuse for that conviction on cross-examination is so convoluted it should be examined directly from the transcripts, Tr., pg. 153, lines 4 - 24. Suffice it to say, Scott cannot even be truthful about crimes she has already admitted to committing. That Scott has trouble with the truth is obvious. Her truth is whatever truth she finds convenient. To trust her to recount what her daughter supposedly said that night would be ridiculous. The statement lacks veracity because of the mother's inability to be truthful and cannot be relied on as an excited utterance.

Finally, the statement was not offered nor ruled on as an excited utterance. The prosecution offered the statement as proof of the allegation against Applicant. It would only have been reasonable for counsel to object to this testimony.

(2) State's Exhibit 12 and Doctor Connell's testimony did not meet the exception of 801(d)(1)(D), SCRE, because they went beyond time and place, and included particulars of the victims allegation and identity of the perpetrator. Neither met the excited utterance exception of Rule 803(2), SCRE, because the statement was made the following day in response to the Doctors

questions. They did not meet the requirements of the medical diagnosis and treatment exception of Rule 803(4), SCRE, because identity of the alleged perpetrator and claims of threats to the victim can not be part of a diagnosis or treatment. The State did not make any claim at trial that the evidence was offered to rebut a charge of recent fabrication and cannot be permitted to fall back on any such claim now. The evidence simply was offered as proof of the crime charged.

The evidence also should have been objected to because it is inadmissible character evidence under Rule 404(b), SCRE, as it alleges that Applicant made threats to the victim of putting hot suauce in her mouth.

(3) Elliott's testimony as hearsay is especially troubling considering the South Carolina Supreme Court's decision in State v. Kromah, 737 S.E.2d 490 (2013). It was spelled out in no uncertain terms that so called forensic interviewers are not "experts" and should be limited to their own personal observations. Here, Elliott was admitted as an "expert" without objection, even though Kromah is not the first warning given on this problem.

The hearsay testified to by Elliott was in response to the State's question: "What if anything did [victim] relate to you concerning the time frame of the assault by the Defendant, George Branham?"; Tr., pg. 231, lines 22 - 24. Objection was needed here to the form of the question because Applicant is being identified as the perpetrator by the Prosecutor, which is nothing less than the prosecution testifying. Any answer to this question would be hearsay and not admissible as such. Specifically, Elliott's testimony did not fall under any hearsay exception: it was not limited to time and place, and because of the form of the question, the "he" she referred to could only be the Applicant; see, Rule 801(d)(1)(D), as it was part of an interview conducted several days later, it was not an "excited utterance" under Rule 803(2), SCRE; it was not offered to rebut a charge of recent fabrication but as proof of the allegation against Applicant; see Rule 801(d)(1)(B), SCRE; and, finally, Elliott is not a medical professional. That objection was necessary here is obvious.

(4) State's Exhibit 9 and Rebecca Scheffer's testimony failed to meet any

hearsay exception. As above, it went beyond time and place limitations of 801(d)(1)(D); it was in response to questioning hours later; there was no claim by the State that it was offered for any particular purpose; and, identity of the alleged perpetrator is not a medical diagnosis.

(5) Kathy Saunders's testimony is the most troubling as hearsay because that statement is never attributed to the victim in any way. Since it is not the victim's statement the exceptions of Rules 801(d)(1)(D), 801(d)(1)(B); and 803(2) do not apply at all as these exceptions are all for the victim's own statements.

The exception of Rule 803(4), SCRE, clearly does not apply, as the statement does not contain anything pertinent to medical diagnosis or treatment, especially given the identification of the alleged perpetrator by an unknown source. Counsel should have objected to this evidence.

Applicant was prejudiced by counsel's deficient performance because each witness was allowed to bolster the victim's credibility by implying that her story had remained consistent. This bolstering effect is precisely what the rule forbidding hearsay is there to stop. The credibility of the accuser must stand on its own for the jury to determine. The prosecution even rehashed the hearsay and embellished it for the jury during closing, further enhancing the prejudicial effect; Tr., pg. 453, lines 1 - 5.

In the trial the victim's testimony was exceptionally weak. In fact, if only a few words were omitted, then a directed verdict would have been required as a matter of law. Without the bolstering effect of the hearsay, and the reiteration of same in State's closing, it cannot be said the outcome of the trial would have been the same.

To recap, counsel was ineffective for failing to object to:

hearsay evidence from Jessica Scott; State's Exhibit 12, Emergency Room Records; hearsay evidence from Dr. Foy Connell; character evidence from Dr. Foy Connell; qualification of Debbie Elliott as an expert; hearsay evidence from Elliott; State's Exhibit 9, sexual assault

examination protocol form; hearsay evidence from Rebecca Scheffer; qualification of Kathy Saunders as an expert; hearsay evidence from Saunders; character evidence from Saunders.

Applicant was prejudiced by the above evidence being admitted without objection because the victim's allegation was repeated over and over by witnesses qualified as experts; evidence of Applicants character was unduly suggestive of guilt and not proper evidence for the jury to consider; and, the Emergency Room Records and sexual assault examination protocol went with the jury to deliberations, compounding the hearsay and character issues above.

Finally, if the court determines that any of the hearsay used in this trial to convict Applicant was admissible under Rule 801(d)(1)(B), SCRE, because trial counsel opened the door by asking victim if she had practiced before trial, then that reckless questioning would also be a denial of effective assistance of counsel because the Applicant was clearly prejudiced by what was otherwise inadmissible hearsay. However, to rule that the hearsay was admissible to rebut a claim of recent fabrication would be an error of law. The State never made any such claim at trial and in fact opened the door to cross-examination through her own direct questioning of the victim; Tr., pg. 174, lines 12 - 21. Having asked victim about their meeting before the trial, defense was engaging in proper cross-examination.

In the State's closing arguments the prosecution refers to the hearsay as direct evidence - not as a rebuttal to rehabilitate their witness; see, Tr., pg. 453, lines 1 - 5. If that were the case here then an instruction to the jury to limit the purpose for which the hearsay could be considered would have been required. No such ruling was requested or made. As such, simply put, the State made no such claim at trial and should not be allowed to fall back on any such claim now.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW)

FIFTH JUDICIAL CIRCUIT

GEORGE S. BRANHAM, II
SCDC # 347471

CASE NO.: 2014-CP-28-703

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

2015 JUN 25 AM 9:12

Plaintiff's Attorney:

Kristy Goldberg, Bar No. 72674

Address:

1720 Main Street, Suite 303, Columbia, South
Carolina 29201

Phone: 803-667-6633 Fax 803-799-4059

E-mail: kristy@kristygoldberglaw.com Other:

Defendant's Attorney:

Clay Mitchell, Bar No. _____

Address:

Attorney General's Office, Post Office Box
11549, Columbia South Carolina 29211

Phone: 803-734-3970 Fax 803-253-6283

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: Motion for Discovery/Production of Documents

Estimated Time Needed: 5 minutes

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

06-23-2015

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, SCRCP)☐ 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	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF KERSHAW	)	DOCKET NO.: 2014-CP-28-703
GEORGE S. BRANHAM, II,	)	
SCDC # 347471	)	
Applicant,	)	
v.	)	MOTION FOR DISCOVERY/ PRODUCTION OF DOCUMENTS
STATE OF SOUTH CAROLINA,	)	
Respondent,	)	

COMES NOW Applicant, by and through his undersigned attorney, and requests that this Court enter an Order for Production of Discovery pursuant to S.C. Code Ann. §17-27-150(a) (2008).

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on August 4, 2014. The State submitted a Return on January 30, 2015. Kristy Goldberg, Esquire, was appointed to represent the Applicant by Order dated August 8, 2014.

Applicant, through counsel, is requesting funding for an expert (see separate order) to review the forensic interview video, medical records and photographs that were offered as evidence in the jury trial. Applicant seeks a second opinion regarding the reliability of the medical findings and opinions offered into testimony regarding the victim by expert witnesses. In order to have an expert consult on this matter, counsel needs to receive color copies of the original exhibits that were offered at trial. Due to the fact that these are the records involve a minor child, counsel believes the best avenue to obtain these documents is by court order.

Counsel has received and reviewed a copy of trial counsel's file and the photographs and forensic interview video are not contained within the file. Further,

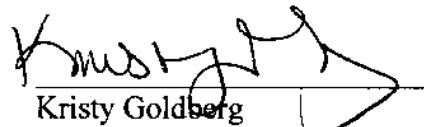
counsel believes that the most accurate way to review the evidence would be to match each photograph by the evidence number attached during trial and compare those to the testimony in the transcript. Therefore, copies of the specific photographs offered at trial with their "evidence number" stickers would be the most accurate way for an independent expert to review the evidence offered at trial.

To ensure that an accurate evaluation is conducted by an expert, Applicant would request the production of color copies of all documents offered into evidence during the original criminal trial pursuant to S.C. Code Ann. §17-27-150(a) (2008).

As already described, the Applicant, through undersigned counsel, submits that the above listed documents and case materials are necessary for counsel to properly prepare his case and to present his claims. Furthermore, the Applicant, through counsel, submits that this request is not being made as a fishing expedition, but it is only being submitted to the Court due to the importance of the requested materials in Applicant obtaining "one full bite of the apple."

THEREFORE, based upon the foregoing the Applicant respectfully requests that this Court hold a hearing and enter an Order for Discovery which allows the Clerk of Court of Kershaw County to provide counsel for the Applicant with color copies of the documents entered into evidence during the Applicant's jury trial.

I so move,


Kristy Goldberg
1720 Main Street, Suite 303
Columbia, SC 29201
Attorney for Applicant

June 23, 2015
Columbia, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF KERSHAW	)	DOCKET NO.: 2014-CP-28-703
	)	
GEORGE S. BRANHAM, II,	)	
SCDC # 347471	)	
Applicant,	)	
v.	)	MOTION FOR PRODUCTION OF A
	)	NEW TRIAL TRANSCRIPT
STATE OF SOUTH CAROLINA,	)	
Respondent,	)	
	)	

COMES NOW Applicant, by and through his undersigned attorney, and requests that this Court enter an Order for Production of a new trial transcript.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on August 4, 2014. The State submitted a Return on January 30, 2015. Kristy Goldberg, Esquire, was appointed to represent the Applicant by Order dated August 8, 2014.

Applicant has raised several concerns regarding his trial transcript. Specifically the entire jury selection processes completely left out of the transcript and counsel for the applicant is unable to review the jury selection to determine whether or not counsel was ineffective for failing to raise any possible meritorious motions in response to the selection.

Secondly, the trial transcript is redacted to remove information pursuant to South Carolina Rules of Civil Procedure Rule 41.2, but in redacting said information it appears that errors were made.

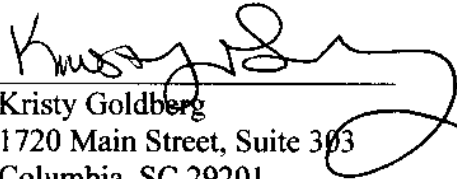
In order to ensure that the transcript is a reliable representation of what occurred in the court proceeding, the Applicant requests that this Court order the Court Reporter to create a new unreacted transcript from the original record including the jury selection

portion. This unreacted transcript should be provided to both parties in this action but should not be filed with the court pursuant to SCRCP 41.2.

Further, counsel for the Applicant requests that this Court order that the Office of Indigent Defense provide funding to cover the cost of transcription. A proposed order will be provided to the Court including an estimation of this cost when one is obtained from the Court Reporter.

I so move,

June 23, 2015
Columbia, SC



Kristy Goldberg
1720 Main Street, Suite 303
Columbia, SC 29201
Attorney for Applicant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2014-CP-28-00703
COUNTY OF KERSHAW	)	
	)	
George S. Branham, II	)	
S.C.D.C. No. 347471,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

FILED FOR RECORD
2015 FEB -4 AM 11:00
JOYCE B. BOWEN
CLERK OF COURT
KERSHAW COUNTY, S.C.

In response to the post-conviction relief application filed August 8, 2014, the Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Kershaw County Clerk of Court's orders of commitment. The Kershaw County Grand Jury indicted the Applicant at the July 2011 term of General Sessions for Criminal Sexual Conduct with a Minor – First Degree (2010-GS-28-0448). Jason D. Kirincich, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On August 25, 2011, the Honorable Clifton Newman sentenced the Applicant to fifty (50) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Breen Richard Stevens, Esquire, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected an Anders¹ brief. Applicant filed a *pro se* brief. The South Carolina Court of Appeals dismissed Applicant's appeal without argument on September 4, 2013, and granted

counsel's request to withdraw. State v. Branham, Op. No. 2013-UP-346 (S.C. Ct. App. filed September 4, 2013). Applicant's petition for rehearing was filed and denied on October 24, 2013. The Remittitur was sent on December 5, 2013.

Attached herewith and incorporated herein by reference are the records of the Kershaw County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of trial counsel.
 - a. Failed to inform Applicant "of his right to request substitute counsel due to a conflict of interest."
 - b. Failed to obtain an written informed consent waiver from Applicant
 - c. Failed to object to the jury replaying videotaped witness testimony during deliberations
 - d. Failed to object to impermissible hearsay testimony
 - e. Failed to object to impermissible opinion testimony given by the Forensic Interviewer
 - f. Failed to consult with or hire an independent medical expert to refute the findings of the State's medical expert
 - g. Failed to object when Applicant was improperly "pitted" by the Solicitor during re-cross examination of Applicant
 - h. Failed to object when Solicitor improperly "vouched" to the credibility of witnesses during closing arguments
 - i. Improperly "opened the door" to allow for otherwise impermissible hearsay testimony
 - j. Failed to object to a picture of the victim being admitted into evidence
 - k. Failed to object to impermissible hearsay testimony "that impermissibly corroborated the victim's identification of Applicant as the perpetrator."
 - l. Failed to object to the admittance of Emergency Room Records

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

- into evidence
 - m. Failed to object to qualifications of expert witnesses
- 2. Ineffective assistance of appellate counsel
 - a. Failed "to appeal trial counsel's objection to the introduction of complaining witness's prior out-of-court video recorded statements during an interview."

III.

Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v.

State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need

not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held on the issue of ineffective assistance of counsel.

(signatures on following page)

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:



Attorneys for Respondent

January 30, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS

2014-CP-28-0703

GEORGE S. BRANHAM, II,)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

AFFIDAVIT OF SERVICE BY MAIL

JOYCE KEDDUPALU
CLERK OF COURT
KERSHAW COUNTY, S.C.

2015 FEB -4 AM 11:00

FILED FOR RECORD

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** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Kristy Grafton Goldberg, Esquire
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 301
Columbia, SC 29201**

DATED this 30th day of January, 2015.



Sara B. Moore, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW) DOCKET NO.: 2014-CP-28-703

GEORGE S. BRANHAM, II,)
SCDC # 347471)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)
Respondent,)

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

FILED FOR RECORD
2016 JAN 25 AM 9:35
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

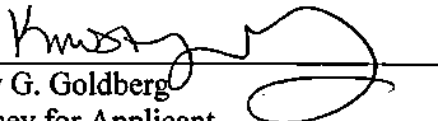
Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows:

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Ineffective assistance of trial counsel for failure to object to hearsay statements. Tr. 135 and 136.
- (b) Ineffective assistance of trial counsel for asking questions regarding prior allegations of sexual misconduct against the defendant, alerting the jury to this fact without the opportunity to explain to the jury the result or circumstances of such allegations. Tr. 157-158.
- (c) Ineffective assistance of counsel for failing to object to the qualification of witness Debbie Elliott as an expert in child abuse assessment and forensic interviewing.
- (d) Ineffective assistance of counsel for failing to object when witness Debbie Elliot offered testimony in front of the jury that was not limited to foundational information for introduction of the interview videotape. Specifically, counsel failed to object when this witness offered information regarding techniques involved in conducting the interview, theories regarding types of disclosures, and conclusions and opinions regarding the victim's credibility and ability to understand the difference between the truth and a lie.
- (e) Ineffective assistance of counsel for failing to retain and consult with a forensic pediatrician for a second opinion regarding the medical and photograph evidence.
- (f) Ineffective assistance of counsel for failure to object when Dr. Saunders testified regarding hearsay information obtained from prior medical records not offered in trial. Tr. 323-324.

- (g) Ineffective assistance of counsel for failure to object when the Judge charged that "testimony of an alleged victim in a criminal sexual conduct case need not be corroborated" and the Solicitor put special emphasis on this during closing arguments. Tr. 427 and 456.
- (h) Ineffective assistance of counsel for failing to object to Solicitor's improper pitting of the witnesses. Tr. 401-402.
- (i) Ineffective assistance of counsel for failing to object to prior consistent statements of the witnesses as impermissible hearsay which bolstered the witness testimony. Inadmissible prior consistent statements of the witnesses were offered without objection through:
 - a. The admission of written reports and medical records. Tr. 265 and 191.
 - b. Through the testimony of witnesses. Tr. 125, 266, 268-271, 313-314.
- (j) Ineffective assistance of counsel for failure to object to the replay of the forensic interview video in the jury room.

Respectfully Submitted,



Kristy G. Goldberg
Attorney for Applicant

Columbia, South Carolina

This 92 Day of January, 2016.

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CASE # 2014-CP-28-703

George S. Branham, II,)
SCDC # 347471)

vs.)

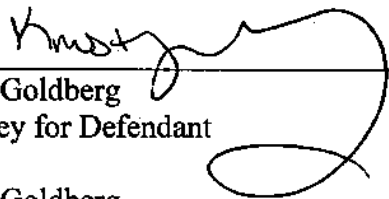
State of South Carolina,)

Respondent.)
_____)

CERTIFICATE OF SERVICE

FILED FOR RECORD
2016 JAN 25 AM 9:35
JOYCE McDONALD
CLERK OF COURT
KERSHAW COUNTY, S.C.

I certify that on this date I served the Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this application to the Office of the Attorney General via U.S. mail at Post Office Box 11549, Columbia, South Carolina 29211-1549.



Kristy Goldberg
Attorney for Defendant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 22nd day of January, 2016

The Grose Law Firm, LLC
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

February 24, 2019

The Honorable Janet C. Hasty
Clerk of Court Kershaw County
PO Box 1557
Camden, SC 29021-8557

Re: *George Branham, II v. State of South Carolina*
Case Number 2014-CP-28-00703

Dear Ms. Hasty:

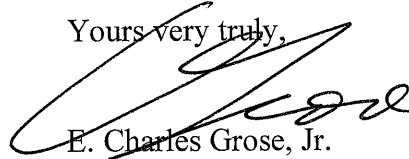
Enclosed for filing, please find Mr. Branham's Rule 59(e), SCRCP motion, along with a certificate of service.

By copy of this letter, I am serving Judge Cole and the State of South Carolina with a copy of the motion.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: The Honorable J. Derham Cole (via email and US Mail)
Kelly Oppenheimer, Esquire (via email and US Mail)
Mr. George Branham (via US Mail)

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Kershaw)

5th JUDICIAL CIRCUIT

George Stanley Branham, II)

CASE NO.: 2014-CP-28-00703

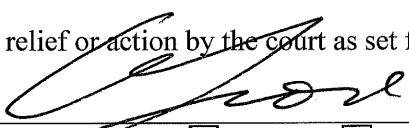
Plaintiff,)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

vs.)

State of South Carolina)

Defendant.)

Plaintiff's Attorney: Charles Grose, Bar No. 66063 Address: 404 Main Street, Greenwood, SC 29646 Phone: 864-538-4466 Fax 864-538-4405 E-mail: charles@groselawfirm.com Other: _____	Defendant's Attorney: Kelly Oppenheimer, Esquire, Bar No. _____ Address: PO Box 11549, Columbia, SC 29211-1549 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: Rule 59(e), SCRPC Motion Estimated Time Needed: 15 min 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 Feb. 24, 2019 Date submitted										
SECTION III: Motion Fee										
☐ PAID – AMOUNT: \$ _____ ☒ EXEMPT: (check reason) <table style="width: 100%; margin-top: 5px;"> <tr> <td>☐ Rule to Show Cause in Child or Spousal Support</td> </tr> <tr> <td>☐ Domestic Abuse or Abuse and Neglect</td> </tr> <tr> <td>☐ Indigent Status ☐ State Agency v. Indigent Party</td> </tr> <tr> <td>☐ Sexually Violent Predator Act ☒ Post-Conviction Relief</td> </tr> <tr> <td>☐ Motion for Stay in Bankruptcy</td> </tr> <tr> <td>☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)</td> </tr> <tr> <td>☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions</td> </tr> <tr> <td>Name of Court Reporter: _____</td> </tr> <tr> <td>☐ Other: _____</td> </tr> </table>		☐ 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: _____
☐ 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: \$ _____										

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW	)	
	)	Case No. 2014-CP-28-00703
George Stanley Branham, II,	)	
Applicant	)	Rule 59(e), SCRCP Motion and
	)	Proffer of Proposed Orders
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

To: The Honorable J. Derham Cole, Presiding Judge, Fifth Judicial Circuit,

Pursuant to Rule 59(e), SCRCP, George Branham moves this Court to reconsider its order of dismissal dated February 12, 2019, filed February 15, 2019, and received by undersigned counsel on February 19, 2019. A copy of Mr. Branham's proposed order is attached to this motion as Exhibit A, and Mr. Branham incorporates by reference the statement of facts and legal analysis contained therein as if set forth herein fully and verbatim. This motion is based on the additional grounds set forth below.

A. The findings of fact and conclusions of law are those of an advocate and not the Court.¹

As a threshold matter, the procedure followed by this Court denied Mr. Branham an opportunity to have his post-conviction relief claims adjudicated by a judicial officer. "S.C. Code Ann. §17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991); *see also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). Addressing section 17-27-80 in the context of a capital post-conviction relief case, our Supreme

¹ A copy of the State's proposed order is attached as Exhibit B. The order signed by this Court is identical to the State's proposed order other than formatting changes.

Court “strongly encourage[d] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Although the Attorney General addressed the merits of each issue presented during the hearing, the reasoning in the order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, § 8. The admonitions in *Hall*, *Pruitt*, and *McCray* are consistent with this Court’s responsibility, as an independent branch of government, to “safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). This Court, therefore, should withdraw this order and make its own findings of fact and conclusions of law.

B. Incomplete Standard of Review.

Although articulating the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and similar cases, the standard of review section of the order drafted by the State, at pp. 10-11, does not recognize the requirement that strategic decisions made by trial counsel must be reasonable. “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); *see also Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Additionally, the order did not address our Supreme Court’s recent decision in *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *see also Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018) (adhering to *Smalls*). For a discussion of *Smalls*, *see* Mr. Branham’s proposed order, at pp. 32-33.

C. Counsel’s failure to object to hearsay statements made by complaining witness’ mother.

Even though it was drafted by the State, the order, at p. 11, presumes deficient performance by not discussing the first prong of *Strickland* and proceeding directly to a prejudice analysis. The

order errs as a matter of law by concluding all hearsay evidence is not prejudicial if it is testified to by a medical expert. Rule 803(4), SCRE limits the admissibility of statements made for the purposes of medical treatment and diagnosis to those statements that are “reasonably pertinent to diagnosis or treatment.” *See State v. Brown*, 286 S.C. 445, 334 S.E.2d 816 (1985) (“The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim. A doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses”); *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997) (a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim. In this case, however, the fact that Burroughs asked if he could have a hug before he assaulted the victim in no way can be viewed as “reasonably pertinent” to the victim's diagnosis or treatment). Our Supreme Court most recently addressed this issue in *State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018), which held, “The hearsay testimony ventured far beyond the parameters of Rule 803(4), SCRE, for much of the testimony was unrelated to medical diagnosis or treatment.” In reaching this holding, the Court pointed out the doctor’s testimony “recounting of Minor 1’s statements amounted to nothing more than ‘hearsay shrouded in a doctor’s white coat.’” *See also State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010), and *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989).

The order drafted by the State, at p. 13, argues:

Furthermore, Applicant’s own expert, Dr. Olga Rosa, testified at the evidentiary hearing that medical diagnoses are based approximately ninety percent on a patient’s medical history. PCR Tr. 22. Because the State’s expert at trial testified to previous doctors’ diagnoses of Victim, any alleged deficiency by Counsel in

failing to object to these statements during the testimony of Ms. Scott could not have had any impact on the result of the proceeding and was entirely cumulative to other properly admitted evidence.

This conclusion, however, overlooks the legal reality that this portion of Dr. Rosa's testimony was not admissible, which was based the history provided by the child. *See* Subsection G, *infra*.

Once the false medical testimony is corrected by an independent expert, *see* Subsection G, *infra*, this case turns solely on the credibility of witnesses, thereby establishing prejudice. *See Smalls*; *see also 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. 214, 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.").

D. Trial counsel's asking questions regarding prior allegations of sexual misconduct against Mr. Branham.

The order drafted by the State, at p. 12, discusses trial counsel's purported trial strategy and concludes, "This Court finds this strategy was valid and *prudent* based on all testimony presented; and, therefore, Counsel's performance was not deficient" (emphasis added).² This conclusion completely ignores the proffer of this evidence and ruling by the trial judge, "It's pretty easy to see why that's an improper line of questioning if that's what you were trying to do." As a

² The order drafted by the State never explains how this strategy could be "prudent" in light of the trial judge scolding trial counsel and pointing out this questioning was obviously inadmissible. Thus, trial counsel's purported strategy was not reasonable. *See Ingle* and *Freiburger, supra*.

result, the jurors heard misleading information that Mr. Branham had abused another child. This is improper character evidence. Rule 404(b), SCRE; *see also State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998) (declining to recognize a special rule allowing admission of evidence of a propensity to commit a sex crime). Although our appellate courts recognize exceptions to Rule 404(b), *see, e.g., State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), no exception exists here because the evidence was not “proved by clear and convincing evidence,” *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). In fact, trial counsel attempted to introduce this evidence to show it was not true, but the trial judge recognized the inherently objectionable nature of the questions. The jurors were left with the false impression that Mr. Branham had abused this other child.

Mr. Branham was prejudiced by the admission of this testimony. “The fundamental problem with this [testimony] is that the ‘bad act’ evidence was not presented **by the State** as substantive evidence of guilt, nor was it introduced **by the State** in an attempt to impeach respondent’s character. Instead, it was introduced largely through the questioning conducted by respondent’s attorney.” *State v. Warren*, 341 S.C. 349, 351, 534 S.E.2d 687, 688 (2000) (emphasis original). Additionally, as discussed in more detail throughout Mr. Branham’s proposed order, this case is not a case of overwhelming evidence. *See Smalls, Anderson, Jennings, and Berry, supra*; *see also State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

E. Counsel’s failure to object to the qualification of Debbie Elliott as an expert in child abuse assessment and forensic interviewing.

Even though it was drafted by the State, the order, at p. 13, acknowledges that trial counsel conceded deficient performance when he acknowledged “that his failure to object to Ms. Elliott’s qualifications as an expert witness was a mistake.” The order concluded, at p. 13-14:

At the time of [Mr. Branham’s] trial, in 2011, it was common practice to admit

forensic interviewers as experts in the field of forensic interviewing. Furthermore, any objections to qualifications of such witnesses were generally unsuccessful. Because forensic interviewers were offered as expert witnesses without objection at that time, [Mr. Branham] cannot establish prejudice.

This conclusion is simply wrong and ignores appellate court decisions that were available to trial counsel at the time of Mr. Branham's trial from August 22-25, 2011. *See, e.g., State v. Douglas*, 380 S.C. 499, 504, 671 S.E.2d 606, 609 (2009) ("to the extent the Court of Appeals upheld the qualification of Herod as an expert in this case, its opinion is reversed"). Our Supreme Court's decision in *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (2017) provides guidance about how to approach this analysis and the analysis in Section F below. *Briggs* examined *Douglas*, *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010), and *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989), all of which were decided before Mr. Branham's jury trial. *Briggs*, accordingly, held:

After *Dawkins* in 1989, certainly after *Douglas* in 2009 and *Smith* in 2010, 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.

421 S.C. at 325, 806 S.E.2d at 718.

Mr. Branham suffered prejudice because this case is not a case of overwhelming evidence. *See Smalls, Anderson, Kromah, Jennings, and Berry, supra.*

F. Trial counsel's failure to object to Debbie Elliott's testimony regarding techniques involved in conducting the interview, theories regarding types of disclosures, and the complaining witness' credibility and ability to understand the difference between a truth and a lie.

The order, at p. 14-15, states:

[Mr. Branham] argues under *Kromah*, Counsel was ineffective for allowing testimony that bolstered Victim's credibility. In *Kromah*, the Supreme Court of South Carolina held although the trial court erred in admitting the forensic interviewer's testimony concerning the credibility of the victim, any error was harmless. *Kromah*, 401 S.C. at 360, 737 S.E.2d at 501. The Court specified

forensic interviewers should avoid the following types of statements: “[(1)] that the child was told to be truthful; [(2)] a direct opinion as to a child’s veracity or tendency to tell the truth; [(3)] any statement that indirectly vouches for the child’s believability, such as stating the interviewer has made a ‘compelling finding’ of abuse; [(4)] any statement to indicate to a jury that the interviewer believes the child’s allegations in the current matter; or [(5)] an opinion that the child’s behavior indicated the child was telling the truth.” *Id.* at 360, 737 S.E.2d at 500. It is proper, however, for a forensic interviewer to testify to: (1) the time, date, and circumstances of the interview; (2) his or her personal observations regarding the child’s behavior or demeanor; and (3) the events that occurred within the personal knowledge of the interviewer. *Id.* At the time *Kromah* was decided, it was a significant departure from practices commonly employed by both prosecuting and defense attorneys, specifically those techniques that were employed at the time of [Mr. Branham’s] trial. Therefore, this Court finds that *Kromah* is inapplicable in the present case. “The relevant timeframe for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies [his] original statements.” *Thornes v. State*, 310 S.C. 306, 310, 426 S.E.2d 764, 765 (1993). *Kromah* was decided two years after [Mr. Branham’s] trial. Therefore, Counsel’s performance must be analyzed under the reasonable professional norms at the time of [Mr. Branham’s] trial. Counsel testified he had seen the State offer forensic interviewers as experts prior to [Mr. Branham’s] trial and that challenges to these experts’ testimonies as bolstering were generally ineffective. PCR Tr. 64. Because allowing forensic interviewers to testify at the time of [Mr. Branham’s] trial was common practice and arguments that this testimony was bolstering were generally ineffective, Counsel cannot now claim that he made a mistake in failing to object to Ms. Elliott’s testimony. Therefore, this Court finds [Mr. Branham] has failed to establish any deficiency.

(footnote omitted).

Once again, this Court completely overlooked our Supreme Court’s holding in *Briggs*. See Section E, *supra*; see also Mr. Branham’s proposed order, at pp. 38-44. Once this error is recognized, the need to grant Mr. Branham post-conviction relief is apparent.

The order, at p. 15, also concludes, “Even if Counsel were deficient for failing to object to Ms. Elliott’s testimony, [Mr. Branham] cannot have suffered any resulting prejudice. The presence of overwhelming evidence of guilt negates any claim that counsel’s performance could have reasonably affected the result of the trial.” As pointed out in Subsection B, *supra*, the order drafted by the State completely ignores our Supreme Court’s holding in *Smalls*. Once the false medical

testimony is corrected, this case turns solely on the credibility of witnesses, thereby establishing prejudice. *See Smalls, Anderson, Kromah, Jennings, and Berry, supra.*

G. Trial counsel's failure to retain and consult with an independent medical expert.

The order drafted by the State, at pp. 16-17, finds that trial counsel was not deficient for failing to seek funding for an independent medical expert to review the medical evidence. The order relied on trial counsel interviewing Dr. Saunders and reviewing her photographs.³ The order completely overlooks our Supreme Court's opinion in *Ard v. Catoe*, which held:

Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. When evaluating the reasonableness of counsel's conduct, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. Moreover, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case.

372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (internal citations and quotes omitted) (emphasis supplied by the court). Trial counsel reviewing the photographs with Dr. Saunders and having her explain her testimony was not sufficient because Dr. Saunders "was not an **independent** expert." *Ard*, 372 S.C. at 333, 642 S.E.2d at 597 (emphasis supplied by court).⁴

³ Neither the order drafted by the State nor the PCR testimony of trial counsel identify trial counsel's expertise in reviewing this medical evidence without the assistance of an independent expert.

⁴ Additionally, that trial counsel was not able to convince the chief administrative judge to issue an *ex parte* funding order for a psychosexual examination of Mr. Branham "to mitigate Mr. Branham's responsibility" does not excuse trial counsel from consulting an independent medical expert. First, Mr. Branham never admitted to committing any misconduct for the evaluation to mitigate. Second, that the chief administrative judge denied the request for the psychosexual evaluation does not mean the Court would have denied funding for an independent medical expert based on a proper showing why such an expert was "reasonably necessary for the representation of" Mr. Branham. *See* S.C. Code Ann. § 17-3-50(B). Third, trial counsel's recognition that "certain things in Dr. Saunders' report that could be contradictory" establishes a proper showing for an independent expert to review the evidence. Fourth, even if the chief administrative judge

Regarding the second prong of *Strickland*, the order, at p. 17, states:

Moreover, this Court finds [Mr. Branham] suffered no resulting prejudice from this alleged deficiency. In support of his allegation Counsel was ineffective for failing to retain and consult a medical expert, [Mr. Branham] presented the testimony of Dr. Rosa. Dr. Rosa testified she agreed with Dr. Saunders regarding the presence of redness and shape of Victim's hymen, but she disagreed with Dr. Saunders regarding the avascularity area or scar tissue on the posterior hymen. PCR Tr. 15-17. She further testified the lack of acute trauma at the time Victim was examined does not, however, rule out past penetration. PCR Tr. 19-20. Ultimately, Dr. Rosa testified she believed Victim had been sexually assaulted and would have testified to that opinion had she been called as a witness at trial. PCR Tr. 21, 23. Although Dr. Rosa disagreed with some of Dr. Saunders's description of the symptoms and appearance of Victim's hymenal tissue, Dr. Rosa did agree with Dr. Saunders's opinion that Victim had been sexually assaulted. Because [Mr. Branham's] own expert did not refute the opinion presented by State's experts at trial, [Mr. Branham] has wholly failed to establish he suffered any prejudice—as the result of the proceeding would not have been any different had Counsel retained an independent medical expert. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

This conclusion, however, overlooks the legal reality that this portion of Dr. Rosa's testimony was not admissible, which was based the history provided by the child. This this type of opinion testimony, based solely on the victim's statement, is not allowed because it bolsters the testimony of the child, vouches for the child's credibility, and conveys to the jurors that the witness believes the child is telling the truth. See *Briggs, Smith, Douglas, and Dawkins, supra*. In *Mangal v. State*, 415 S.C. 310, 781 S.E.2d 732 (Ct. App. 2015), our Court of Appeals addressed whether a medical doctor improperly bolstered the child's testimony based on statements made by the child. Relying on *Chavis, Jennings, Douglas, Dawkins*, and *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (testimony of child sexual abuse counselor that, when a child says he or she

denied this request, trial counsel would have preserved the need for an independent expert for appellate review. The Supreme Court of the United States has consistently held an accused is entitled to funding for expert and investigative services after making a threshold showing. See *McWilliams v. Dunn*, ___ U.S. ___, 137 S. Ct. 1790 (2017), *Hinton v. Alabama*, 134 S. Ct. 1081 (2014), and *Ake v. Oklahoma*, 470 U.S. 68 (1985). See also *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992).

has been sexually assaulted, child is telling the truth 95% of the time, improperly vouched for credibility of victim), the Court of Appeals concluded such testimony to be improper. Our Supreme Court reversed the Court of Appeals decision in *Mangal*, holding because the improper bolstering issue was not presented to the PCR court and, therefore, the PCR Court did not err by not ruling on the issue. *Mangal v. State*, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017). Our Supreme Court most recently addressed this issue in *Simmons*, *supra*, which held, “The hearsay testimony ventured far beyond the parameters of Rule 803(4), SCRE, for much of the testimony was unrelated to medical diagnosis or treatment.” In reaching this holding, the Court pointed out the doctor’s testimony “recounting of Minor 1’s statements amounted to nothing more than ‘hearsay shrouded in a doctor’s white coat.’” *Simmons*, therefore, removed any doubt left after *Mangal*. This issue is squarely before the Court in this case. As was the case in *Briggs*, *Smith*, *Douglas*, and *Dawkins* prohibit a medical doctor from vouching for the credibility of a witness. *Simmons* additionally relied on caselaw that pre-dated Mr. Branham’s trial. *See Brown*, and *Burroughs*, *supra*.

In determining whether Mr. Branham has established prejudice, this Court must “consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls*, *supra*. Trial counsel’s failure to consult an independent medical expert deprived Mr. Branham of testimony that contradicted Dr. Saunder’s (very arguably false) testimony that the Solicitors emphasized during both of their closing arguments. Had trial counsel presented the testimony of an independent medical expert, “there is a reasonable probability the jury would have had a reasonable doubt as to whether [Mr. Branham] was guilty of” criminal sexual conduct with a minor. *Ard*, 372 S.C. at 336, 642 S.E.2d at 599. *See also McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008) (counsel rendered prejudicial, ineffective assistance when she failed to investigate medical evidence

contradicting the State's experts' testimony). The prejudice to Mr. Branham was compounded because the solicitor emphasized Dr. Suanders' testimony during closing.

H. Trial counsel's failure to object to hearsay testimony by Dr. Saunders.

Once again, the order drafted by the State, at pp. 17-18, incorrectly applies the medical exception to the hearsay rule. As seen above, admissibility of hearsay information provided to a medical doctor is limited by Rule 803(4), SCRE. *See Simmons, Burroughs, and Brown, supra.* Although an expert can rely on hearsay information to form an opinion, *see* Rule 703, SCRE, the opinion at issue in Dr. Saunders' testimony improperly vouched for the credibility of the child. *See Simmons, supra.* Trial counsel was deficient for not objecting. Trial counsel did not offer any strategic reasons for not objecting. *See Ingle and Freiburger, supra.* For the reasons set forth in Subsection E above, trial counsel's deficient performance prejudiced Mr. Branahm.

Regarding the second prong of *Strickland*, the order drafted by the State impermissibly relies on the inadmissible portion of Dr. Rosa's PCR testimony. *See* Subsection G, *supra*.

I. Trial counsel's failure to object to jury instruction and State's closing argument.

The order drafted by the State, at pp. 18-19, acknowledges *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), but it concludes, at p. 19:

Although, after *Stukes*, the trial court's charge would be error, "the relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies [his] original statements." *Thornes*, 310 S.C. at 310, 426 S.E.2d at 766. Moreover, trial counsel has never been required to anticipate or discover changes in the law that differ from the law at the time of trial. *Id.* at 309-10, 426 S.E.2d at 765. *Stukes* was decided in 2016, approximately five years after [Mr. Branham's] trial. Therefore, because the trial court's jury charge was an appropriate charge on the law at the time, Counsel cannot be found to have been deficient, nor can [Mr. Branham] have suffered any prejudice.

The order, however, completely overlooks *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 244 (2006). Prior to Mr. Branham's jury trial, our Supreme Court cautioned about the danger of

instructing § 16-3-657:

A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law.

Rayfield, 369 at 118, 631 S.E.2d at 250. Justice Pleicones, joined by Acting Justice Bartlett, dissented because this instruction “might cause confusion when read with the general charge on witness credibility,” “carries a strong possibility of biasing the jury against the defendant,” and is an improper comment on the facts in violation of S.C. Const. Art. V, § 15. Justice Pleicones also noted, “Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim’s testimony.” *Id.* at 120-21, 251-252. *State v. Hill*, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011)⁵ provides some guidance for applying *Rayfield*. Our Court of Appeals observed, “Notably, the judge immediately followed [the § 16-3-657 instruction] with, ‘Necessarily you must determine the credibility of witnesses who have testified in this case.’” *Id.* at 299, 379. This statement does not follow the trial judge’s instruction in Mr. Branham’s case. R. 456.

The instruction given in this case implied to the jurors they should give added weight to the child’s testimony. Because credibility was the central issue for the jurors to determine, this instruction prejudiced Mr. Branham. *See e.g. Anderson, Jennings, Berry, supra.*

J. Trial counsel’s failure to object to pitting of the witnesses.

The order drafted by the State, at p. 19, acknowledges “the State did question [Mr. Branham] as to whether or not Ms. Scott, Victim, and Investigator Lyons were lying.” The order never addressed the cases cited by Mr. Branham in his proposed order, at pp. 51-52. *See State v.*

⁵ Our Court of Appeals decided *Hill* on July 27, 2011, prior to Mr. Branham’s trial from August 22-25, 2011.

Brown, 297 S.C. 27, 29, 374 S.E.2d 669, 670 (1988) (“we are compelled to reverse a conviction because the assistant solicitor forced Brown to attack the veracity of the investigating officers by inquiring whether the officers “made the story up” about Brown’s participation”); *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988) (“It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness.”); *State v. Hariott*, 210 S.C. 290, 298, 42 S.E.2d 385, 389 (1947) (prosecutor’s cross-examination was improper when defendants “were forced in effect to directly attack the veracity of the state’s witnesses”); *State v. Warren*, 207 S.C. 126, 35 S.E.2d 38 (1945) (cross-examination of accused as to whether sheriff had told the truth in previous testimony for state concerning statement allegedly made by accused while in jail was improper). Trial counsel, therefore, was deficient for failing to object to the Solicitor’s improperly pitting Mr. Branham’s testimony against the testimony of the witnesses called by the State. Trial counsel did not offer any strategic reasons for not objecting. *See Ingle and Freiburger, supra*.

Trial counsel’s failure to object to the Solicitor’s improper questing prejudiced Mr. Branham by not preserving this issue for appeal. Additionally, prejudice results because credibility was the central issue for the jurors to resolve. *See Smalls, Anderson, Kromah, Jennings, and Berry, supra*.

K. Failure to object to prior consistent statements exceeding the scope of Rule 801(d)(1)(D).

The order drafted by the State, at p. 20, never discusses Rule 810(d)(1)(D). Presumably, the order is silent on this rule because the State concedes deficient performance. *See also Smith v. State*, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (“The forensic interviewer’s testimony substantially exceeded the limitations of time and place set forth in Rule 801(d)(1)(D), SCRE.”).

Addressing the second prong of *Strickland*, the order drafted by the State, at p. 20, states,

“The presence of overwhelming evidence of guilt negates any claim that counsel’s performance could have reasonably affected the result of the trial. As pointed out in Subsection B, *supra*, the order drafted by the State completely ignores our Supreme Court’s holding in *Smalls*. Once the false medical testimony is corrected, *see* Subsection G, *supra*, this case turns solely on the credibility of witnesses, thereby establishing prejudice. *See Smalls, Anderson, Jennings, and Berry, supra*.

L. Counsel’s failure to object to the replay of the child’s videotaped interview.

The order drafted by the State, at p. 21, cites *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980) and argues, “In its discretion, the trial court may permit the jury at their request to review testimony after beginning their deliberations.” The order, however, does not address any of the caselaw cited by Mr. Branham in his proposed order, at pp. 56-57. The videotape of Ms. Elliott’s interview of the child is essentially videotaped testimony without an opportunity for contemporaneous cross-examination. “The rereading of a witness’ testimony is disfavored when it unduly emphasizes that testimony.” *United States v. Binder*, 769 F.2d 595, 600–01 (9th Cir. 1985) (citing *United States v. Nolan*, 700 F.2d 479, 486 (9th Cir.)). “The determination to allow a rereading or rehearing of testimony must be based on particular facts and circumstances of the case. Undue emphasis of particular testimony should not be permitted.” *Id.* *Binder* explained:

Videotape testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness. It serves as the functional equivalent of a live witness. Since there was no physical evidence, the only evidence of acts of molestation was presented through the children's videotaped testimony. The defendant denied any criminal conduct, asserting that the children were displeased with him and their charges against him were vindictive. Credibility became a crucial issue. Under these circumstances the videotaped testimony may have taken on great significance. Allowing the jury to see and hear the children's videotaped testimony a second time in the jury room during deliberations unduly emphasized their testimony.

Id. In South Carolina, the trial judge has the discretion to allow jurors to review portions of the

testimony “*in the defendant’s presence.*” *State v. Carlson*, 363 S.C. 586, 601, 611 S.E.2d 283, 291 (Ct. App. 2005) (emphasis added). *See also State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). The same rule applies to audio and videotape. *State v. Winkler*, 388 S.C. 574, 585, 698 S.E.2d 596, 602 (2010) (“The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the evidence was presented at trial.”). Trial counsel therefore, was deficient for not objecting to the jurors receiving a copy of Ms. Elliott’s interview. Trial counsel did not offer any strategic reasons for not objecting. *See Ingle* and *Freiburger*, *supra*.

Because credibility was the central issue for the jurors to determine, Mr. Branham has established prejudice. *See Smalls, Anderson, Kromah, Jennings, and Berry*, *supra*.

M. Cumulative error.

The State’s proposed order, at p. 21, cites *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002) (“Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.”). This argument overlooks application of the harmless error rule by the Supreme Court of the United States when applying *Strickland*. *See, e.g. Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the prejudice must be “considered collectively, not item-by-item”). The Supreme Court’s opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire 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.”

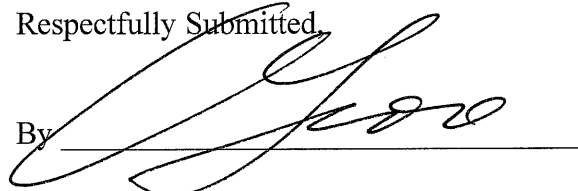
CONCLUSION

For the foregoing reasons and the reasons set forth in George Branham’s proposed order, this Court should reconsider its order of dismissal, withdraw that order, and enter an order granting Mr. Branham post-conviction relief.

IT IS SO MOVED.

Respectfully Submitted,

By

A handwritten signature in black ink, appearing to read "E. Charles Grose, Jr.", written over a horizontal line.

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

Attorney for George Branham

February 24, 2019
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW	)	
	)	Case No. 2014-CP-28-00703
George Stanley Branham, II,	)	
Applicant	)	
	)	Rule 59(e), SCRCP Motion and
vs.	)	Proffer of Proposed Orders
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Kelly Oppenheimer, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549

By 

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

February 25, 2019
Greenwood, South Carolina

A. 610

EXHIBIT A

**PROFFER OF GEORGE BRANHAM'S PROPOSED
ORDER**

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF KERSHAW	)	
	)	Case No. 2014-CP-28-00703
George Stanley Branham, II,	)	
Applicant,	)	
	)	Order Granting Post-Conviction Relief
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

This matter is before the Court of George Branham's application for post-conviction relief ("PCR"). After reviewing the procedural history, this Court makes the following findings of fact and conclusions of law. For the reasons set forth below, this Court grants Mr. Branham's PCR application.

I. PROCEDURAL HISTORY.

At the July 2011 term of General Sessions Court, the Kershaw County Grand Jury indicted Mr. Branham for first-degree criminal sexual conduct with a minor (Indictment No. 2010-GS-28-00448). R.¹ 491. From August 22-25, 2011, the State tried Mr. Branham before the Honorable Clifton Newman and a jury. Ron Moak and Debra Barry of the Fifth Circuit Solicitor's Office prosecuted the case. Cornelius J. Riley of the Kershaw County Public Defender's Office initially represented Mr. Branham, and Jason D. Kirincich, also of the Kershaw County Public Defender's Office represented Mr. Branham at trial.² The jurors convicted Mr. Branham as charged. R. 472.

¹ "R." followed by a number refers to the pager number of the Record on Appeal.

² Attached to Mr. Branham's initial PCR application are letters dated (1) December 7, 2010 dismissing an Office of Disciplinary Counsel filed by Mr. Branham against Mr. Riley, (2) March 10, 2010 from Mr. Riley to Mr. Branham stating, "You're fired. I've reassigned your case to Mr. Kirinch. Good luck," and (3) June 9, 2011 stating an additional Office of Disciplinary Counsel complaint filed by Mr. Branham against Mr. Riley "was not dismissed, but the disposition is

Judge Newman sentenced Mr. Branham to fifty years imprisonment. R. 488, 492. On September 2, 2011, Mr. Branham filed written motions for a new trial and to re-consider the sentence. R. 495-98. By written orders dated November 2, 2011, Judge Newman denied those motions. R. 499-500.

Mr. Branham appealed his conviction and sentence. Breen R. Stevens, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, represented Mr. Branham and filed an *Anders*³ brief, briefing this single issue:

Whether the trial court reversibly erred in violation of Appellant's Due Process right to present a complete defense by prohibiting Appellant to introduce evidence of a prior false allegation of abuse made by Child complainant's older sibling against Appellant thus depriving Appellant of the ability to show that Child's family had a history of coaching alleged sexual assault victims?

The Court of Appeals dismissed the appeal and granted counsel's motion to withdraw. *State v. Branham*, Op. No. 2013-UP-346 (S.C. Ct. App.) (filed September 4, 2013). On October 24, 2013, the Court of Appeals denied Mr. Branham's *pro se* petition for rehearing. The Remittitur issued on December 5, 2013.

On August 4, 2014, Mr. Branham filed a *pro se* PCR application raising the following grounds for relief:

10(a) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when counsel failed to inform the Applicant of his right to request substitute counsel due to a conflict of interest and for failure to obtain a written waiver from the Applicant.

10(b) Applicant's due process right to respond to adverse testimony as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated along with Applicant's right to effective assistance

confidential under the provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

³ *Anders v. California*, 386 U.S. 738 (1967).

of counsel and the right to be present “at every stage of the trial,” as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to object to the replay of the videotaped forensic interview in the jury room during deliberations.

10(c) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to object under S.C.R.Evid. 801(d)(1) to hearsay testimony from a Forensic Interviewer that was improperly corroborative of the alleged victim, and for failing to object to her opinion testimony that improperly bolstered the alleged victim’s credibility, and counsel was also ineffective for eliciting testimony from the Interviewer that vouched for vouched for the alleged victim’s credibility.

10(d) Applicant was denied the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to consult with or subpoena an independent medical expert for the defense to refute clearly erroneous findings of the State’s medical expert witness.

10(e) Applicant’s right to the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution was violated as a result of trial counsel’s failure to object to a Solicitor’s recross-examination that improperly pitted the Applicant’s testimony against that of three of the State’s witnesses.

10(f) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution by trial counsel’s failure to object to a Solicitor’s comments vouching for [the] credibility of three of the State’s witnesses during her summation.

10(g) Applicant was denied the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel opened the door for 801(d)(1)(B), to allow otherwise inadmissible hearsay, during cross examination of the alleged victim.

10(h) Applicant was denied the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution by appellate counsel’s failure to appeal trial counsel’s objection to the introduction of the complaining witness’s prior out-of-court video recorded statements during an interview.

10(I) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to object to a picture of the alleged victim being moved into evidence; State's Exhibit #7.

10(J) Applicant was denied the right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the South Carolina Constitution when trial counsel failed to object to several instances of hearsay testimony from five of the State's witnesses that impermissibly corroborated the victim's identification of Applicant as the perpetrator and went into particular details of the alleged assault which substantially exceeded the limitations of time and place set forth in Rule 801(d)(1)(D), SCRE, thereby improperly bolstering the victim's credibility.

The State served its return on January 30, 2015. On January 22, 2016, appointed PCR counsel amended Mr. Branham's PCR application to present the following grounds for relief:

11(a) Ineffective assistance of trial counsel for failure to object to hearsay statements. Tr. 135 and 136.

11(b) Ineffective assistance of trial counsel for asking questions regarding prior allegations of sexual misconduct against the defendant, alerting the jury to this fact without the opportunity to explain to the jury the results or circumstances of such allegations. Tr. 157-158.

11(c) Ineffective assistance of counsel for failing to object to the qualification of witness Debbie Elliott as an expert in child abuse assessment and forensic interviewing.

11(d) Ineffective assistance of counsel for failing to object when witness Debbie Elliott offered testimony in front of the jury that was not limited to foundational information for introduction of the interview videotape. Specifically, counsel failed to object when this witness offered information regarding techniques involved in conducting the interview, theories regarding types of disclosure, and conclusions and opinions regarding the victim's credibility and ability to understand the difference between the truth and a lie.

11(e) Ineffective assistance of counsel for failing to retain and consult with a forensic pediatrician for a second opinion regarding the medical and photograph evidence.

11(f) Ineffective assistance of counsel for failure to object when Dr. Saunders testified regarding hearsay information obtained from prior medical records not offered in trial. Tr. 323-324.

11(g) Ineffective assistance of counsel for failure to object when the Judge charges that “testimony of and alleged victim in a criminal sexual conduct case need not be corroborated” and the Solicitor put special emphasis on this during closing arguments. Tr. 427 and 456.

11(h) Ineffective assistance of counsel for failing to object to the Solicitor’s improper pitting of the witnesses. Tr. 401-402.

11(i) Ineffective assistance of counsel for failing to object to prior consistent statements of the witnesses as impermissible hearsay which bolstered the witness testimony. Inadmissible prior consistent statements were offered without objection through:

- a. The admission of written reports and medical records. Tr. 265 and 191.
- b. Through the testimony of witnesses. Tr. 125, 266 268-271, 313-314.

11(j) Ineffective assistance of counsel for failure to object to the replay of the forensic interview video in the jury room.

This Court convened an evidentiary hearing on February 4, 2016. Kristy G. Goldberg represented Mr. Branham. J. Clayton Mitchell, III represented the State. At the beginning of the hearing, counsel for Mr. Branham orally amended the application to include cumulative error as a ground for relief. PCR⁴ 5. The Court heard testimony from Dr. Olga Rosa, Mr. Branham, and Mr. Kirincich. After hearing arguments from counsel, this Court took that matter under advisement and subsequently requested proposed orders.

Kelly Oppenheimer of the South Carolina Attorney General’s Office substituted as counsel for the State for Mr. Mitchell. Charles Grose substituted as counsel for Mr. Branham for Ms. Goldsmith.

⁴ “PCR” followed by a number refers to the page number in the transcript of the PCR evidentiary hearing.

II. FACTUAL BACKGROUND.

A. Evidence Presented at Trial.

The trial judge convened a pre-trial motions hearing. Trial counsel renewed Mr. Branham's motion for the State to disclose photographs taken by Dr. Kathy Saunders of the child during a sexual assault examination at the Carehouse, which is a children's advocacy center in Florence, South Carolina. The Solicitor had "requested them repeatedly" but had not received the photographs. After the Solicitor suggested the photographs would not be admissible, trial counsel argued:

Your Honor, our purpose is not to introduce these to the jury. There are certain things in Dr. Saunder's report that could be contradictory. I think they may be cleared up if we had an opportunity to view the pictures beforehand, or at least give me a better idea of how to question this doctor.

R. 26-28.

The State called Debbie Elliott, pre-trial. She is employed by the Carehouse as a "forensic interviewer." Ms. Elliott completed the "finding words training" and had eight and one-half years of experience conducting "forensic interviews." When the Solicitor offered Ms. Elliott "as an expert in forensic interviewing and child abuse assessment," trial counsel conducted *voir dire* about the "finding words training" and whether Ms. Elliott could recall the number of children she found not to be credible, which she could not. Ultimately, trial counsel did not object to the trial judge qualifying Ms. Elliott as an expert witness in forensic interviewing and child abuse assessment. Ms. Elliott then testified about the child abuse accommodation syndrome, the process of a child disclosing sexual abuse, and the RATAC method. The Solicitor published the videotape of Ms. Elliott's interview of the child. R. 46-62. Trial counsel did not object to the admissibility of the videotape, and the trial judge ruled it admissible, pursuant to S.C. Code § 17-23-175. R. 76-77; 118-19.

During opening statements, the Solicitor informed the jurors they would hear medical testimony that is “going to be very uncomfortable.” Dr. Foy Connell will “describe how [the child] had a widened introitus.” Kathy Saunders, a forensic nurse examiner, will testify about her findings during a medical exam three days later. The Solicitor told the jurors they would “see the forensic interview,” conducted by “Debbie Elliott, “a trained interviewer” at the Carehouse. R. 106-13.

The State called Jessica Scott, who is the child’s mother.⁵ She used to be married to Mark Scott, who is the father of the child and two of her siblings. Mr. Branham and Ms. Scott had four children together.⁶ Ms. Scott began living with Mr. Branham in 2005 in Camden. They moved eight times in three years to various locations around the state, eventually returning to Elgin, in Kershaw County, in October or November 2009. On December 8, 2009, Mr. Branham came home at 2:00 a.m. Mr. Branham woke up Ms. Scott. Ms. Scott alleged:

And I got up and talked to him for a few minutes. I went back to bed. In the process, I guess it woke up some of the kids. [The child] woke up. And I laid back down with them. And I rolled over to curl up with [the child] and realized she wasn’t there. So I got up to look for her.

When I walked into the kitchen, I could see down the hallway and George was laying on top of her with his pants around his ankles. And he had her pants down.

So I walked down the hallway and asked him what he was doing.

And he jumped up, pulled his pants up, and told me he was trying to make her go to the bathroom.

So I walked down the hallway. I got her and I took her to the restroom. And she peed.

⁵ Ms. Scott was convicted on two separate occasions for obtaining money under false pretenses. R. 137-38; 152-52.

⁶ At the time she testified, Jessica Scott was pregnant with an eighth child by a third father. R. 121. She refused to disclose the identity of the father. R. 143-44.

And George stood at the doorway the whole time. So whenever we walked back through the living room, I was talking [the child] back to my room with me to ask her what happened, and George stopped me. He says, are you taking her back to the bedroom with you?

And I said, no. I'm going to get her pillow and get [her sibling] off the bed, and I am going to put them in their room.

And when I took [the child into the bedroom and her what he was doing to her.

And she told me he was trying to stick his private in her hole.

R. 120-25. Ms. Scott testified she confronted Mr. Branham "in the living room where he was sitting in a chair and told him I knew what he was doing and I wanted him to get out of my house."

Ms. Scott called 911. Law enforcement responded, and Ms. Scott provided a written statement.

R. 125. Ms. Scott authenticated her call to 911 (State's Ex. 6), which was played for the jurors.

R. 128-29.

Ms. Scott called her mother, Debra Scott, who came to her residence and took the child to the hospital. Ms. Scott did not go to the hospital with her daughter. Mr. Scott took the child to the interview at the Carehouse. R. 133-34.

During Ms. Scott's testimony, the Solicitor introduced a photograph of the child showing "what she looked like around the time" of the allegations (State's Ex. 7). Trial counsel did not object. R. 118, 132-33. The following exchange occurred between the Solicitor and Ms. Scott:

Q: And did [child] have something going on with her hair around that time?

A: Yes, her hair was falling out.

Q: What did the doctor tell you.

A: That it was stress.

Q: And you were working 16 hours a day?

A: A lot of times, yes.

Q: Who was taking care of the kids?

A: George or Bubba.

MR. KIRINCICH: Your honor, I'm going to object. I'd like to approach if I can.

(A bench conference was held off the record in the presence of the jury, but out of the hearing of the jury.)

THE COURT: The question has already been answered. You may proceed.

Q: Did [child] have an issue with her privates?

A: Yes.

Q: Tell us about that?

A: We took her to the doctor a lot. She kept having urinary tract infections. The doctor would give her an antibiotic. Whenever we would ask him to let us know what was going on, they would just say she's red and irritated and that they didn't want to mess with it because they didn't want to make it worse.

Q: And this was a common occurrence?

A: Yes.

Q: She ever have any yeast infections?

A: Yes.

Q: And you took her to the doctor?

A: I'd take her to the doctor. My mother took her to the doctor. Her father took her to the doctor.

Q: Did you ever notice [child] bleeding?

A: I never seen any blood in her underwear or anything. But she had told me that she had fallen riding her bike and had hit her pelvic area because she had just gotten, I guess, like a 10-speed bike.

Q: And when was that?

A: Maybe a year or so before that incident happened. There was also a time where she said she had gotten hit in the stomach by her brother.

Q: That's the only 2 instances you can think of?

A: Yes.

Q: When she got hit – allegedly hit in the stomach by her brother, was she bleeding from her vagina?

A: I never seen it. I – I'm not sure. She just said she'd gotten hit in her stomach by her brother.

R. 135-37.

On cross-examination, Ms. Scott admitted to using crack cocaine but denied she and Mr. Branham argued about her drug use on the night of December 7, 2009. R. 142-43.

Following a bench conference, the following exchange occurred between Ms. Scott, trial counsel, the Solicitor, the trial judge during cross-examination:

Q: Ms. Scott, at some point did [sibling 1] alleged [sic] that he had been abused?

MR. MOAK: Your Honor, this is not – this is what my objection was.

THE COURT: Objection is sustained.

(Pause.)

Q: Ms. Scott, has anybody ever made a false allegation against Mr. Branham in your family?

A: As in?

Q: A false allegation of sexual abuse?

MR. MOAK: Your Honor, this is the same objection.

THE COURT: Objection is sustained. I sustain the objection. No comment necessary. Next question.

MR. MOAK: Your Honor, I ask that we strike those from the record. I mean, that's total improper questions.

THE COURT: The jury is to disregard that question.

Later on, outside the presence of the jurors, trial counsel informed the trial judge, “[T]here was a specific line of questioning that I wanted to go in to [sic] that involved fabrication by another one of her children.” The trial judge stated, “It’s pretty easy to see why that’s an improper line of questioning if that’s what you were trying to do.” Trial counsel questioned Ms. Scott *in camera*. Ms. Scott acknowledged the child’s sibling previously accused Mr. Branham of sexual abuse, but Ms. Scott’s ex-husband’s brother, John Scott, turned out to be the “alleged perpetrator of that abuse.” Ms. Scott denied the child’s sibling was coached to make the allegations against Mr. Branham. The trial judge, once again, sustained the State’s objection to this line of questioning by the defense. R. 184-90.

The State called the child. At the time of the trial, she was eight years old and lived with her father and brother. She testified she lived for seven years with her mother, Jessica Scott, and Mr. Branham, who she referred to by his nickname, “Bubba.” She testified Mr. Branham “messed with” her “privates” with “[h]is private.” The child testified about the night Ms. Scott called 911 and law enforcement arrested Mr. Branham. The child testified she was sleeping in her mother’s room, woke up, and had to go to the bathroom. She testified she went down the hallway, and Mr. Branham started “messaging” with her outside the bathroom by pulling down her pants, pulling down his pants, and putting his private inside her. The child testified, “It happened a lot of times. And I don’t know how much.” R. 167-75.

On cross-examination, trial counsel asked the child if she recalled a little boy at school “messaging” with her. Initially, she did not recall it. Later during cross-examination, she recalled, “I told my teacher that this little boy was messing with me.” She was six years old when this assault occurred. R. 179, 181-82.

The State called Dr. Foy Connell, who is the emergency room doctor that examined the child on December 9, 2009. Dr. Connell testified about his examination of the child, who was “lying on the bed with her feet in a frog leg position.” He opined, “[T]he introitus to the vagina, or where the opening of the vagina appeared to be dilated or – or widened posteriorly, which is indicative of abuse or trauma or anything like that that’s been going on for a long time.” Dr. Connell explained, “Typically the introitus is a V-shaped opening. On the introitus with this young lady, the opening to her vagina was U-shaped, wide.” Dr. Connell testified, “The hymen in this position appeared to me to be attenuated, which means that instead of being tall and, you know, normal appearing, it appeared to be shortened.” Dr. Connell testified, “[A]nything that penetrates the vagina would – could possibly cause it to be widened.” According to Dr. Connell, a widened introitus in a seven year old child is “very uncommon.” Dr. Connell recommended the child follow up with Dr. Luberoff for an “extensive [medical] examination.”⁷ R. 192-202.

On cross-examination, Dr. Connell acknowledged his written records stated, “There are no signs of physical injuries at the time of the examination, meaning “there were no signs of an acute laceration or acute bruising or acute anything at the time of the examination.” Dr. Connell further acknowledged he examined the child only one position and “the hymen or the introitus [could] appear differently if she’s examined on her back or if she’s examined in the prone position.” R. 202-13.

The State called Debbie Elliott who interviewed that child at the Carehouse. At the State’s request—without objection by trial counsel—the trial judge qualified Ms. Elliott “as an expert in forensic interviewing and child abuse assessment.” Ms. Elliott explained a “forensic interview is

⁷ Dr. Susan Luberoff is a pediatrician, who trial court judge have qualified as an expert witness in child abuse pediatrics. *See, e.g. State v. Dial*, 405 S.C. 247, 252, 746 S.E.2d 495, 498 (Ct. App. 2013); *State v. Williams*, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013).

a child-friendly interview that's conducted in a child-friendly setting." During the interview "it's stressed to them that they need to tell the truth." Ms. Elliott testified, "I want as clean and unbiased interview as possible." Ms. Elliott "assess[es] the child's competency." She testified:

And also about the truth and lie. I'm talking – asking children to tell me the truth, but then I also have to elicit from the child whether they understand what that means, if they understand what truth means and the difference between truth and lie and what those consequences are. And we have a truth-lie competency exercise that we do with children to assess that.

R. 218-25. Ms. Elliott explained:

I try to use non-leading questions and non-suggestive questions, starting out with the most narrative kinds of questions like: Tell me about you family, tell me about school so that it starts out very broad and getting the child to talk as narratively as possible without it being yes, no, or multiple choice. You want it to start out as narratively as possible, so non-suggestive and non-leading.

R. 226. Ms. Elliott explained, "I want that information to come from the child, clean information from the child." She uses "the RATAC protocol," which is a "nationally-recognized protocol." She then explained the "Child Abuse Accommodation Syndrome." She testified "delayed reporting" is "extremely common" for "victims of child sexual assault when there is a familiar" relationship. R. 226-30.

Ms. Elliott next testified about her "forensic interview" of the child on December 11, 2009. Ms. Elliott conducted the "competency assessment" and determined the child "understands the difference between truth and lie and the consequences of lying." She opined the child was competent. She testified about the "safeguards" used "to prevent any type of influence." Ms. Elliott testified there was nothing about the child's disclosure that would cause her "to believe it was the result of third-party influence," and in her "expert opinion" the child's disclosure was not "affected by suggestibility or coaching." Ms. Elliott explained:

[W]hen children are coached – and I have interviewed some children that have been coached. Many, many more have not been. But usually they – they cannot provide

details. I'll ask them about what happened. They may say a little bit. I'll go to something else and come back to that. And they kind of go back to the exact same thing that they said before. It's almost like a rote statement. It's sort of like somebody told you to say that.

With [child] her's was extremely spontaneous. She had a lot of detail – much more detail than a – than an un-abused 7-year old would know about, non-abused 7-year old.

R. 230-34. The State introduced a videotape recording of Ms. Elliott's interview of the child and published it to the jurors. R. 235-37. After the jurors viewed the videotape of the interview, the following exchange occurred between the prosecutor and Ms. Elliott:

Q: Ms. Elliott, in your expert opinion based on that video and based on your actual interview with [child,] was she able to give you a detailed account of what happened?

A: She was.

Q: Was it age appropriate?

A: It was.

Q: Was it logical – did it follow a logical path?

A: I think it did.

Q: The chronological order of the event, did that make sense in your opinion?

A: It did.

Q: Was there anything about her interview that gave you any concern?

A: No.

Q: At 7 years old, are children typically in tune with their body, meaning are they aware of the anatomy and which hole might be used in your experience.

A: Only children that have some knowledge of that from sexual abuse or – from sexual abuse mostly.

Q: In your opinion can they accurately describe events in the adult world?

A: No. Children typically can tell you the most detail about the last event that's happened, because it's the most fresh in their memory. Sometimes other things get kind of muddled through the years.

Q: In your expert opinion was she – did she give you details that were not age appropriate?

A: Some of the – some of the terms that she used certainly were words that typically a 7 year old wouldn't use. Like when she said – when she talked about Bubba messaging his wiener until he finished. No 7 year olds aren't going to know about finishing until he's done in that context. And that she said until he's finished or until he's done. That's not something that a child who has not been abuse would typically know about or have knowledge of.

Q: What was your conclusion following this interview:

A: *My conclusion was that [child] had been chronically sexually abused by Bubba, George Branham.*

Q: You have conducted over –

A: Over 5,000 interviews.

Q: And that was your conclusion?

A: Yes, ma'am.

Q: What recommendations did you have for [child]?

A: I had several recommendations. Most importantly, that she enter therapy so that she can begin to process the sexual abuse; that she have no contact with George Branham; that he have no direct or indirect contact with her. Do you want all the recommendations?

Q: No.

A: Okay.

Q: In your opinion – and you were present when she testified?

A: Yes.

Q: Is it easier or more difficult for a child to talk to an adult one-on-one or in a group setting?

A: Definitely I think one-on-one; that's why child advocacy centers were developed, so that there would be a place for children to disclose in a safe and child-friendly environment, where there were no distractions and the non-offending – I mean, the offending – alleged offender was not present.

Q: And in your expert opinion what effect if any does time play on a child's ability to talk about sexual abuse?

A: Usually the most recent event children can talk about. They don't always know – and that's one of the reasons why I said to her in the interview, you may not be able to answer this question. But do you remember when this first started? And she said 3.

And when she said 3, I asked her how she knew that or how she could remember she was 3 when it started. And she said because I can't remember when I was 1 and I can't remember when I was 2.

So that leads me to think that maybe those were just some of her memories – first memories is when she was 3.

Q: And as time goes on, what effect does memory have on a child's ability to remember events?

A: They usually – not – not as able or capable to talk about things in such detail as the most current event.

Q: And in your expert opinion is it more common for younger children to talk about – or give spontaneous disclosures in forensic interviews as opposed to older children, does that time – is anything lost during that time?

A: Oh, certainly things can be lost.

Q: What other factors might play in to that as children get older?

A: Well, they're more sophisticated. They know that more things can happen – more things can happen to their family, negative things can happen to them. More and more people have talked to them about what's happened. So the sooner the disclosure to somebody – whether it's accidental or purposeful – the better it is to have the interview conducted.

R. 238-42 (emphasis added). Trial counsel did not object to any of this testimony.

On cross-examination, the following exchange emphasized Ms. Elliott's opinion that the child told her the truth:

Q: Ms. Barry was asking if anything gave you concern. You said, no, that you weren't concerned that she was telling the truth or that she inaccurately described anything?

A: *I felt she was telling me the truth.* Of course, I was concerned about what she was telling me, that's very concerning.

R. 245 (emphasis added). Ms. Elliott acknowledged the child reported seeing Mr. Branham and Jessica Scott having sex on numerous occasions. R. 248-50.

On re-direct, the following exchange occurred, again emphasizing Ms. Elliott's opinion that the child told her the truth during the interview:

Q: In your expert opinion after interviewing over 5,000 children, did you find her disclosure credible?

A: I did.

Q: How often did she say that the abuse happened?

A: [Child] said it happened all the time. He done it all the time.

R. 255-56. Trial counsel did not object to this testimony.

The State called Rebecca Scheffer, who is a Registered Nurse, qualified "as an expert in sexual assault nurse examination." She performed a sexual assault examination on the child on December 8, 2009. Ms. Scheffer testified the child provided the following information:

Mom caught Bubba trying to touch me in the hallway. Bubba has touched me with his nuts a lot of times. I bled on time – not last night. Mom saw him with his pants down and my pants down as usual.

R. 260-66. Ms. Scheffer summarized the sexual assault exam she performed and testified about the evidence she collected. R. 266-76.

The State called Amanda Webb, who is a DNA analyst at the South Carolina Law Enforcement Division ("SLED"). She analyzed the "swabs and materials that were collected" during the child's sexual assault examination. She did not find any semen or sperm on any

evidence submitted to her. R. 281-88. None of the evidence collected during the sexual assault examination was linked to Mr. Branham.

The State called Deputy Michael Lyons of the Kershaw County Sheriff's Office. Along with other deputies, he responded to the call at Mr. Branham's home on December 8, 2009. He detained and handcuffed Mr. Branham. He interviewed Ms. Scott and made the decision to arrest Mr. Branham. Corporal Bailey gave Mr. Branham his *Miranda* warning. According to Deputy Lyons, no one from law enforcement questioned Mr. Branham. He heard Mr. Branham say "the little girl had had an issue with going to the bathroom and cleaning herself, and that he was checking to make sure she did a good job." R. 288-96, 302.

The State called Dr. Kathy Saunders,⁸ who is employed by the Carehouse as a "nurse practitioner and functioned in the role as the forensic medical examiner." The trial judge qualified her "as an expert in the field of forensic child sexual assault examination." She examined the child on December 11, 2009. A Department of Social Services caseworker provided Ms. Saunders "a brief history of why the child was presenting" to her. The child's father provided the following history:

Bubba, who is mom's boy friend [sic], George Branham, had come in drunk from a neighbor's house. Bubba wanted to have sex with Jessica, who was the child's mother, but she didn't want to. [Child] had gotten out of the bed and was going to the bathroom and Bubba came – had got up behind her and went in the hallway and pulled the child's pants down and pulled his pants down and was having sex with the child, [child]. [Child] was taken to the hospital by the maternal grandmother because she was complaining of vaginal pain. The child was then referred to the Carehouse for follow-up evaluation.

R. 304-14.

⁸ Dr. Saunders is not a medical doctor. She is a registered nurse. She obtained an associate's degree in nursing, a bachelor's degree in nursing, a master's degree in nursing, and doctorate of nursing practice. R. 306.

Mr. Elliott's had shared with Ms. Saunders the information that the child told her about the sexual assault during her interview at the Carehouse. Ms. Saunders summarized her examination. The shape of the child's hymenal tissue was annular, which "means that the opening to her vagina had a complete collar of skin all the way around the opening of the vaginal introitus or the vaginal opening." Ms. Saunders then testified:

Other significant findings where that the tissue was smooth, it was very thin to the posterior rim, and that simply, again, reestablishes that she had no hormonal effects or that she was not even nearing pubital development. With attenuation of the hymenal tissue from 5:00 to 7:00 o'clock area. And with a medical examiner, we use this opening – this little circle opening like the face of a clock, with 12:00 at the top, 6:00 at the bottom, and 3:00 and 9:00 to the left and right of either side. So the absence or loss of that tissue would have been from 5:00 to 7:00 o'clock on the lower half of the vaginal rim.

There was generalized vulvar erythema, which just means that the whole vaginal area – both the inside and to the outer layers of the vaginal opening were red and irritated. And also noted urethral tissue – and the urethra is where we secrete our urine through – was also found to be red or with erythema.

There was a small amount of clear discharge present. And the conclusion and impression of these medical findings were that it was consistent with past penetration.

Q: And what was your conclusion?

A: Any time we see a loss of hymenal tissue, it does not occur by accident. It doesn't occur as a [redacted] defect. All girls are [redacted] – if they are truly girls, they are all [redacted] with hymenal tissue or a charry or a vagina. People in the lay community call it different things. We call it hymenal tissue. But every female is [redacted] with tissue. When there is an absence of tissue, it is because there has either been a surgical procedure to remove it for some reason, like maybe cancer or whatever. Or that there has been an injury like a penetrating injury, an object has been inserted into the vagina to cause a loss of that tissue present.

Q: And in your findings, you found that there was a loss of tissue present?

A: That's correct.

Q: Were you provide information that [child] had had any vaginal surgery to remove hymenal tissue?

A: I had not.

R. 314-21.

Reversing its pre-trial position, the State moved into evidence two photographs Ms. Saunders took during her examination of the child. R. 321; State's Ex. 15 and 16. Ms. Saunders re-explained her findings using these photographs. She then testified:

The other thing that's of significance to me, just in my clinical experience of examining the numbers of children that I have, is there's some a-vascularity, meaning absence of blood tissue or blood vessels, excuse me, in this area along the posterior rim. Which the significance of that to me in my medical report I put consistent with past penetration.

R. 321-22.

Ms. Saunders testified about the child's history of symptoms of a urinary tract infection but a lack of tests confirming the child had a urinary tract infection. She explained, "So when I see these findings, and then I see this a-vascular pattern right here, the concern for me is does this represent scar tissue that has formed as a result of the penetrating injury?" The following exchange occurred:

Q: And you mentioned scar tissue. Why is that significant at all?

A: We've all injured our skin before. Sometimes it heals with no residual or no scar present. Sometimes we've injured our self and it heals with a scar. Two things that are significant to me when you seek scar tissue, it represents past injury for sure. There's no question that there's been an injury.

Secondly, it desensitizes the skin, meaning that the strong sensation of pain or discomfort that a female would experience originally – I don't know how to do this – during intercourse because of the lack of hormones present, because the scar tissue is present, the repeated penetration or attempts of penetration or just touching in that general area would allow some desensitization of the skin and would not be painful to her during the contact or during the events that may occur to her.

Q: So in 2009 – December 2009 when you saw her, she had developed scar tissue, there are was desensitized?

A: That is correct.

R. 322-25.

Ms. Saunders was aware of Dr. Connell's medical exam of the child at the hospital. The following exchange occurred between the prosecutor and Ms. Saunders:

Q: What in your expert opinion does the term widening introitus mean?"

A: Usually when providers – whether it be a physician from any walk of practice, whether it be private practice, emergency room, pediatrics, calls and wants to make a referral to me, they're not experts in the field of child abuse. So they are using their best tools to describe what they see. And usually in my clinical experience when somebody refers to the child's vaginal opening as being wide open, widening, or thin, or narrow, it's because there has been a loss of tissue present that does allow this opening if you will right here, this entire opening, to appear big or large or more open than it should be. So that would be my interpretation of what he's saying, and it's because there's a loss of tissue.

Now, if the tissue would have been more normally present in this entire area, the opening would have been considerably smaller, and then I wouldn't have fully understood what was being described as a widening or wider opening.

But typically, that's the reasoning they use those terms.

Q: So in an 8-year old or 7-year old you would expect to find a hymen – more tissue present?

A: That is correct.

Q: But not –

A: That is correct.

Q: In your expert opinion, Dr. Saunders, what were your conclusions based on your examination?

A: That the findings were consistent with past penetration.

Q: What are you basing that on?

A: Basically, just my physical findings. Certainly, the history that was given supported what I was finding. The information that the child disclosed in the forensic interview supported my findings on the medical evaluation as well.

Q: And the injuries that we are looking at right now, in your expert opinion would you classify that as chronic sexual assault or –

A: Knowing the disclosures of the child during the forensic interview, that it was not a single event, does this finding support that? Absolutely, it does. Absolutely.

R. 327-32. Trial counsel did not object to any of this testimony.

After the State rested, Mr. Branham testified. On December 7, 2009, Mr. Branham and Jessica Scott had an argument about her drug use. Mr. Branham wanted Ms. Scott to quit using crack cocaine. Mr. Branham “threatened to leave and take the children.” The argument calmed down, and Ms. Scott went to bed. Mr. Branham did not have a car and planned for his father come get him and the children and take them to his house in Gaston, South Carolina. Later on, the “child got up to go to the bathroom.” The child wanted Mr. Branham to go with her. Mr. Branham “told her to get her mom. She said she had asked her mom to go with her, and her mom wouldn’t get up.” The child went to the bathroom. Ms. Scott came into the hallway as the child was coming out of the bathroom. Mr. Branham and Ms. Scott “argued for another minute or 2.” Mr. Branham testified:

[Ms. Scott] walked [child] into the bathroom. They stayed in there for a few minutes. She came back out, went to the bedroom. And I believe that’s when she picked up the phone and called 911.

R. 365-69. Mr. Branham heard Ms. Scott talking to the 911 dispatcher, and he was “shock[ed].” Although Mr. Branham was “upset” with Ms. Scott and yelled, he did not leave the residence and waited for law enforcement to arrive. He recalled telling law enforcement that that child had trouble wiping after using the bathroom. R. 369-71, 381.

Mr. Branham testified that the child, on two prior occasions, disclosed allegations of abuse to him and Ms. Scott in the past that led to a medical exam at the hospital. The allegations were reported to the appropriate authorities. Mr. Branham was also aware the child had been “taken to

the hospital for problems with her genitalia” in the past. Mr. Branham denied touching the child in any in appropriate way. R. 376-77, 79.

The following exchange occurred during the Solicitor’s re-cross-examination of Mr. Branham:

Q: So all these people, Jessica, [child,] Investigator Lyons, they’re all lying?

A: Apparently.

Q: Apparently?

A: Yes, ma’am.

R. 402.

Mr. Branham’s father, George Branham, Sr., testified. He was concerned about Ms. Scott’s problems with illegal drugs. He believed his son needed to leave Ms. Scott. He confirmed there had been discussion about his son moving in with him. R. 406-11.

During closing arguments, the Solicitor argued:

Now he’s saying Jessica made this up.

But when asked why would [child] make this up? He says, I don’t know. He says that he loved [child] and still loved [child]. He said [child] loved him. I don’t know why she would make this up. He didn’t even throw out anybody – he didn’t even throw anything out –

R. 426. Trial counsel objected. The trial judge overruled the objection. The Solicitor continued:

Did the witness have any reason to be biased or prejudiced?

[Child] – she’s not even living with her mother. She’s living with her father. She’s not in the home of anybody that’s really involved in this case. She’s in another home. The outcome of this case really doesn’t affect her one way or another. She’s in another home.

The defendant himself said she has no reason to make this up. Whereas, the defendant, he’s the one on trial. Who has a bigger dog in this fight?

R. 426-27.

In closing arguments, the Solicitor argued, "Is she missing part of her hymen? Is that corroboration? We would submit it is. She is corroborated." R. 428. The Solicitor argued the "scar tissue on the vagina of a 7-year old child" and the "attended hymen where it's kind of rubbed out" corroborated the child's testimony. R. 431.

The Solicitor emphasized Ms. Elliott's expertise as a "forensic interviewer" but arguing:

I submit to you, it's not easy to talk to me, it's not easy to talk in front of the perpetrator, the man who violated you for years and 14 people she's never seen in her life. But she did it. And she was consistent. She was consistent Tuesday, just as she was December 11th when she had her forensic interview.

December 11 she went to the Carehouse in Florence and talked to Debbie Elliott. And Debbie's easy to talk to too. She interviewed 5,000 children. She is well-qualified, trained professional with children. One-on-one, in a room. You saw it. She had great rapport with her and she tells details that a 7-year old, first grader should have no idea about.

Yet, he wants you to believe that she was coached by her mother. Can a child that age maintain a story of that length of time? Can a child that age maintain that story this week? No. The state submits absolutely not.

She was able to give details that were logical, chronologically correct. She said that Bubba sexually assaulted her since she can remember. And she couldn't remember when she was 1 or 2. She started to remember when she was 3.

R. 451-52.

The Solicitor argued, "We have a special statute here in South Carolina. And what it says in a sexual assault prosecution, the testimony of the victim need not be corroborated. R. 427.

The Solicitor continued to emphasize the medical evidence by arguing:

But before she gives her disclosure, the very next day she goes to see Dr. Connell and Rebecca Scheffer. And she tells Rebecca Scheffer, Bubba touched me with his nuts a lot of times. He bled one time but not last night. The next day she said that.

But in addition to what she says, her injuries match. You saw the photographs. Dr. Connell didn't take any photographs. Yet, he sees her the next day, it's a widened introitus, a penetrating injury, very, very uncommon. He's never seen in 19 years. He said this widened introitus heals quickly and can revert back to the same shape. He says it's chronic abuse; and that's exactly what Dr. Saunders says. She's seen

over 8,000 children. 8,000 children; and she says there's evidence of scar tissue, chronic abuse. She didn't bleed that night. She was used to it. This wasn't the first time.

She also saw an injury 1 to 2 inches – evidence of 1 to 2 inches inside the body, an attenuated hymen that has been rubbed away by past penetration. You'll have the pictures in the jury room to refresh your memory.

She was tanor stage 1, her hymen, which means infant like. This is a child. Children should not have these injuries. This didn't – this wasn't self-inflicted. This didn't come from a one-time event at the school, some kid put his fingers down her pants. This came from a grown man. You would not expect to find those injuries in a 7-year old with an infant-like hymen.

R. 453-54.

The trial judge charged the jurors:

In passing on the credibility, of may take into consideration many things, such as the demeanor or manner of testifying, whether the witness had a reason to be biased or prejudiced, whether a witness' testimony was contradicted on the one hand or supported and corroborated on the other hand.

However, the testimony of an alleged victim in a criminal sexual conduct case need not to be corroborated.

R. 456.

During deliberations, the jurors sent the trial judge a note requesting to view the DVD of Ms. Elliott's interview with the child. Trial counsel suggested, "Your Honor, it's in evidence. Let's give them a laptop." The Clerk of Court provided the jurors with a laptop. The trial judge provided the jurors with the laptop computer at 1:54 p.m., and the jurors returned a guilty verdict at 2:38 p.m. R. 467-72.

B. Evidence Presented at the PCR Hearing.

This Court convened an evidentiary hearing on February 4, 2016. The first was witness was Dr. Olga Rosa, who is a physician at the University of South Carolina School of Medicine, Department of Pediatrics, and at Palmetto Health Children Hospital. She performs medical

evaluations and assessments for children that are referred for suspected abuse and neglect. She is the director of the statewide Medical Response System to child abuse and neglect for the State of South Carolina. In this capacity, she directs, coordinates, and develops the medical response system across the state for child abuse and neglect, trains medical providers, and develops clinical guidelines for doctors that practice in this field. She also consults with solicitors and defense attorneys. She is board certified in general pediatrics and child abuse pediatrics. This Court certified Dr. Rosa as an expert in child abuse pediatrics. PCR. 7-10.

Dr. Rosa reviewed the medical testimony from Mr. Branham's trial, focusing on the medical aspects of case. She reviewed medical records from the child's visit to the emergency department, Carehouse, and a prior visit to the Lexington Medical Center. She reviewed the transcripts of the medical experts that testified at trial, medical records for the child, and the photographs that were admitted as State's Exhibits 15 and 16 during Mr. Branham's trial and marked Applicant's Exhibit 3 at the evidentiary hearing. PCR. 10-12.

Dr. Rosa testified that Kathy Saunders is a Ph.D in nurse practice. Dr. Rosa testified:

Q. Okay. Do you recall what her testimony was regarding those photographs?

A. Yes, ma'am.

Q. And what was that?

A. Dr. Saunders started describing, you know, as part as what we do, describing the shape of the hymen, and in this case is, you know, angular, basically a ring. She also indicated that, the posterior ring of the hymen. So, the way you look at this is think about the face of a clock. So, the posterior ring is basically from 3:00 to 9:00, and she indicated that the area on the posterior ring was narrow and that there was scar tissue. And I can be a little bit more precise if ---

Q. Yes, ma'am.

A. So, she indicated that the posterior ring from 5 to 7:00 -- think again about the face of a clock -- was attenuated. Basically as being blunted. It's narrower, and she indicate that there was a presence of what she called avascularity. A, V as in Victor,

a-s-c-u-l-a-r-i-t-y, and basically what that means is that it's lacking in blood vessels, and that it could be that area could be a scar.

Q. And that was on the same area she's referring to?

A. Yes, ma'am.

Q. She also testified to some redness in the area.

A. Yes. She also testified that there was, she observed redness at the entrance, the surrounding -- it's like -- we call it the vestibule. Think about your house and think about the foyer. You know that's the part just before you get into the living room, that. Think about the living room and the sofa as the hymen. So, basically that entrance was red and around the urethra, which is the area from where the urine flows, was red.

Q. And I think we've gone over this, but just a little bit more specific detail. How familiar are you with this particular type of -- with viewing this particular type of area of the body, the photographs? You said you've taken photographs yourself?

A. Yes.

Q. And do you have any idea how many times?

A. Well, I've been practicing full-time child abuse pediatrics since the year 2000, and prior to that in part of my general pediatric practice I have done such. And also as part of general pediatric practice to look at the genital area just to inspect it of children, both males and females, during their well-child check up to make sure that everything is, you know, where it's supposed to be.

Q. Based on your medical experience, was what Ms. Saunders or Dr. Saunders stated a correct statement of what can be seen in the photographs?

A. I'm sorry. Repeat the question again.

Q. Let me ask you a different way. What do you see when you look at the photographs?

A. When I look at the photographs, I agree with Dr. Saunders regarding the appearance of redness and the shape of the hymen. However, I did disagree with Dr. Saunders regarding the presence of the avascularity area or scar tissue, as well as the attenuated region from 5 to 7:00 on the hymen, on the posterior hymen.

Q. You do not see the presence of any scar tissue in those photographs?

A. That's correct.

Q. Either healed scar tissue, new scar tissue, any difference in that regard, or you don't see any scar tissue at all?

A. There is no scar tissue.

Q. Does it appear to be a normal hymen?

A. That would be correct, except for the redness, of course, but the redness is located to vestibule and the area around the urethra.

Q. And what does that mean?

A. It's a normal exam except for the redness but, you know, she's -- she was seven at the time. So, redness is kind of common at that age, too, because of they don't clean themselves [sic] that well.

PCR 13-16.

On cross-examination, Dr. Rosa also testified she "conclude[d] that it's likely that the [child] was subject to sexual abuse." Because of the normal medical exam, this conclusion was "based on the history or the report from the patient." PCR. 17-18, 21-24.

Mr. Branham testified at the evidentiary hearing. Neil Riley was his first court appointed attorney, but he was relieved as counsel. Mr. Kiricich began representing Mr. Branham in August 2011, about two to three months before trial. Mr. Branham never sought to negotiate a plea bargain because he always wanted a jury trial. Mr. Branham believed the child was coached to make these allegations. PCR. 24-29.

Mr. Branham testified he was not aware that his attorney could obtain funding to hire a medical expert to consult about the medical evidence, and he did not have any information that his trial counsel ever consulted with a medical expert. PCR. 29. Mr. Branham additionally was not aware of his trial counsel requesting expert funding for any purpose. PCR. 34.

On cross-examination, the State asked Mr. Branham about his belief that the child had been sexually abused. Two incidents had been reported. Once allegation was made by the child's

brother that turned out to be false. The other incident involved another child at the kindergarten class that inserted his finger inside her, which was one reason the child was seen at the Lexington Medical Center. PCR 32-33. Mr. Branham testified he was suspicious that the child's father or her father's brother might have abused the child. PCR. 36.

Trial counsel, Jason Kirincich, testified at the evidentiary hearing. He began representing Mr. Branham sometime between March and May of 2011.⁹ Mr. Branham provided trial counsel with the names of several witnesses, including his parents and several character witnesses. Mr. Branham informed trial counsel about the incident involving a child at the school, the possibility of abuse by the brother of the child's father, and information about family members coaching the child to make false allegations. Mr. Branham told trial counsel about Ms. Scott's issues with drugs and the argument they had about her drug abuse the night Ms. Scott called law enforcement. Trial counsel explained:

So, strategy wise, talking to him, it was going to be that they were lying to the – like they had done in the past to get him out of the picture because Ms. Scott was going to lose her kids, and I guess they didn't want to expose her drug use.

PCR 38-40, 61, 68, 74-75.

Trial counsel testified about the *in camera* hearing where he asked Ms. Elliott about the child's sibling making false allegations, and the trial judge admonishing, "You can ask that if you wish, but I think that's clearly not part of this case." Trial counsel acknowledged this statement indicated the trial judge "was already inclined to not permit other allegations unrelated to this case." Later on in the trial, with the jurors present, trial counsel asked Ms. Scott whether "anybody

⁹ Prior to representing Mr. Branham, trial counsel had not defended a jury trial involving allegations of criminal sexual conduct with a minor. He had observed another lawyer defend a criminal sexual conduct trial, but he could not recall if that trial involved a child or adult complainant. PCR. 63-64.

ever made a false allegation against Mr. Branham in your family.” When Ms. Scott asked for clarification, trial counsel explained, “A false allegation of sexual abuse.” The jurors never heard the answer to those questions or that those allegations were unfounded. Trial counsel acknowledged the jurors never would have learned about those additional allegations if he had not asked those questions in their presence. PCR 40-45, 63-64.

Regarding Ms. Elliott being offered as an expert in forensic interviewing and child abuse assessment, without objection, trial counsel explained:

You know, now we can definitely say it’s a mistake. I should have [objected]. At the time – this is all pre *Kromah*.¹⁰ Specifically in this case, I, I don’t remember. I don’t remember if I had been through another case and a witness had been offered as an expert without objection. I don’t remember why at this time but clearly a mistake now.

Trial counsel acknowledged his failure to object to Ms. Elliott being qualified as an expert was not a trial strategy. PCR 45, 64-66, 74.

During the trial, without out objection, Ms. Elliott testified about the efforts she made to ensure the child told the truth. These included the competency exercise regarding the difference between the truth and a lie, “giving the child tools that are developmentally appropriate in order for the child to disclose or tell what’s happened to them,” “it’s stressed to them they need to tell the truth,” the “ruled of the room” mean “[d]on’t make up something,” understanding the “consequences” for not telling the truth,” and determining that the child “understands the difference between the truth and a line and the consequences of lying.” Ms. Elliott testified “she could determine whether or not this child is telling the truth or lying,” the child’s disclosure was not “affected by suggestibility or coaching in any way,” and her “conclusion was that the child has been chronically sexually abused by Bubba, George Branham.” Trial counsel acknowledged he

¹⁰ *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

did not have a strategic reason for not objecting to this testimony. Trial counsel further acknowledged he should have objected to this testimony as improper bolstering and vouching for the credibility of another witness. PCR 45-53.

Trial counsel testified, “I did not hire a medical expert or consult with an independent expert. I did meet with Dr. Saunders to review the, the photographs prior” to trial. Trial counsel did not “remember the specifics of the conversation but she, she told me what her testimony was going to be. When asked why he did not hire an independent medical expert, trial counsel explained:

Judge Newman, who tried this case, was also our chief administrative judge at the time. I made an *ex parte* motion for a psychosexual examination for Mr. Branham. Judge Newman denied it with the explanation that in cases such as these, the defense can hire every expert that the state hires, and we’re just going to find one that has a different opinion.

PCR 53-54. On cross-examination, trial counsel explained the purpose of this evaluation would have been to mitigate Mr. Branham’s responsibility. PCR. 66-72.

Trial counsel testified about medical records that were admitted into evidence at trial, without objection. *See* Applicant’s Ex. 1 and 2. Trial counsel did not recall why he did not object to these records being admitted into evidence. PCR 54-58.

Trial counsel testified he did not have any reason for not objecting to the history provided to Dr. Saunders by the child’s father, Mark Scott, who did not testify during the trial. PCR. 58.

Trial counsel testified he did not have any reason for not objecting when “[t]he State directly aske[d Mr. Branham] whether or not other witnesses, including the victim, are liars – lying.” PCR 59.

Trial counsel testified he did not have any reasons for not objecting to the trial judge instructing S.C. Code § 16-3-657, “the statute that exists regarding sexual assault cases where the

victim does not have to be corroborated.” PCR. 59-60. On cross-examination, trial counsel explained:

I think that’s a correct statement of the law for any case, that the testimony does not need to be corroborated. So, definitely in the – in this case it seems to place certain emphasis on, on that child’s testimony that doesn’t need to be there.

PCR 73-74.

Finally, trial counsel testified he did not have a reason for not objecting to the jurors being allowed to watch the videotape of Ms. Elliott’s interview in the jury room. PCR. 60.

III. 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).

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.” *Strickland*, 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*, No. 2016-001079, 2018 WL 736339, at *6 (S.C. Feb. 7, 2018)¹¹ (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.* at *7. "[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.* at *8.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. Failure to object to hearsay statements by Jessica Scott.

In his amended PCR application, Mr. Branham alleges, "11(a) Ineffective assistance of trial counsel for failure to object to hearsay statements. Tr. 135 and 136." During Ms. Scott's testimony, the following exchange occurred:

Q: And did [child] have something going on with her hair around that time?

A: Yes, her hair was falling out.

¹¹ See also *Thompson v. State*, No. 2014-001611, 2018 WL 1404480, at *5 (S.C. Mar. 21, 2018) (adhering to *Smalls*).

Q: What did the doctor tell you.

A: That it was stress.

Q: And you were working 16 hours a day?

A: A lot of times, yes.

Q: Who was taking care of the kids?

A: George or Bubba.

MR. KIRINCICH: Your honor, I'm going to object. I'd like to approach if I can.

(A bench conference was held off the record in the presence of the jury, but out of the hearing of the jury.

THE COURT: The question has already been answered. You may proceed.

Q: Did [child] have an issue with her privates?

A: Yes.

Q: Tell us about that?

A: We took her to the doctor a lot. She kept having urinary tract infections. The doctor would give her an antibiotic. Whenever we would ask him to let us know what was going on, they would just say she's red and irritated and that they didn't want to mess with it because they didn't want to make it worse.

Q: And this was a common occurrence?

A: Yes.

Q: She ever have any yeast infections?

A: Yes.

Q: And you took her to the doctor?

A: I'd take her to the doctor. My mother took her to the doctor. Her father took her to the doctor.

Q: Did you ever notice [child] bleeding?

A: I never seen any blood in her underwear or anything. But she had told me that she had fallen riding her bike and had hit her pelvic area because she had just gotten, I guess, like a 10-speed bike.

Q: And when was that?

A: Maybe a year or so before that incident happened. There was also a time where she said she had gotten hit in the stomach by her brother.

Q: That's the only 2 instances you can think of?

A: Yes.

Q: When she got hit – allegedly hit in the stomach by her brother, was she bleeding from her vagina?

A: I never seen it. I – I'm not sure. She just said she'd gotten hit in her stomach by her brother.

R. 135-37. Trial counsel did not object to any of this testimony.

This testimony contains multiple hearsay statements. It includes the opinion of a doctor about the cause of the child's hair falling out. It also includes two incidents where the child reported vaginal bleeding. Ms. Scott did not witness either of those events, and her testimony was based entirely on information provided to her by other witnesses. These statements were hearsay because they were "offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Hearsay is not admissible except as provided by the court rules. Rule 802, SCRE. Trial counsel was ineffective for not objecting to this hearsay testimony. Trial counsel did not offer any strategic reasons for not objecting. *See Ingle and Freiburger, supra.*

Counsel's failure to object to this hearsay testimony prejudiced Mr. Branham. Ms. Scott's testimony about Mr. Branham caring for the child during these same periods of time implied he caused the child's stress, hair falling out, and vaginal bleeding. Additionally, as discussed in more detail throughout this order, this case is not a case of overwhelming evidence. *See Smalls, supra.* *See also 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. 214, 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.”).

B. Prior allegations of sexual abuse.

In his amended PCR application, Mr. Branham alleges:

11(b) Ineffective assistance of trial counsel for asking questions regarding prior allegations of sexual misconduct against the defendant, alerting the jury to this fact without the opportunity to explain to the jury the results or circumstances of such allegations. Tr. 157-158.

The following exchange occurred between Ms. Scott, trial counsel, the Solicitor, the trial judge during cross-examination:

Q: Ms. Scott, at some point did [sibling 1] alleged [sic] that he had been abused?

MR. MOAK: Your Honor, this is not – this is what my objection was.

THE COURT: Objection is sustained.

(Pause.)

Q: Ms. Scott, has anybody ever made a false allegation against Mr. Branham in your family?

A: As in?

Q: A false allegation of sexual abuse?

MR. MOAK: Your Honor, this is the same objection.

THE COURT: Objection is sustained. I sustain the objection. No comment necessary. Next question.

MR. MOAK: Your Honor, I ask that we strike those from the record. I mean, that's total improper questions.

THE COURT: The jury is to disregard that question.

R. 157-58.

Later on, outside the presence of the jurors, trial counsel informed the trial judge, "[T]here was a specific line of questioning that I wanted to go in to [sic] that involved fabrication by another one of her children." The trial judge stated, "It's pretty easy to see why that's an improper line of questioning if that's what you were trying to do." Trial counsel questioned Ms. Scott *in camera*. Ms. Scott acknowledged the child's sibling previously accused Mr. Branham of sexual abuse, but Ms. Scott's ex-husband's brother, John Scott, turned out to be the "alleged perpetrator of that abuse." Ms. Scott denied the child's sibling was coached to make the allegations against Mr. Branham. The trial judge, once again, sustained the State's objection to this line of questioning by the defense. R. 184-90.

Trial counsel was deficient for presenting evidence that Mr. Branham had sexually abused the child's sibling. This is improper character evidence. Rule 404(b), SCRE. *See State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998) (declining to recognize a special rule allowing admission of evidence of a propensity to commit a sex crime). Although our appellate courts recognize exceptions to Rule 404(b), *see, e.g., State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), no exception exists here because the evidence was not "proved by clear and convincing evidence," *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). In fact, trial counsel attempted to introduce this evidence to show it was not true, but the trial judge recognized the inherently objectionable nature of the questions. The jurors were left with the impression that Mr. Branham had abused this other child.

Mr. Branham was prejudiced by the admission of this testimony. “The fundamental problem with this [testimony] is that the ‘bad act’ evidence was not presented **by the State** as substantive evidence of guilt, nor was it introduced **by the State** in an attempt to impeach respondent's character. Instead, it was introduced largely through the questioning conducted by respondent's attorney.” *State v. Warren*, 341 S.C. 349, 351, 534 S.E.2d 687, 688 (2000) (emphasis original). Additionally, as discussed in more detail throughout this order, this case is not a case of overwhelming evidence. See *Smalls, Anderson, Kromah, Jennings, and Berry, supra*.

C. Expert qualifications of Debbie Elliott.

In his amended PCR application, Mr. Branham alleges:

11(c) Ineffective assistance of counsel for failing to object to the qualification of witness Debbie Elliott as an expert in child abuse assessment and forensic interviewing.

As a threshold matter, the Court notes this issue—the expert qualifications of Ms. Elliott—is a separate from but necessary connected to the issue presented in paragraph 11(d) of the amended PCR application—the opinion testimony of Ms. Elliott. Since Mr. Branham’s trial, a plethora of appellate decisions held it impermissible to qualify a witness as a “forensic interviewer.” *State v.*

Kromah instructed:

The title of “forensic interviewer” is a misnomer. The use of the word forensic indicates that the interviewer deduces evidence suitable for use in court. It also implies that the evidence is deduced as the result of the application of some scientific methodology. The exact scientific methodology applied apparently defies identification. The RATAC style of interviewing is not scientific. It merely represents the objectives and topics of discussion between the interviewer and the child. Somehow RATAC is supposed to convert the interviewer into a human truth-detector whose opinions of the truth are valuable and suitable for the jury's consumption.

401 S.C. 340, 356 (fn. 4), 737 S.E.2d 490, 498 (fn. 4). *State v. Anderson* subsequently counseled:

Assuming the court determines that the interview is admissible under the statute, the forensic interviewer will be called to testify before the jury. The sole purpose of her jury testimony is to lay the foundation for the introduction of the videotape,

and the questioning must be limited to that subject. There is to be no testimony to such things as techniques, of the instruction to the interview subject of the importance of telling the truth, or that the purpose of the interview is to allow law enforcement to determine whether a criminal investigation is warranted. This type of testimony, which establishes the “particularized guarantees of trustworthiness,” necessarily conveys to the jury that the interviewer and law enforcement believe the victim and that their beliefs led to the defendant's arrest, these charges, and this trial, thus impermissibly bolstering the minor's credibility. We hold none of the evidence necessary for the trial court's determination of “whether a statement possesses particularized guarantees of trustworthiness” and thus admissible under § 17–23–175(A)(4) and (B) is to be presented to the jury, as such evidence necessarily vouches for the credibility of the alleged victim.

413 S.C. 212, 220–21, 776 S.E.2d 76, 80 (2015).

Because *Kromah* and *Anderson* were decided after Mr. Branham's trial, this Court must look at the law at the time of Mr. Branham's trial. Our Supreme Court's decision in *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (2017)¹² provides guidance about how to approach this analysis and the analysis in Subsection D below. *Briggs* examined *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010), and *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989), all of which were decided before Mr. Branham's jury trial. *Briggs*, accordingly, held:

After *Dawkins* in 1989, certainly after *Douglas* in 2009 and *Smith* in 2010, 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.

421 S.C. at 325, 806 S.E.2d at 718.

¹² At the PCR hearing, counsel for Mr. Branham pointed to the Court of Appeals opinion in *Mangal v. State*, 415 S.C. 310, 781 S.E.2d 732 (Ct. App. 2015), *reversed by Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) where the Court of Appeals followed *State v. Dawkins* and *State v. Dempsey*. The State informed the Court it was appealing the Court of Appeals decision in *Mangal*. PCR 117-21.

In *Douglas*, our Supreme Court addressed whether the trial court should have qualified the person who interviewed the child, who was trained in the RATAC method, as an expert “in the field of forensic interviewing.” 380 S.C. at 501, 671 S.E.2d at 607. The Court noted the testimony was limited to the interviewer’s “personal observations and experiences” and the interview of the child witness. *Id.* 380 S.C. at 502-03, 671 S.E.2d at 608. The Court held “it was unnecessary for the trial court to have qualified her as an expert.” *Id.* The Court found this error to be harmless because there was “no evidence whatsoever that [the witness] believed the [child] to be telling the truth.” *Id.* 380 S.C. at 504, 671 S.E.2d at 609. Our Supreme Court subsequently cited *Douglas* in *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) when summarizing the three-part procedure for qualifying an expert witness.

This Court finds that *Douglas* and *Watson* placed trial counsel on notice of the three-part procedure for qualifying an expert witness, to wit, whether (1) “the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury,” (2) the “expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,” (3) the substance of the testimony is reliable. *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. This Court, therefore, finds trial counsel was deficient for not objecting the trial judge qualifying Ms. Elliott as an expert in forensic interviewing.¹³ Trial counsel did not offer any strategic reasons for not objecting. *See Ingle* and *Freiburger*, *supra*.

In determining whether Mr. Branham has established prejudice, this Court must “consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls* at 9. Trial counsel’s failure to object to Ms. Elliott being qualified as an expert in forensic interviewing allowed her to

¹³ Qualification of Ms. Elliott as an expert in child abuse assessment might not have been error. *See, e.g. Anderson*, *supra*. As discussed in Subsection D, Ms. Elliott’s testimony in that capacity was improper.

offer opinions that bolstered the testimony of the child, vouched for the child's credibility, and conveyed to the jurors that she believed the child was telling the truth. Again, *Douglas* placed trial counsel on notice that such testimony by a forensic interviewer is prejudicial. Additionally, credibility was the central issue for the jurors to determine in this case. Both Mr. Branham and trial counsel testified the trial strategy was that the child was coached to lie about the allegations of sexual abuse. In addition to contradicting the child's testimony, Mr. Branham testified to a different account of the events than Ms. Scott. The jurors had to resolve a credibility dispute about whether Mr. Branham and Ms. Scott had just argued about her drug use. Because credibility was the central issue for the jurors to determine, Ms. Elliott's testimony prejudiced Mr. Branham. *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. 214, 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.").

Finally, this Court finds and concludes that the medical evidence in this case does not render this error harmless. Dr. Connell testified there were not any evidence of acute injury to this child. Because of this Court's ruling in Subsection E below, the existence of medical evidence of chronic sexual abuse is a disputed issue for the jurors to determine. *See Smalls, supra*.

D. Opinion testimony by Debbie Elliott.

In his amended PCR application, Mr. Branham alleges:

11(d) Ineffective assistance of counsel for failing to object when witness Debbie Elliott offered testimony in front of the jury that was not limited to foundational information for introduction of the interview videotape. Specifically, counsel failed to object when this witness offered information regarding techniques involved in conducting the interview, theories regarding types of disclosure, and conclusions and opinions regarding the victim's credibility and ability to understand the difference between the truth and a lie.

Since Mr. Branham's trial, a plethora of appellate decisions held it is impermissible for the person who interviewed the child to express an opinion about the truthfulness of the child. *See, e.g., Anderson, Kromah, State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015), *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012). *Anderson* counseled:

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. *Compare State v. Brown*, 411 S.C. 332, 768 S.E.2d 246 (Ct.App.2015) (distinguishing improper bolstering cases because in *Brown* the behavioral expert did not examine the victim).

413 S.C. 212, 218–19, 776 S.E.2d 76, 79 (2015). Because *Anderson* and these other cases were decided after Mr. Branham's trial, this Court must look at the law at the time of Mr. Branham's trial. As discussed in Subsection C above, our Supreme Court's Decision in *Briggs*, including its reliance on *Dawkins*, *Douglass*, and *Smalls*, is instructive. Specifically, *Briggs* held:

After *Dawkins* in 1989, certainly after *Douglas* in 2009 and *Smith* in 2010, 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.

421 S.C. at 325, 806 S.E.2d at 718.

This Court is aware South Carolina recognizes an expertise in child abuse assessment, *i.e.* the type of expert who can, for example, testify to the behavioral characteristics of sex abuse victims.” *Anderson*, 413 S.C. at 218, 776 S.E.2d at 79 (citing *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787

(Ct.App.1999), and *State v. White*, 361 S.C. 407, 605 S.E.2d 540 (2004)). Even an expert in child abuse assessment is not allowed her to offer opinions that bolsters the testimony of the child, vouches for the child's credibility, and conveys to the jurors that she believed the child was telling the truth. *Smalls, Smith, Douglass, and Dawkins*. Trial counsel was deficient for not objecting to this testimony. Trial counsel did not offer any strategic reasons for not objecting. *See Ingle and Freiburger, supra*.

In determining whether Mr. Branham has established prejudice, this Court must "consider the specific impact counsel's error had on the outcome of the trial." *Smalls* at 9. Trial counsel's failure to object to Ms. Elliott being qualified as an expert in forensic interviewing allowed her to offer opinions that bolstered the testimony of the child, vouched for the child's credibility, and conveyed to the jurors that she believed the child was telling the truth. Again, *Douglas* placed trial counsel on notice that such testimony by a forensic interviewer is prejudicial. Additionally, credibility was the central issue for the jurors to determine in this case. Both Mr. Branham and trial counsel testified the trial strategy was that the child was coached to lie about the allegations of sexual abuse. In addition to contradicting the child's testimony, Mr. Branham testified to a different account of the events than Ms. Scott. The jurors had to resolve a credibility dispute about whether Mr. Branham and Ms. Scott had just argued about her drug use. Because credibility was the central issue for the jurors to determine, Ms. Elliott's testimony prejudiced Mr. Branham. *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. 214, 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.”). The prejudice to Mr. Branham was compounded because the solicitor emphasized Ms. Elliott’s testimony during closing.

Finally, this Court finds and concludes that the medical evidence in this case does not render this error harmless. Dr. Connell testified there were not any evidence of acute injury to this child. Because of this Court’s ruling in Subsection E below, the existence of medical evidence chronic sexual abuse is a disputed issue for the jurors to determine. *See Smalls, supra*.

E. Failure to consult independent medical expert.

In his amended PCR application, Mr. Branham alleges:

11(e) Ineffective assistance of counsel for failing to retain and consult with a forensic pediatrician for a second opinion regarding the medical and photograph evidence.

In *Ard v. Catoe*, our Supreme Court held:

Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. When evaluating the reasonableness of counsel's conduct, the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. Moreover, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case.

372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (internal citations and quotes omitted) (emphasis supplied by the court).

Here, Mr. Branham denied sexually abusing the child and never engaged in guilty plea negotiations. Dr. Connell did not find any evidence of acute trauma during his emergency room medical evaluation of the child. Trial counsel testified there was reason to believe this child had never been sexually abused. Trial counsel moved the trial court for an opportunity to review the

photographs taken by Dr. Saunders during her medical examination of the child because the photographs were crucial to the State's case. Trial counsel also recognized the potential for a contrary interpretation of this evidence when he argued:

There are certain things in Dr. Saunders' report that could be contradictory. I think they may be cleared up if we had an opportunity to view the pictures beforehand, or at least give me a better idea of how to question this doctor.

R. 26-28. Trial counsel reviewing the photographs with Dr. Saunders and having her explain her testimony was not sufficient because Dr. Saunders "was not **an independent expert**." *Ard*, 372 S.C. at 333, 642 S.E.2d at 597 (emphasis supplied by court). The Court, therefore, finds trial counsel was deficient for not consulting an independent medical expert.

That Mr. Branham and trial counsel were aware of evidence that other people potentially abused the child does not excuse trial counsel's failure to consult an independent medical expert. As the State pointed out at the evidentiary hearing, once of these allegations proved to be false. As Dr. Saunders testified at trial and the Solicitor pointed out in closing, the one-time incident involving another child at the kindergarten would not have produced evidence of chronic abuse that Dr. Saunders testified about at trial. Dr. Rosa's testimony, furthermore, strengthens counsel's testimony that there was reason to believe this child was *not* sexually abused. Dr. Rosa's testimony, additionally, would allow Mr. Branham to assert at trial that there is no evidence that this child had been sexually abused.

That Dr. Rosa testified she believes the child was sexually abused based on the history provided by the child does not change the result. This type of opinion testimony, based solely on the victim's statement, is not allowed because it bolsters the testimony of the child, vouches for the child's credibility, and conveys to the jurors that the witness believes the child is telling the truth. *See Briggs, Smith, Douglas, and Dawkins, supra*. In *Mangal v. State*, 415 S.C. 310, 781

S.E.2d 732 (Ct. App. 2015), our Court of Appeals addressed whether a medical doctor improperly bolstered the child's testimony based on statements made by the child. Relying on *Chavis*, *Jennings*, *Douglas*, *Dawkins*, and *State v. Dempsey*, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000) (testimony of child sexual abuse counselor that, when a child says he or she has been sexually assaulted, child is telling the truth 95% of the time, improperly vouched for credibility of victim), the Court of Appeals concluded such testimony to be improper. Our Supreme Court reversed the Court of Appeals decision in *Mangal*, holding because the improper bolstering issue was not presented to the PCR court and, therefore, the PCR Court did not err by not ruling on the issue. *Mangal v. State*, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017). Our Supreme Court most recently addressed this issue in *State v. Simmons*, Appellate Case Number 2016-001934 (S.C.S.Ct. Op. No. 27819) (Filed June 27, 2018), which held, "The hearsay testimony ventured far beyond the parameters of Rule 803(4), SCRE, for much of the testimony was unrelated to medical diagnosis or treatment." Slip Op. at 12. In reaching this holding, the Court pointed out the doctor's testimony "recounting of Minor 1's statements amounted to nothing more than 'hearsay shrouded in a doctor's white coat.'" Slip Op. at 10. *Simmons*, therefore, removed any doubt left after *Mangal*. This issue is squarely before the Court in this case. As was the case in *Briggs*, *Smith*, *Douglas*, and *Dawkins* prohibit a medical doctor from vouching for the credibility of a witness. *Simmons* additionally relied on caselaw that pre-dated Mr. Branham's trial. See *State v. Brown*, 286 S.C. 445, 334 S.E.2d 816 (1985) ("The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim. A doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses"); *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997) (a

statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim. In this case, however, the fact that Burroughs asked if he could have a hug before he assaulted the victim in no way can be viewed as “reasonably pertinent” to the victim's diagnosis or treatment).

Additionally, that trial counsel was not able to convince the chief administrative judge to issue an *ex parte* funding order for a psychosexual examination of Mr. Branham “to mitigate Mr. Branham’s responsibility” does not excuse trial counsel from consulting an independent medical expert. First, Mr. Branham never admitted to committing any misconduct for the evaluation to mitigate. Second, that the chief administrative judge denied the request for the psychosexual evaluation does not mean the Court would have denied funding for an independent medical expert based on a proper showing why such an expert was “reasonably necessary for the representation of” Mr. Branham. See S.C. Code Ann. § 17-3-50(B). Third, trial counsel’s recognition that “certain things in Dr. Saunders’ report that could be contradictory” establishes a proper showing for an independent expert to review the evidence. Fourth, even if the chief administrative judge denied this request, trial counsel would have preserved the need for an independent expert for appellate review. The Supreme Court of the United States has consistently held an accused is entitled to funding for expert and investigative services after making a threshold showing. See *McWilliams v. Dunn*, ___ U.S. ___, 137 S. Ct. 1790 (2017), *Hinton v. Alabama*, 134 S. Ct. 1081 (2014), and *Ake v. Oklahoma*, 470 U.S. 68 (1985). See also *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992).

In determining whether Mr. Branham has established prejudice, this Court must “consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls* at 9. Trial counsel’s failure to consult an independent medical expert deprived Mr. Branham of testimony that

contradicted Dr. Saunder's testimony that the Solicitors emphasized during both of their closing arguments. Had trial counsel presented the testimony of an independent medical expert, "there is a reasonable probability the jury would have had a reasonable doubt as to whether [Mr. Branham] was guilty of" criminal sexual conduct with a minor. *Ard*, 372 S.C. at 336, 642 S.E.2d at 599. *See also McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008) (counsel rendered prejudicial, ineffective assistance when she failed to investigate medical evidence contradicting the State's experts' testimony). The prejudice to Mr. Branham was compounded because the solicitor emphasized Dr. Suanders' testimony during closing.

F. Failure to object to hearsay testimony by Dr. Saunders.

In his amended PCR application, Mr. Branham alleges:

11(f) Ineffective assistance of counsel for failure to object wen Dr. Saunders testified regarding hearsay information obtained from prior medical records not offered in trial. Tr. 323-324.

The following exchange occurred between Dr. Saunders and the Solicitor:

Any time you have a significant injury to the body – and [child's] father reported that on at least 2 occasions she had presented to the emergency room with vaginal bleeding, painful urination. So we knew something is going on. It was thought to be a urinary tract infection. But indeed when they cultured the urine – which is the most definitive and specific test for urinary tract infections – indeed there was no infection present.

So when I see these findings, and then I see a-vascular pattern right here, the concern for me is does that represent scar tissue that has formed as a result of the penetrating injury? And the significance to me, again, is that there are at least 2 reports of vaginal bleeding of this child that was presumptive urinary tract that was never clinically documented to be urinary tract infections.

Q: Do back up to your background information, you were provided with the information that she had been taken to the doctor that her dad had reported for urinary tract – fore bleeding and urinary tract infections?

A: That is correct.

Q: Did you in fact get those records and review them yourself?

A: I did.

Q: And the lab report showed what?

A: No growth on the urine cultures that were completed, and they were done two separate dates. I believe it was one in September and one in December or it may have been October and December, at 2 separate hospital facilities. So it wasn't even done at the same hospital facility.

R. 323-24.

As seen above, admissibility of hearsay information provided to a medical doctor is limited by Rule 803(4), SCRE. *See Simmons, Burroughs, and Brown, supra.* Although an expert can rely on hearsay information to form an opinion, *see* Rule 703, SCRE, the opinion at issue in Dr. Saunders' testimony improperly vouched for the credibility of the child. *See Simmons, supra.* Trial counsel was deficient for not objecting. Trial counsel did not offer any strategic reasons for not objecting. *See Ingle and Freiburger, supra.* For the reasons set forth in Subsection E above, trial counsel's deficient performance prejudiced Mr. Branahm.

G. Failure to object to jury instruction.

In his amended PCR application, Mr. Branham alleges:

11(g) Ineffective assistance of counsel for failure to object when the Judge charges that "testimony of and alleged victim in a criminal sexual conduct case need not be corroborated" and the Solicitor put special emphasis on this during closing arguments. Tr. 427 and 456.

During its closing arguments, the State emphasized South Carolina has "a special statute . . . in a sexual assault prosecution, the testimony of the victim need not be corroborated. R. 427. Section 16-3-657 provides, "The testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658. The trial judge charged the jurors:

In passing on the credibility, of may take into consideration many things, such as the demeanor or manner of testifying, whether the witness had a reason to

be biased or prejudiced, whether a witness' testimony was contradicted on the one hand or supported and corroborated on the other hand.

However, the testimony of an alleged victim in a criminal sexual conduct case need not to be corroborated.

R. 456.

Our Supreme Court recently held including this section when instructing the jurors is an unconstitutional comment of the facts. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). Because *Stukes* was decided subsequent to Mr. Branham's jury trial, this Court must look to the law at the time of Mr. Branham's jury trial. Prior to Mr. Branham's jury trial, our Supreme Court cautioned about the danger of instructing § 16-3-657:

A trial judge is not required to charge § 16-3-657, but when the judge chooses to do so, giving the charge does not constitute reversible error when this single instruction is not unduly emphasized and the charge as a whole comports with the law.

State v. Rayfield, 369 S.C. 106, 118, 631 S.E.2d 244, 250 (2006). Justice Pleicones, joined by Acting Justice Bartlett, dissented because this instruction "might cause confusion when read with the general charge on witness credibility," "carries a strong possibility of biasing the jury against the defendant," and is an improper comment on the facts in violation of S.C. Const. Art. V, § 15. Justice Pleicones also noted, "Separately instructing the jury that it may believe one witness against many or many against one does not ameliorate or remove the favorable emphasis on the alleged victim's testimony." *Id.* at 120-21, 251-252.

State v. Hill, 394 S.C. 280, 715 S.E.2d 368 (Ct. App. 2011) provides some guidance for applying *Rayfield*. Our Court of Appeals observed, "Notably, the judge immediately followed [the § 16-3-657 instruction] with, 'Necessarily you must determine the credibility of witnesses who have testified in this case.'" *Id.* at 299, 379. This statement does not follow the trial judge's instruction in Mr. Branham's case. R. 456. This Court therefore finds that trial counsel was

ineffective for not objecting to the § 16-3-657, pursuant to *Rayfield*, because the trial court unduly emphasized this instruction.

The instruction given in this case implied to the jurors they should give added weight to the child's testimony. Because credibility was the central issue for the jurors to determine, this instruction prejudiced Mr. Branham. 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. 214, 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.").

H. Failure to object to improper pitting of witnesses.

In his amended PCR application, Mr. Branham alleges, "11(h) Ineffective assistance of counsel for failing to object to the Solicitor's improper pitting of the witnesses. Tr. 401-402."

The following exchange occurred during the Solicitor's re-cross-examination of Mr. Branham:

Q: So all these people, Jessica, [child,] Investigator Lyons, they're all lying?

A: Apparently.

Q: Apparently?

A: Yes, ma'am.

R. 402. Trial counsel did not object. During closing arguments, the Solicitor argued:

Now he's saying Jessica made this up.

But when asked why would [child] make this up? He says, I don't know. He says that he loved [child] and still loved [child]. He said [child] loved him. I don't know

why she would make this up. He didn't even throw out anybody – he didn't even throw anything out –

R. 426. Trial counsel objected. The trial judge overruled the objection.

The prosecutor's questioning of Mr. Branham and subsequent was improper, prejudicial pitting of witnesses and contrary to a longstanding South Carolina case law. *State v. Brown*, 297 S.C. 27, 29, 374 S.E.2d 669, 670 (1988) ("we are compelled to reverse a conviction because the assistant solicitor forced Brown to attack the veracity of the investigating officers by inquiring whether the officers "made the story up" about Brown's participation"); *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988) ("It is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of another witness."); *State v. Hariott*, 210 S.C. 290, 298, 42 S.E.2d 385, 389 (1947) (prosecutor's cross-examination was improper when defendants "were forced in effect to directly attack the veracity of the state's witnesses"); *State v. Warren*, 207 S.C. 126, 35 S.E.2d 38 (1945) (cross-examination of accused as to whether sheriff had told the truth in previous testimony for state concerning statement allegedly made by accused while in jail was improper). Trial counsel, therefore, was deficient for failing to object to the Solicitor's improperly pitting Mr. Branham's testimony against the testimony of the witnesses called by the State. Trial counsel did not offer any strategic reasons for not objecting. *See Ingle and Freiburger, supra.*

Trial counsel's failure to object to the Solicitor's improper questing prejudiced Mr. Branham by not preserving this issue for appeal. Additionally, prejudice results because credibility was the central issue for the jurors to resolve. *See Smalls, Anderson, Kromah, Jennings, and Berry, supra.*

I. Failure to object to prior consistent statements exceeding the scope of Rule 801(d)(1)(D).

In his amended PCR application, Mr. Branham alleges:

11(i) Ineffective assistance of counsel for failing to object to prior consistent statements of the witnesses as impermissible hearsay which bolstered the witness testimony. Inadmissible prior consistent statements were offered without objection through:

- a. The admission of written reports and medical records. Tr. 265 and 191.
- b. Through the testimony of witnesses. Tr. 125, 266 268-271, 313-314.

During her direct examination, Ms. Scott testified, “And when I took [child] into the bedroom and asked her what he was doing to her. And she told me he was trying to stick his private in her hole.” R. 125. Trial counsel did not object.

Without objection, the State introduced the sexual assault examination protocol completed at the hospital by Ms. Scheffer and Dr. Connell (State’s Ex. 9) and Dr. Sanders sexual assault examination report (State’s Ex. 12) into evidence. R. 191.

Ms. Scheffer testified about filling out the sexual assault examination form (State’s Ex. 9), including five lines under the heading, “brief summary of assault.” Ms. Scheffer recalled that information coming directly from the child, although the child’s grandmother was also in the examination room. The Solicitor asked Ms. Scheffer to read the “brief summary of assault” to the jurors. She testified:

Mom caught Bubba trying to touch me in the hallway. Bubba has touched me with his nuts a lot of times. I bled on time – not last night. Mom saw him with his pants down and my pants down as usual.

R. 265-66. Trial counsel did not object.

The sexual assault examination from also contained a lot of questions about the particulars of the alleged sexual assault. The Solicitor asked Ms. Scheffer to read this information to the

jurors. This information included a statement that “Jessica, her mother” witnessed the assault. R. 268-71. Trial counsel did not object.

Dr. Saunders later testified about the medical history provided to her by the child’s father:

Bubba, who is mom’s boy friend [sic], George Branham, had come in drunk from a neighbor’s house. Bubba wanted to have sex with Jessica, who was the child’s mother, but she didn’t want to. [Child] had gotten out of the bed and was going to the bathroom and Bubba came – had got up behind her and went in the hallway and pulled the child’s pants down and pulled his pants down and was having sex with the child, [child]. [Child] was taken to the hospital by the maternal grandmother because she was complaining of vaginal pain. The child was then referred to the Carehouse for follow-up evaluation.

R. 313-14; State’s Ex. 12. Trial counsel did not object.

Rule 801(d)(1)(D), SCRE provides:

A statement is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant’s testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

See also Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (“The forensic interviewer’s testimony substantially exceeded the limitations of time and place set forth in Rule 801(d)(1)(D), SCRE.”). *See also Simmons, supra*. The testimony of Ms. Scott exceeded the time and place limitation of Rule 801(d)(1)(D), SCRE.

The statements in the medical reports and testimony of Ms. Scheffer and Dr. Saunders also exceeded the scope of Rule 801(d)(1)(D), SCRE. Rule 803(4), SCRE is an exception to the hearsay rule and provides:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Although some of the statements included in the medical records and repeated during the testimony of Ms. Scheffer and Dr. Saunders, arguably, fall under this exception, the portions of the medical records and testimony identifying Mr. Branham as the perpetrator and setting forth names of witnesses do not fall under this exception. *See State v. Brown*, 286 S.C. 445, 334 S.E.2d 816 (1985) (“The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim. A doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses”) and *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997) (a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim. In this case, however, the fact that Burroughs asked if he could have a hug before he assaulted the victim in no way can be viewed as “reasonably pertinent” to the victim's diagnosis or treatment). *See also Simmons, supra*. Trial counsel was deficient for not objecting to this testimony. Trial counsel did not offer any strategic reasons for not objecting. *See Ingle and Freiburger, supra*.

In determining whether Mr. Branham has established prejudice, this Court must “consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls* at 9. This evidence involves the central issue at trial—whether Mr. Branham sexually assaulted the child—and bolster’s the child’s testimony. Because credibility was the central issued for the jurors to determine, Mr. Branham has established prejudice. *See Smalls, Anderson, Kromah, Jennings, and Berry, supra*.

J. Failure to object to re-play of videotaped interview in jury room.

In his amended PCR application, Mr. Branham alleges:

11(j) Ineffective assistance of counsel for failure to object to the replay of the forensic interview video in the jury room.

During deliberations, the jurors sent the trial judge a note requesting to view the DVD of Ms. Elliott's interview with the child. Trial counsel suggested, "Your Honor, it's in evidence. Let's give them a laptop." The Clerk of Court provided the jurors with a laptop. The trial judge provided the jurors with the laptop computer at 1:54 p.m., and the jurors returned a guilty verdict at 2:38 p.m. R. 467-72.

The videotape of Ms. Elliott's interview of the child is essentially videotaped testimony without an opportunity for contemporaneous cross-examination. "The rereading of a witness' testimony is disfavored when it unduly emphasizes that testimony." *United States v. Binder*, 769 F.2d 595, 600-01 (9th Cir. 1985) (citing *United States v. Nolan*, 700 F.2d 479, 486 (9th Cir.)). "The determination to allow a rereading or rehearing of testimony must be based on particular facts and circumstances of the case. Undue emphasis of particular testimony should not be permitted." *Id.* *Binder* explained:

Videotape testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness. It serves as the functional equivalent of a live witness. Since there was no physical evidence, the only evidence of acts of molestation was presented through the children's videotaped testimony. The defendant denied any criminal conduct, asserting that the children were displeased with him and their charges against him were vindictive. Credibility became a crucial issue. Under these circumstances the videotaped testimony may have taken on great significance. Allowing the jury to see and hear the children's videotaped testimony a second time in the jury room during deliberations unduly emphasized their testimony.

Id. In South Carolina, the trial judge has the discretion to allow jurors to review portions of the testimony "*in the defendant's presence.*" *State v. Carlson*, 363 S.C. 586, 601, 611 S.E.2d 283, 291 (Ct. App. 2005) (emphasis added). See also *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). The same rule applies to audio and videotape. *State v. Winkler*, 388 S.C. 574, 585,

698 S.E.2d 596, 602 (2010) (“The trial court replayed the 911 tape for the jury in the courtroom and the jury was allowed to review the transcript while the tape played, which mirrored the way in which the evidence was presented at trial.”). Trial counsel therefore, was deficient for not objecting to the jurors receiving a copy of Ms. Elliott’s interview. Trial counsel did not offer any strategic reasons for not objecting. *See Ingle and Freiburger, supra*.

Because credibility was the central issue for the jurors to determine, Mr. Branham has established prejudice. *See Smalls, Anderson, Kromah, Jennings, and Berry, supra*.

K. Cumulative prejudice.

Having found specific allegations of ineffective assistance of counsel warranting a new trial, it is not necessary to apply the cumulative error analysis. Out of an abundance of caution, however, this Court will apply a cumulative prejudice analysis. *Kyles*, 514 U.S. 419, 436 (1995) (the prejudice must be “considered collectively, not item-by-item”). The United States Supreme Court’s opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire 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.”¹⁴ This

¹⁴ Numerous courts, relying on *Strickland*, have held that a cumulative prejudice analysis is appropriate. *See, e.g., Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001); *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006); *Martin v.*

Court finds and concluded that the cumulative effect of trial counsel's ineffectiveness prejudiced Mr. Branham.

Trial counsel's multiple errors allowed multiple witnesses to bolster and couch for the child's credibility. Allowing Ms. Elliott to be qualified as an expert in forensic interviewing allowed her to testify impermissibly about her interviewing techniques, including the RATAC method. Her purported expert qualifications, combined with her testimony impermissibly conveyed to the jurors that the child's allegations were reliable.

V. CONCLUSION.

For the foregoing reasons, this Court grants George Branham's application for post-conviction relief and remands this case to the Court of General Sessions for a new trial.

IT IS SO ORDERED.

J. Derham Cole
Presiding Judge, Fifth Judicial Circuit

_____, 2018
Spartanburg, South Carolina

Grosshans, 424 F.3d 588 (7th Cir. 2005); *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003); *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002); *Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008); *Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008); *In re Gay*, 968 P.2d 476 (Cal. 1998); *McIntosh v. State*, 941 So. 2d 1 (Fla. Dist. Ct. App. 2006); *People v. Briones*, 816 N.E.2d 1120 (Ill. App. Ct. 2004); *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997); *Mata v. State*, 141 S.W.3d 858 (Tex. Ct. App. 2004); *State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).

EXHIBIT B

PROFFER OF STATE'S PROPOSED ORDER

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF KERSHAW	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
George Stanley Branham, II, #347471,	)	Case No. 2014-CP-28-00703
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed August 4, 2014. Respondent made its Return on January 30, 2015, requesting an evidentiary hearing be held. Thereafter, Applicant, through his counsel filed an amended application for post-conviction relief on January 22, 2016. An evidentiary hearing was convened on February 4, 2016, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Kristy G. Goldberg, Esquire. Respondent was represented by Assistant Attorney General J. Clayton Mitchell, III of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Kershaw County Clerk of Court. Applicant was indicted during the July 2011 term of the Kershaw County Grand Jury for first-degree criminal sexual conduct with a minor (2010-GS-28-0448). Jason D. Kirincich, Esquire represented Applicant on this charge. On August 22-25, 2011, Applicant proceeded to a jury trial before the Honorable Clifton Newman, where he was convicted as indicted. Judge Newman sentenced Applicant to fifty years imprisonment for first-degree criminal sexual conduct with a minor.

A Notice of Appeal was filed with the South Carolina Court of Appeals. Breen Richard Stevens, Esquire, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense perfected an appeal on Applicant's behalf. In his *Anders*¹ brief, Applicant raised the following issue:

Whether the trial court reversibly erred resulting in a violation of [Applicant's] Due Process right to present a complete defense by prohibiting [Applicant] to introduce evidence of a prior false allegation of abuse made by Child complainant's older sibling against [Applicant] thus depriving [Applicant] of the ability to show that Child's family had a history of coaching alleged sexual assault victims?

Applicant subsequently filed a *pro se* brief. The South Carolina Court of Appeals issued an order dismissing Applicant's appeal without argument on September 4, 2013, and granted counsel's request to withdraw. *State v. Branham*, Op. No. 2013-UP-346 (S.C. Ct. App. Filed September 4, 2013). Applicant filed a petition for rehearing, which was denied on October 24, 2013. The Remittitur was issued on December 5, 2013.

In his amended application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

- a. Ineffective assistance of trial counsel for failure to object to hearsay statements. Tr. 135 and 136.
- b. Ineffective assistance of trial counsel for asking questions regarding prior allegations of sexual misconduct against the defendant, alerting the jury to this fact without the opportunity to explain to the jury the result or circumstances of such allegations. Tr. 157-158.
- c. Ineffective assistance of counsel for failing to object to the qualification of witness Debbie Elliott as an expert in child abuse assessment and forensic interviewing.
- d. Ineffective assistance of counsel for failing to object when witness Debbie Elliott offered testimony in front of the jury that was not limited to foundational information for introduction of the interview videotape. Specifically, counsel failed to object when this witness offered information regarding techniques involved in conducting the interview, theories regarding types of disclosures, and conclusions and opinions regarding the victim's credibility and ability to understand the difference

¹ *Anders v. California*, 386 U.S. 738 (1967).

- between the truth and a lie.
- e. Ineffective assistance of counsel for failing to retain and consult with a forensic pediatrician for a second opinion regarding the medical and photograph evidence.
- f. Ineffective assistance of counsel for failure to object when Dr. Saunders testified regarding hearsay information obtained from prior medical records not offered in trial. Tr. 323-324.
- g. Ineffective assistance of counsel for failure to object when the Judge charged that “testimony of an alleged victim in a criminal sexual conduct case need not be corroborated” and the Solicitor put special emphasis on this during closing arguments. Tr. 427 and 456.
- h. Ineffective assistance of counsel for failing to object to the Solicitor’s improper pitting of the witnesses. Tr. 401-402.
- i. Ineffective assistance of counsel for failing to object to prior consistent statements of the witnesses as impermissible hearsay which bolstered the witness testimony. Inadmissible prior consistent statements of the witnesses were offered without objection through:
 - a. The admission of written reports and medical records. Tr. 265 and 191.
 - b. Through the testimony of witnesses. Tr. 125, 266, 268-271, 313-314.
- j. Ineffective assistance of counsel for failure to object to the replay of the forensic interview video in the jury room.

In addition to those allegations set forth in his amended application for post-conviction relief, Applicant also proceed on an additional claim of cumulative error to which the State consented.

STATEMENT OF FACTS ADDUCED AT TRIAL

On December 8, 2009, Victim, Victim’s mother, Jessica Scott, and Ms. Scott’s other children were living with Applicant. Trial Tr. 121, 123, 169. That night, Applicant had been at a neighbor’s house drinking. Trial Tr. 123. Ms. Scott, Victim, and Ms. Scott’s other children were all sleeping in Ms. Scott’s bed together. Trial Tr. 123-24, 171. When Applicant returned home, at about two o’clock, he came into the bedroom and woke Ms. Scott. Trial Tr. 124. They spoke for a while, and then Ms. Scott returned to bed. Trial Tr. 124.

Later, Victim woke up to use the restroom. Trial Tr. 171. While she was in the hall, just outside of the bathroom, Victim was lying on the ground, and Applicant was on top of her. Trial

Tr. 172. Applicant had pulled down his pants, as well as Victim's. Trial Tr. 172. Applicant then proceeded to have sexual intercourse with Victim. Trial Tr. 172-73, 175.

When Ms. Scott realized Victim was no longer in her bed, she got up to look for her. Trial Tr. 124. She walked into the kitchen and could see Applicant in the hallway, lying on top of Victim with his pants around his ankles. Trial Tr. 124. Ms. Scott could see Victim's pants were also down. Trial Tr. 124. When Ms. Scott confronted Applicant, Applicant jumped up, pulled his pants up, and told Ms. Scott he was trying to make Victim go to the bathroom. Trial Tr. 124, 127, 130. Applicant also told Ms. Scott he was just to check to see if Victim had wiped herself well after using the bathroom. Trial Tr. 130, 131. Ms. Scott took Victim to the bathroom, and Victim proceeded to use the bathroom. Trial Tr. 124, 130-31. She then took Victim back into her bedroom, and Victim informed her Applicant was trying to have sexual intercourse with her. Trial Tr. 125. Ms. Scott then called 911. Trial Tr. 125.

Ms. Scott's mother arrived in the early hours to take Victim to the hospital because Victim was complaining of vaginal pain. Trial Tr. 133, 314. While there, Dr. Foy Connell examined Victim. Trial Tr. 196. Dr. Kathy Saunders also examined Victim a couple of days after the abuse. Trial Tr. 312. Upon examination of Victim, there was attenuation of the hymen, which was consistent with past penetration. Trial Tr. 197, 203, 317-18. Although there were no signs of tearing, bruising, or bleeding, the opening of Victim's vagina appeared to be dilated, which was indicative of prolonged abuse. Trial Tr. 197, 203, 210, 332. Because Victim's vagina was widened at the time of the exams, penetration could have occurred between hours and days of the exam. Trial Tr. 214. Victim's genitalia were also red and irritated. Trial Tr. 209, 317. There was a small amount of clear discharge present as well. Trial Tr. 318, 320. In addition, there was some avascularity along the posterior rim of Victim's vagina, which was

also consistent with past penetration. Trial Tr. 322.

TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented testimony from Dr. Olga Rosa, trial counsel, Jason D. Kirincich (hereinafter "Counsel"), and Applicant testified on his own behalf. This Court also had before it a copy of Applicant's trial transcript, the records of the Kershaw County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant first presented testimony from Dr. Olga Rosa. Dr. Rosa testified she currently works with the Department of Pediatrics at the University of South Carolina School of Medicine, where she has been employed since October 2004, and at Palmetto Health Children's Hospital. PCR Tr. 7. Dr. Rosa testified she currently works as a pediatrician and is the director of the statewide medical response system to child abuse and neglect. PCR Tr. 8. In her position as director, she performs medical evaluations and assessments for children that are referred to the program for suspected abuse and neglect. PCR Tr. 8. Furthermore, she directs, coordinates, and develops the medical response system throughout South Carolina for child abuse and neglect. PCR Tr. 8. She testified she attended medical school at the University of Puerto Rico School of Medicine and did her residency program in pediatrics at the University Children's Hospital in San Juan, Puerto Rico. PCR Tr. 7. She further testified that she completed a fellowship in forensic pediatrics at Bryan University School of Medicine in Providence, Rhode Island. PCR Tr. 7. Dr. Rosa testified she has been retained to consult in child abuse and neglect cases before and has previously been qualified as an expert in general pediatrics and in child abuse pediatrics. PCR Tr. 8-9. She testified in such cases she has either based her opinion on a physical examination of the child or on the medical

records of that child. PCR Tr. 10. Following Dr. Rosa's testimony as to her credentials and practice, she was offered and qualified as an expert in child abuse pediatrics. PCR Tr. 9-10.

Dr. Rosa testified she reviewed the trial transcript, focusing on the physicians involved in Applicant's case, as well as the medical records for Victim, including the visits to the Care House of the Pee Dee for medical assessment, to the Kershaw Emergency Room, and to Lexington Medical Center, as well as the CD of the forensic interview. PCR Tr. 10-11. She testified about ninety percent of diagnosis is based on medical history and the report from the patient. PCR Tr. 22-23. She testified she also reviewed some photographs of Victim's hymenal tissue in preparation for this evidentiary hearing. PCR Tr. 11. She testified she agreed with Dr. Saunders, who testified at Applicant's trial and took these photographs of Victim, as to the appearance of redness and shape of the hymen but that she disagreed with Dr. Saunders regarding the avascularity area or scar tissue on the posterior hymen. PCR Tr. 15-17. She testified the genital area can heal quickly and that the lack of acute trauma at the time these photographs were taken does not rule out past penetration. PCR Tr. 19-20. She testified she believed that Victim had been sexually assaulted. PCR Tr. 21. She further testified had she been called to testify at Applicant's trial, she would have testified that Victim had a normal physical exam but that it would have been her opinion that Victim had been sexually abused. PCR Tr. 23.

After Dr. Rosa's testimony, Applicant testified on his own behalf. Applicant testified he was first represented by Cornelius Riley, Esquire, who was relieved before trial, and that Counsel became his attorney two to three months before his trial. PCR Tr. 25. Applicant testified Counsel only met with him once while he was in jail and that they reviewed the CD of the forensic interview. PCR Tr. 25. Applicant further testified he does not recall discussing trial strategy with Counsel. PCR Tr. 26. Applicant testified the Ms. Scott, testified at his trial as to

what she saw the night of the alleged assault and that she made a statement to the police. PCR Tr. 31, 34. Applicant denied ever making a comment to the police that he was just helping Victim wipe. PCR Tr. 31-32. Applicant testified although he testified at trial, he was unable to speak on his defense. PCR Tr. 27-28. Applicant further testified his testimony at trial indicated he believed Victim was abused and encouraged Ms. Scott to report the abuse and to seek treatment. PCR Tr. 32. He further testified he did not admit to the allegations against him. PCR Tr. 31-32.

Applicant testified Counsel asked Ms. Scott about a second allegation made against Applicant by a different child, which Counsel and Applicant discussed in advance of trial and discussed using this as a trial strategy. PCR Tr. 27. Applicant further testified he wanted to show there was a history of coaching between Victim's father and the children who were making allegations against Applicant, and Victim's father coached these children into making false allegations so that he could get back at Applicant for being in a relationship with Ms. Scott. PCR Tr. 27-28. Applicant testified he and Counsel discussed this strategy well in advance of his trial. PCR Tr. 28. He testified the child who made the false allegation against him admitted he was coached by his father to make a false allegation against Applicant. PCR Tr. 28-29. He further testified he had the documentation of this false allegation, and he gave Counsel the documentation but that the jury was unable to hear the end result of this allegation. PCR Tr. 29. Applicant testified he was able to testify at trial Victim could be influenced to make false allegations against him. PCR Tr. 33-34. Applicant also testified he knew Ms. Scott had a drug problem, but he was not able to tell the jury that the night of the alleged assault they had gotten into an argument regarding her drug use, which led to Ms. Scott making these allegations against him. PCT Tr. 36-37. He further testified he was able to testify at trial that he and Ms. Scott had

an argument over drugs, but she testified that they argued over cigarettes. PCR Tr. 35-36. Applicant testified the solicitor and the trial court prevented him from testifying about certain things because the court ruled they were hearsay. PCR Tr. 37.

Applicant also testified he did not discuss with Counsel the possibility of having a medical expert to consult on his case, and he was unaware that he could get funding for a medical expert. PCR Tr. 29. Applicant further testified, to his knowledge, Counsel did not consult any medical expert or request funding for any kind of expert. PCR Tr. 29. Applicant testified he does not believe that Counsel should have allowed the video of the forensic interview to be played in the jury room but that the video was entered into evidence. PCR Tr. 29-30.

Following Applicant's testimony, Counsel testified. Counsel testified he has been working at the Kershaw County Public Defender's Office since 2007. PCR Tr. 38. He testified he began representing Applicant between March and May of 2011. PCR Tr. 38. He testified he met with Applicant numerous times, particularly in the week before his trial. PCR Tr. 39. He further testified he helped Applicant prepare a defense. PCR Tr. 40. He elaborated Applicant gave him a list of several people that he wanted to be called as character witnesses. PCR Tr. 40. Furthermore, Counsel testified he and Applicant developed a strategy that Victim's family coached Victim in order to avoid exposing Ms. Scott's drug use and because the family did not like Applicant. PCR Tr. 40. He elaborated he and Applicant discussed the possibility of coaching, he based his strategy off of his discussions with Applicant, and he requested records from Victim's school regarding abuse she experienced in class. PCR Tr. 40.

Counsel testified he first asked about prior allegations against Applicant during an in-camera pre-trial hearing of Ms. Elliott, and the trial court told Counsel he could go into those allegations if he wanted, but they were clearly not part of Applicant's case. PCR Tr. 41-43.

Counsel further testified he never asked the court for an instructional ruling or order regarding Counsel's ability to ask about past events or whether there was prior evidence of coaching. PCR Tr. 42. From this, Counsel testified, he had a reason to believe that the trial court would not allow Counsel to go into issues of prior allegations. PCR Tr. 42. Counsel further testified that at Applicant's trial, he did ask Ms. Scott if anyone in her family had ever made a false allegation of sexual abuse against Applicant, and the trial court sustained the State's objections to those questions. PCR Tr. 43. He further testified he was able to argue that Ms. Scott was not credible, and Victim had been influenced. PCR Tr. 63-64. Counsel testified he did not recall making arguments regarding the admissibility of any testimony regarding the coaching of Victim. PCR Tr. 44. Counsel testified his strategy was to discredit Ms. Scott, who was an eyewitness to the alleged assault. PCR Tr. 75. Further, he testified the State tried to use a statement made by Applicant to the police, in which Applicant explained he was trying to help Victim wipe because she had problems with cleaning. PCR Tr. 62. Counsel testified he does not specifically remember challenging this statement, but Applicant was able to testify that he never made that statement to the police. PCR Tr. 62. Counsel further testified he did not object when Ms. Scott testified about various doctors' diagnoses of Victim. PCR Tr. 57.

Counsel testified Applicant readily admitted that Victim had been abused and there was no reason for Counsel to believe that Victim had not been abused. PCR Tr. 69.

Counsel testified he did not object to the forensic interviewer, Debbie Elliott, being offered as an expert and that this decision was not based on trial strategy, but the law was unclear at the time of the trial as to the admissibility of these types of experts. PCR Tr. 45, 74. Counsel testified at the time of Applicant's trial, he had seen the State offer forensic interviewers as experts and challenges of bolstering were not successful. PCR Tr. 64. He further testified he

objected neither to Ms. Elliott's description of the competency exercise she performs to determine if a child understands the difference between a truth and a lie nor to her emphasis that Victim tell the truth and there was no strategic reason for him not objecting. PCR Tr. 46-47. He testified he did not object to Ms. Elliott's testimony that she could tell if the victim was lying, but an interviewer is permitted to describe a child's behavior and demeanor. PCR Tr. 49, 66. Counsel testified he did not object when Ms. Elliott testified at trial as to what Victim told her, and he did not object when she testified that it was her opinion Victim was not affected by any third party influence or coaching. PCR Tr. 49. He further testified he objected neither when Ms. Elliott testified it was her opinion Victim had been chronically sexually abused by Applicant nor when she recommended that the victim have no contact with Applicant. PCR Tr. 50. Counsel further testified he did make an argument that the videotape of the forensic interview should not be admitted into evidence because it was inadmissible hearsay and bolstering, but he did not make the same argument as to Ms. Elliott's actual testimony. PCR Tr. 50. He testified he did not object to allowing the jury to watch the video of the forensic interview again. PCR Tr. 60.

Counsel testified he neither hired a medical expert nor consulted with an independent expert, but he did meet with Dr. Saunders prior to trial in order to review the photographs and her trial testimony. PCR Tr. 53. He testified he wanted to hire an expert to perform a psychosexual exam on Applicant in order to show that criminal sexual conduct was not in Applicant's nature and to mitigate Applicant's responsibility. PCR Tr. 53-54, 68. He testified he did ask the court for an expert, but the trial court denied his request. PCR Tr. 54.

He further testified he did not object to the medical records that were entered, and he did not object to Dr. Saunders's account of her review of Victim's medical records and of what she was told by Victim and Victim's father. PCR Tr. 57-58. He also testified he did not object to

Ms. Scott's testimony regarding what diagnoses Victim had received from previous doctors. PCR Tr. 57. Counsel testified he attempted to ask Dr. Saunders about prior reports of abuse by Applicant from Victim's siblings, but after an in-camera review of this testimony and argument regarding the admissibility of these prior allegations, the trial court ruled that reference to these other allegations were inadmissible. PCR TR. 72-73. He also testified Dr. Connell, who evaluated Victim on the night of the alleged assault, testified at trial there were no signs of tearing, bruising, or bleeding, which was inconsistent with Dr. Saunders's testimony, and it was his strategy to try to exploit those differences. PCR Tr. 70-71. Counsel further testified he was able to articulate the fact that there was no physical injury to the jury. PCR Tr. 71.

Counsel testified Applicant testified at his trial, and Counsel did not object to the State's questions asking Applicant if he thought other witnesses were lying. PCR Tr. 59.

Counsel also testified he did not object to the trial court's reference to the statute that dictates that in a sexual assault case, the victim does not have to be corroborated. PCR Tr. 59-60. He further testified he believes that this instruction to the jury regarding corroboration of the victim is correct. PCR Tr. 73.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court’s findings in regards to each of Applicant’s allegations of ineffective assistance of counsel.

*Counsel's alleged failure to object to hearsay statements made by
Victim's mother*

Applicant alleges Counsel was ineffective for failing to object to statements made by Victim's mother, Ms. Scott, regarding the doctors' diagnoses of Victim. Specifically, Applicant contends Counsel should have objected when Ms. Scott testified the doctors told her Victim's hair was falling out due to stress. Trial Tr. 135. Applicant further contends Counsel was ineffective for failing to object when Ms. Scott testified the doctors told her Victim's vagina was red, irritated, and had urinary tract infections. Trial Tr. 136. This Court finds Applicant has failed to establish any prejudice resulting from Counsel's alleged deficiencies and that this allegation must be denied and dismissed with prejudice. The South Carolina Rules of Evidence provide that an expert witness may base his or her opinion upon those facts or data in a particular case even if those facts and data may not be admissible in evidence, if reasonably relied on by experts in the field. Rule 703, SCRE. Dr. Saunders testified at Applicant's trial and was qualified as an expert in forensic child sexual assault examination. Dr. Saunders testified she uses medical records as a guide when examining a child who may have been subject to sexual abuse. Trial Tr. 312. Furthermore, Applicant's own expert, Dr. Olga Rosa, testified at the evidentiary hearing that medical diagnoses are based approximately ninety percent on a patient's medical history. PCR Tr. 22. Because the State's expert at trial testified to previous doctors' diagnoses of Victim, any alleged deficiency by Counsel in failing to object to these statements during the testimony of Ms. Scott could not have had any impact on the result of the proceeding and was entirely cumulative to other properly admitted evidence. Based on the foregoing, this Court finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure in asking questions regarding prior allegations of sexual misconduct against Applicant

Applicant alleges Counsel was ineffective for asking questions regarding prior allegations of sexual misconduct against Applicant, thereby alerting the jury to this fact without the opportunity to explain to the jury the result or circumstance of these allegations. Specifically, Applicant contends Counsel was ineffective for asking Ms. Scott whether Victim's older sibling alleged he had been abused and whether anyone in her family had ever made a false allegation of sexual abuse against Applicant. Trial Tr. 157. Applicant testified he and Counsel discussed bringing up prior allegations of assault made against Applicant prior to the trial. PCR Tr. 27. Applicant further testified he wanted to elicit information about these allegations to show a history of coaching by Victim's father. PCR Tr. 27-28. He further testified the jury was not able to hear the end result of these prior allegations. PCR Tr. 29. Counsel testified his defense strategy was to allege that Victim's family was lying about these allegations and to allege coaching of Victim by her family. PCR Tr. 40-41, 61. Furthermore, Counsel testified he based this strategy off of his discussions with Applicant. PCR Tr. 68. This Court finds that this strategy was valid and prudent based on all testimony presented; and, therefore, Counsel's performance was not deficient. *See Edwards v. State*, 392 S.C. 449, 456-57, 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). The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. *Strickland*, 466 U.S. at 689. Accordingly, we must be

wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)). This Court finds that counsel's performance went well beyond the standard of reasonableness according to professional norms, and, therefore, Applicant has failed to establish any deficiency regarding this allegation. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to the qualification of the
State's expert in child abuse assessment and forensic interviewing*

Applicant alleges that Counsel was ineffective for failing to object to the qualification of witness Debbie Elliott as an expert in child abuse assessment and forensic interviewing. Counsel testified forensic interviewers had been offered as experts prior to and around the time of Applicant's trial but now he can definitely surmise that his failure to object to Ms. Elliott's qualification as an expert witness was a mistake. PCR Tr. 45, 64. Evaluating attorney performance, however, "requires that 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. Counsel's performance must be evaluated based on the reasonable professional practices at the time of Applicant's trial. In *State v. Douglas*, the South Carolina Court of Appeals held the trial court did not abuse its discretion in finding a forensic interviewer had "acquired by study or practical experience such knowledge of the subject matter of [her] testimony as would enable [her] to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge" when the interviewer had previously been qualified in family court, circuit court, and federal court as an expert witness in interviewing child sexual assault victims, had received specialized training in the RATAC method, and had

been certified as a forensic interviewer using the RATAC method. 367 S.C. 498, 519, 626 S.E.2d 59, 70 (Ct. App. 2006), *reversed on other grounds by State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009). In holding that it was unnecessary for the trial court to admit the forensic interviewer as an expert, the Supreme Court of South Carolina, in dicta, noted although it was unnecessary to admit the forensic interviewer in that case as an expert, there may be a case in which qualification of an expert in the field of forensic interviewing would be proper. *Douglas*, 380 S.C. at 503 n. 2, 671 S.E.2d at 609 n. 2. Moreover, the Court noted many states at that time had upheld the qualification of expert witnesses in the field of forensic interviewing. *Id.* (citing *Kilby v. Commonwealth*, 52 Va. App. 397, S663 S.E.2d 540 (2008); *Golden v. State*, 984 So. 2d 1026 (Miss. Ct. App. 2008); *State v. Speers*, 98 P.3d 560 (Ariz. Ct. App. 2004); *In re A.H.*, 259 Ga. App. 608, 578 S.E.2d 247 (Ga. Ct. App. 2003); *State v. Thompson*, 799 A.2d 1126 (Conn. Ct. App. 2002) (some internal citations omitted)). At the time of Applicant's trial, in 2011, it was common practice to admit forensic interviewers as experts in the field of forensic interviewing. Furthermore, any objections to the qualifications of such witnesses were generally unsuccessful. Because forensic interviewers were offered as expert witnesses without objection at that time, Applicant cannot establish any deficiency.

Moreover, a witness providing non-scientific testimony must meet a two-prong test: (1) the qualifications of the witness must be sufficient and (2) there must be a determination that the expert's testimony will be reliable. *State v. White*, 382 S.C. 265, 676 S.E.2d 684. At Applicant's trial, Ms. Elliott testified as to her extensive experience as a forensic interviewer in child abuse cases, specifically that she had conducted approximately 5,000 interviews over the course of eight-and-a-half years and had been qualified as an expert in the field of forensic interviewing and of child abuse assessment approximately fifty times. Trial Tr. 218-20. From this, the

reliability of Ms. Elliott's testimony can be established, and Counsel cannot be found deficient as a result. Based on the foregoing, this Court finds Applicant has failed to meet his burden in establishing any deficiency or prejudice. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to witness Debbie Elliott's testimony regarding techniques involved in conducting the interview, theories regarding types of disclosures, and Victim's credibility and ability to understand the difference between a truth and a lie

Applicant alleges Counsel was ineffective for failing to object when Ms. Elliott testified to information, which was not limited to foundational information for introduction of the interview tape. Applicant specifically alleges Counsel was ineffective for failing to object when Ms. Elliott offered information regarding techniques involved in conducting the interview, theories regarding types of disclosures, and conclusions and opinions regarding Victim's credibility and ability to understand the difference between a truth and a lie. Applicant argues under *Kromah*,² Counsel was ineffective for allowing testimony that bolstered Victim's credibility. In *Kromah*, the Supreme Court of South Carolina held although the trial court erred in admitting the forensic interviewer's testimony concerning the credibility of the victim, any error was harmless. *Kromah*, 401 S.C. at 360, 737 S.E.2d at 501. The Court specified forensic interviewers should avoid the following types of statements: "[(1)] that the child was told to be truthful; [(2)] a direct opinion as to a child's veracity or tendency to tell the truth; [(3)] any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a 'compelling finding' of abuse; [(4)] any statement to indicate to a jury that the interviewer believes the child's allegations in the current matter; or [(5)] an opinion that the child's behavior indicated the child was telling the truth." *Id.* at 360, 737 S.E.2d at 500. It is

² *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013).

proper, however, for a forensic interviewer to testify to: (1) the time, date, and circumstances of the interview; (2) his or her personal observations regarding the child's behavior or demeanor; and (3) the events that occurred within the personal knowledge of the interviewer. *Id.* At the time *Kromah* was decided, it was a significant departure from practices commonly employed by both prosecuting and defense attorneys, specifically those techniques that were employed at the time of Applicant's trial. Therefore, this Court finds that *Kromah* is inapplicable in the present case. "The relevant timeframe for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies [his] original statements." *Thornes v. State*, 310 S.C. 306, 310, 426 S.E.2d 764, 765 (1993). *Kromah* was decided two years after Applicant's trial. Therefore, Counsel's performance must be analyzed under the reasonable professional norms at the time of Applicant's trial. Counsel testified he had seen the State offer forensic interviewers as experts prior to Applicant's trial and that challenges to these experts' testimonies as bolstering were generally ineffective. PCR Tr. 64. Because allowing forensic interviewers to testify at the time of Applicant's trial was common practice and arguments that this testimony was bolstering were generally ineffective, Counsel cannot now claim that he made a mistake in failing to object to Ms. Elliott's testimony. Therefore, this Court finds Applicant has failed to establish any deficiency.

Even if Counsel were deficient for failing to object to Ms. Elliott's testimony, Applicant cannot have suffered any resulting prejudice. The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the trial. *Franklin v. Catoe*, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n.3 (2001), *cert denied*, 535 U.S. 1114 (2002); *see also Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is

overwhelming evidence of guilt). At Applicant's trial, Ms. Scott testified on the night of the abuse she woke up to see Applicant in the hallway lying on top of Victim with his pants down. Trial Tr. 124. She further testified Victim's pants were also down. Trial Tr. 124. In addition to Ms. Scott's testimony, both medical experts who examined Victim testified that there was attenuation of the hymen, which was consistent with past penetration³. Trial Tr. 197, 203, 317-18. Based on the foregoing, this Court finds that the evidence against Applicant was overwhelming and, therefore, Applicant cannot establish any prejudice. This Court finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to retain and consult with an independent medical expert

Applicant alleges Counsel was ineffective for failing to retain and consult with a forensic pediatrician for a second opinion regarding the medical and photograph evidence. This Court finds Counsel's testimony with regards to this allegation is very credible while Applicant's testimony is not credible. Applicant testified he was unaware that he could get funding for a medical expert and did not have any knowledge as to whether or not Counsel ever consulted a medical expert. PCR Tr. 29. Counsel also testified he neither hired nor consulted a medical expert but that he did meet with the State's expert, Dr. Saunders, prior to Applicant's trial. PCR Tr. 53. He testified he reviewed the photographs with Dr. Saunders, and they also reviewed her testimony. PCR Tr. 53. Counsel explained he knew that Dr. Connell's testimony differed from Dr. Saunders's testimony in that Dr. Connell did not find signs of physical injury whereas Dr. Saunders did find signs of physical injury. PCR Tr. 70-71; Trial Tr. 197, 203, 210, 317, 324, 339. He testified it was his strategy to exploit these differences, and he was able to bring out the fact that there was no physical injury in front of the jury. PCR Tr. 71. He further testified he did

³ It is important to note that Applicant's own expert at the evidentiary hearing testified that it would have been her opinion that the victim was subject to sexual abuse. PCR Tr. 24.

ask the trial court for funding for another expert, but the trial court denied his request, explaining that the defense could hire every expert the State hires but that the defense would just hire an expert that has a different opinion than the State's expert. PCR. Tr. 54. When counsel fails to procure expert witnesses, his representation is not rendered deficient when trial counsel vigorously cross-examined the State's witnesses and attacked the accuracy of the evidence. *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing *Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991)). Counsel was able to elicit testimony from both Dr. Connell and Dr. Saunders that there was no physical injury, scarring, or bruising to Victim. Trial Tr. 210, 322, 344. Counsel was also able to elicit testimony from both experts as to different causes of redness and swelling of Victim. Trial Tr. 209, 331. Based on the foregoing, this Court finds that Counsel was not deficient for failing to consult an expert witness, as he was able to vigorously cross-examine both of the State's experts and highlight the differences in their findings.

Moreover, this Court finds Applicant suffered no resulting prejudice from this alleged deficiency. In support of his allegation Counsel was ineffective for failing to retain and consult a medical expert, Applicant presented the testimony of Dr. Rosa. Dr. Rosa testified she agreed with Dr. Saunders regarding the presence of redness and shape of Victim's hymen, but she disagreed with Dr. Saunders regarding the avascularity area or scar tissue on the posterior hymen. PCR Tr. 15-17. She further testified the lack of acute trauma at the time Victim was examined does not, however, rule out past penetration. PCR Tr. 19-20. Ultimately, Dr. Rosa testified she believed Victim had been sexually assaulted and would have testified to that opinion had she been called as a witness at trial. PCR Tr. 21, 23. Although Dr. Rosa disagreed with some of Dr. Saunders's description of the symptoms and appearance of Victim's hymenal tissue,

Dr. Rosa did agree with Dr. Saunders's opinion that Victim had been sexually assaulted. Because Applicant's own expert did not refute the opinion presented by State's experts at trial, Applicant has wholly failed to establish he suffered any prejudice—as the result of the proceeding would not have been any different had Counsel retained an independent medical expert. Therefore, this Court finds that this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to hearsay testimony made by
the State's expert*

Applicant alleges Counsel was ineffective for failing to object to Dr. Saunders's testimony regarding information obtained from prior medical records of Victim that were not offered into evidence at Applicant's trial. Applicant alleges these statements were impermissible hearsay. Hearsay is an out-of-court statement made by the declarant offered to prove the truth of the matter asserted. SCRE 801(c). Hearsay statements are generally inadmissible unless an exception to the rule applies. SCRE 802. A statement that is made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations are admissible upon the court's discretion. SCRE 803(d).

At trial, Dr. Saunders testified the victim's father, Mr. Scott, reported to her Victim had presented to the emergency room at least twice with vaginal bleeding and painful urination, which was thought to be a urinary tract infection (UTI). Trial Tr. 323. She further testified urine cultures were taken and that upon her review of those cultures, there was no growth and no infection present. Trial Tr. 323-24. Here, Dr. Saunders testified to statements that were made to her by Mr. Scott. These statements indicated Victim's prior medical history and symptoms and were ultimately used by Dr. Saunders in her diagnosis. Therefore, these statements fall within an

exception to the hearsay rule and Counsel cannot be found deficient for failing to object to them.

This Court finds this allegation must be denied and dismissed with prejudice.

*Counsel's alleged failure to object to the trial court's jury charge
and the State's closing argument regarding that charge*

Applicant alleges Counsel was ineffective for failing to object when the trial court charged that “testimony of an alleged victim in a criminal sexual conduct case need not be corroborated” and when the State put “special emphasis” on this charge during its closing arguments. The trial court charged the jury:

In passing upon credibility, you may take into consideration many things, such as the demeanor or manner of testifying, whether the witness had reason to be biased or prejudiced, whether a witness' testimony was contradicted on the one hand or supported and corroborated on the other hand. However, the testimony of an alleged victim in a criminal sexual conduct case need not be corroborated.

Trial Tr. 456. Counsel testified that the trial court's instruction was a correct statement of the law. PCR Tr. 73. South Carolina Code § 16-3-657 explicitly provides that “the testimony of the victim need not be corroborated in [criminal sexual conduct] prosecutions.” S.C. Code Ann. § 16-3-657. In 2016, however, the Supreme Court of South Carolina held a jury charge reflecting this statute was an impermissible charge on the facts. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). Consequently, *Stukes* “overrule[d] the precedent to the contrary.” *Id.* at 498, 787 S.E.2d at 482.

Although, after *Stukes*, the trial court's charge would be error, “the relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies [his] original statements.” *Thornes*, 310 S.C. at 310, 426 S.E.2d at 766. Moreover, trial counsel has never been required to anticipate or discover changes in the law that differ from the law at the time of trial. *Id.* at 309-10, 426 S.E.2d at 765. *Stukes* was decided in 2016,

approximately five years after Applicant's trial. Therefore, because the trial court's jury charge was an appropriate charge on the law at the time, Counsel cannot be found to have been deficient, nor can Applicant have suffered any prejudice. This Court finds that Applicant has failed to show any deficiency resulting from Counsel's alleged failure and that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to the State's pitting of the witnesses

Applicant alleges Counsel was ineffective for failing to object to the solicitor's improper pitting of the witnesses. "Improper pitting constitutes reversible error only if the accused is unfairly prejudiced." *Burgess v. State*, 329 S.C. 88, 91, 495 S.E.2 445, 447 (1998). Here, the State did question Applicant as to whether or not Ms. Scott, Victim, and Investigator Lyons were lying. Trial Tr. 402. However, Applicant was still able to attack the credibility of Ms. Scott by testifying to Ms. Scott's history of drug use. PCR Tr. 35-36. Counsel also testified he was able to argue that Ms. Scott was not credible and Victim had been influenced in making this allegation against Applicant. PCR Tr. 63. Furthermore, Counsel's entire trial strategy centered around the idea Victim and her family were lying in order to get Applicant out of the picture. Therefore, this Court finds that Applicant was not prejudiced from Counsel's failure to object to the pitting of witnesses, as Applicant was able to attack the credibility of those witnesses through other means. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to prior consistent statements of the witnesses as impermissible hearsay

Applicant alleges Counsel was ineffective for failing to object to prior consistent statements as impermissible hearsay that were offered through the admission of written reports and medical records, as well as through the testimony of witnesses. At trial, Victim testified

Applicant had “messed with” her genitals with his genitals. Trial Tr. 171. She further testified, on the night of this particular incident she woke up to go to the bathroom, which was down the hall from her mother’s bedroom. Trial Tr. 171. While she was in the hall, Applicant pulled her pants down, as well as his own, got on top of her, and proceeded to have sexual intercourse with her. Trial Tr. 172-73. Victim testified this had occurred numerous times. Trial Tr. 174. A nurse who filled out the emergency room report, which was admitted into evidence, also testified when she asked Victim what happened, Victim responded: ““Mom caught [Applicant] trying to touch me in the hallway. [Applicant] has touched me with his nuts a lot of times. I bled one time—not last night. Mom saw him with his pants down and my pants down as usual.” Trial Tr. 266, 268-71. Ms. Scott and Dr. Saunders testified similarly. Trial Tr. 125, 314. The presence of overwhelming evidence of guilt negates any claim that counsel’s performance could have reasonably affected the result of the trial. *Franklin v. Catoe*, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n.3 (2001); *see also Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt). As aforementioned, the State presented the eyewitness testimony of Ms. Scott, as well as physical findings that were consistent with sexual abuse. Therefore, this Court finds that Applicant has failed to establish any resulting prejudice and this allegation must be denied and dismissed with prejudice.

Counsel’s alleged failure to object to the replay of the forensic interview video

Applicant alleges Counsel was ineffective for failing to object to the replay of the forensic interview video in the jury room. This Court finds Counsel’s testimony concerning this allegation is very credible while Applicant’s testimony is not credible. During deliberations, the jury sent the trial court a note asked to view the forensic interview again. Trial Tr. 467. Both

parties agreed to provide the jury with a laptop so that they could review the video, which was done. Trial Tr. 467, 470. Applicant testified he believes this was ineffective because it “placed prejudicial emphasis on [Victim’s] testimony.” PCR Tr. 29-30. Counsel testified he made an argument that the video should not have been admitted because it was inadmissible hearsay and bolstering, but he did not object to its replay in the jury room. PCR Tr. 50, 60. In its discretion, the trial court may permit the jury at their request to review testimony after beginning their deliberations. *State v. Plyler*, 275 S.C. 291, 298, 270 S.E.2d 126, 129 (1980). Had Counsel objected to the videotape of the forensic interview being sent back to the jury room, the trial court would have had the discretion to have the evidence published to the jury or to send it back with them into the jury room. Therefore, this Court finds that either of these decisions would have placed an equal level of emphasis on Victim’s testimony. Consequently, this Court finds that even if Counsel was deficient for failing to object, any error was harmless and Applicant cannot have been prejudiced as a result. This claim must be denied and dismissed with prejudice.

Cumulative error

Applicant alleges that the cumulative effect of Counsel’s alleged errors constitutes ineffective assistance of counsel. “Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.” *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002); *see also Lorenzen*, 376 S.C. at 535 n. 3, 657 S.E.2d at 779 n.3. Moreover, the Fourth Circuit has held that “ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively” and, therefore, does not recognize a cumulative error analysis. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998). This Court finds that a cumulative error analysis

would be inappropriate and therefore finds that this allegation must be denied and dismissed with prejudice.

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, 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 that 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. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this ____ day of _____, 2018.

J. DERHAM COLE
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina

The Grose Law Firm, LLC
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

October 28, 2019

The Honorable J. Derham Cole
P O Box 1744
180 Magnolia Street, 2nd Floor
Spartanburg, SC 29304-1744

Re: *George Branham, II v. State of South Carolina*
Case Number 2014-CP-28-00703

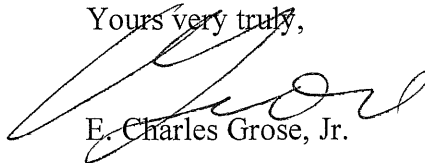
Dear Judge Cole:

By email dated February 24, 2019, I provided Your Honor with Mr. Branham's Rule 59(e), SCRCP motion. I followed up by email on May 9, 2019. A copy of that motion is enclosed. The opinion in *Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) was a consideration in this case. The federal court has granted Mr. Mangal an evidentiary hearing on the improper bolstering issue. A copy of the order of the federal court granting the hearing is enclosed. Given the procedural history of this case and the developments in Mr. Mangal's case, Mr. Branham respectfully requests a hearing on his Rule 59(e) motion.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. George Branham, II
Megan Jameson, Esquire
Clerk of Court, Spartanburg County

The Grose Law Firm, LLC
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

December 23, 2019

The Honorable J. Derham Cole
P O Box 1744
180 Magnolia Street, 2nd Floor
Spartanburg, SC 29304-1744

Re: *George Branham, II v. State of South Carolina*
Case Number 2014-CP-28-00703

Dear Judge Cole:

By letter dated October 28, 2019, I provided Your Honor with a copy of the order of the Honorable R. Bryan Harwell in *Farid Ahmad Mangal v. Warden, Perry Correctional Institution*, C/A No. 6:18-cv-00106-RBH, filed on April 4, 2019, which granted Mr. Mangal an evidentiary hearing on his claims of ineffective assistance of counsel. Enclosed please find a copy of the Report & Recommendation of the Honorable Kevin F. McDonald, dated December 18, 2019 "recommend[ing] the district court grant [Mr. Mangal] relief on the improper bolstering claims" raised in his petition for a writ of *habeas corpus*. As Your Honor is already aware, Mr. Mangal's improper bolstering claim is similar to some of the claims in Mr. Branham's application for post-conviction relief.

Given the procedural history of this case, Mr. Branham respectfully requests a status conference or a hearing on his Rule 59(e) motion.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Mr. George Branham, II
Megan H. Jameson, Esquire
Clerk of Court, Kershaw County

A. 698

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Farid Ahmad Mangal a/k/a
Farid Ahmad Maugal,

Petitioner,

vs.

Warden, Perry Correctional
Institution,

Respondent.

Civil Action No. 6:18-106-RBH-KFM

REPORT OF MAGISTRATE JUDGE

The petitioner, a state prisoner, seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. Pursuant to the provisions of 28 U.S.C. § 636(b)(1), and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), this magistrate judge is authorized to review post-trial petitions for relief and submit findings and recommendations to the district court.

I. BACKGROUND

The petitioner is currently incarcerated at Perry Correctional Institution in the South Carolina Department of Corrections (doc. 1 at 1). He was indicted by the Spartanburg County Grand Jury in August 2006 on charges of incest (06-GS-42-2830) and criminal sexual conduct (“CSC”) with a minor in the first degree (06-GS-42-2831). The Grand Jury indicted him in October 2006 for a lewd act or attempt to commit a lewd act upon a child under 16 (06-GS-42-4217), and he was indicted in January 2007 for CSC with a minor in the second degree (06-GS-42-4869) (doc. 20-39). The petitioner was represented by Lawrence W. Crane on these charges. On March 12-15, 2007, the petitioner was tried before the Honorable J. Mark Hayes, and the jury found him guilty as charged (app. 1-533).¹ On March 16, 2007, Judge Hayes imposed concurrent sentences of 30 years imprisonment for CSC with a minor in the first degree, 20 years imprisonment

¹ The appendix page numbers referenced herein are found in Case Management/ Electronic Case Filing (“CM/ECF”) document numbers 20-6, 20-7, and 20-8.

A. 699

for CSC with a minor in the second degree, 15 years imprisonment for lewd act on a minor, and one year imprisonment for incest. Judge Hayes also ordered that the petitioner receive credit for time served (app. 534-55).

A. Trial in Underlying Case

The petitioner was found guilty of committing various acts of sexual misconduct against his biological daughter, spanning approximately six years and beginning when she was ten years old (see app. 531-32). The State called the victim as the first witness. She testified that when she was ten years old, the petitioner “told me that he was gonna explain what sex was to me and that he was gonna show me what ... I shouldn't allow other people to do to me.” The petitioner sexually assaulted her and told her it would not happen again, but it happened again the next day (app. 10-14). The victim further testified that the petitioner told her that her mother would not believe her if she reported the incidents. Instead, it would embarrass her and the entire family. Several years later, he threatened to kill the whole family if she ever told anyone about the sexual assaults. Even when other people were in the room with them, he would grab and touch her on her breasts, legs, and “behind.” He would also force her to bathe in front of him, and he would wash her (app. 14-15). The victim testified that the sexual abuse “happened many times over the six years” and only ended when she was 16 years old. She could not recall the specific number of times that the petitioner abused her, but she testified, “When it first started it was pretty much every single day I came home from school.” He continued to assault her once or twice a week until she was in the middle of the tenth grade (app. 15-16). The victim testified that the house was more peaceful if the victim complied with his demands, and he would yell at her mother and her brothers when she did not. Also, he would call her mother a “whore” and call the victim’s brother names such as “fat ass” and “bastard.” She felt that she had to comply with his demands to prevent him from abusing them (app. 19-20).

The victim testified that although the petitioner did not fully penetrate her during many of the assaults because he was concerned that she might get pregnant, he

A. 700

fully penetrated her on several occasions. The first time he fully penetrated her occurred when she was 13 or 14 years old (app. 18-21). The victim testified that the last time that the petitioner abused her was on the night before her mother had neck surgery. She refused because her mother was in the next room. He punished her brothers the next day because she had rejected him (app. 28-29). The first person to whom she disclosed the abuse was her brother, Rashan. The victim testified:

My brother Rashan was the first person I told because after he went to bed that night that my dad had hit him, I went in there and I was very upset because he had come in there and called me a whore..... And I told Rashan I had something to tell him because ... I didn't feel it was fair that they had to live in misery because ... I felt like it was my fault. I didn't really tell him upright. He guessed ... what was going on. I mean it took him a while because I didn't want, I didn't want to tell him and my main reason for not wanting to tell him was because I didn't want my mom to find out. [M]y mom had had it hard enough. My mom's had a very hard life and my dad was never good to her, and I grew up watching that, and I didn't want to be another burden on her shoulders. And Rashan told me if I didn't tell her that he would.

(App. 29-30). The victim told her mother the following day that the petitioner had been sexually abusing her for six years (app. 30-31).

On cross examination, the victim testified that the petitioner was very strict. He would take her straight home from school, where she had to do chores, she could not use the telephone, could not have friends over to the house, she could not go out, and she could not celebrate Christmas. Moreover, she was staying in the dining room at the time of the petitioner's arrest, and she did not like this. Also, the petitioner tried to arrange her marriage to a cousin. Although she denied that this was the reason she accused her father, she admitted that things got better after his arrest, and, within about four months after his arrest, she began smoking and drinking, and she had a college-age boyfriend (app. 61-65, 73). The victim confirmed that when she talked to counselors from the Children's Advocacy Center she did not tell them about getting suspended from school in November 2002 for having oral sex with another student (app. 66). The petitioner's trial counsel also

A. 701

questioned the victim about discrepancies between her family court testimony and her testimony at trial as to the time periods during which different types of sexual abuse occurred (app. 70-71).

The victim's brother, Rashan, testified that the petitioner "verbally and physically" abused the family and that he hit the victim with an extension cord. Also, he called her names, such as "slut and bitch and whore" (app. 92-93; 103). Rashan confirmed that his mother was working during the day during this time period and that the petitioner would usually pick up the victim after school. He confirmed that his sister reported the abuse to their mother (app. 95-97). He also testified:

I would see [the petitioner and [the victim] go in her room or maybe I . . . just didn't know where they were, and . . . couldn't find them. So, I'd go and I'd knock on the door, on his or her door . . . and I jiggled the door handle and it was locked. And I asked ... is anybody in there and he would answer. He said we're talking, just go away, and, you know, the door was locked. So, I didn't understand. You know, if he had something to yell at her about or say to her, he usually just did it out in the open.

(App. 97-98). He explained that the victim and the petitioner would be behind closed doors for 20 or 30 minutes at a time. When they came out, she would be "visibly upset, crying, and she [would] just head to the bathroom." However, he never heard them fighting over anything. He saw this happen roughly 20 or 30 times over the years (app. 98). Further, the petitioner installed a keyed lock on his bedroom door around 2000 or 2001, and the State introduced photographs of the lock (app. 100, 107).

The State also presented the testimony of Wiley Garrett, a licensed independent social worker, who conducted two forensic interviews of the victim. He was qualified by the trial judge as an expert "in the area of forensic interviewing to give opinion testimony in that area" (app. 119-22). On direct examination by the State, he testified that one of his "ultimate purpose[s]" in conducting forensic interviews is to determine whether a child has made "a clear[,] consistent disclosure," and he confirmed that part of the process is "to determine whether there's fabrication" (app. 12-24). Garrett interviewed the

A. 702

victim twice in July 2004 at the Children's Advocacy Center in Spartanburg, South Carolina (app. 117, 125, 129). The victim—who was 16 years old at the time of the interview—disclosed to him that she had been sexually assaulted multiple times beginning at age ten and that this happened in her parents' bedroom (app. 125-26). Garrett testified that the victim's disclosure was a "clear, consistent, and compelling disclosure of sexual abuse" (app. 130). On cross examination, Garrett conceded that he had cases where 16 year old girls had lied about being sexually abused, and he did not speak to the petitioner about the allegations against him (app. 139-43). Garrett also testified that at the time he did his assessment, he had not been told by the victim or her mother that the victim had been suspended from school for allegedly engaging in oral sex with another student nor had he been told of other issues the victim had at school (app. 138-42).

Dr. Nancy Henderson, a board certified pediatrician whose practice focused on the diagnosis of child abuse, including sexual abuse, also testified for the State. The trial judge found her qualified as an expert "in the examination, diagnosis, and treatment of child sexual abuse" (app. 147-53). She performed a medical examination of the victim on July 9, 2004, which revealed an abnormality of the hymen, which she explained as follows:

A: And the way I would describe it, it's called a crescent shape hymen because it has - it appears like a crescent shape moon. Sometimes in the normal changing it can be called angular where it goes all the way around. But because it kind of stops at this point up here it's called a crescent shape.

And we label things like a clock. So this is twelve o'clock, six o'clock, three o'clock, and nine o'clock. And so, on her exam right, right at about eight o'clock, right at this point, right at this point here, the hymen tissue looked very, very normal until you get to this point, and she had mark narrowing at that point and then it resumed very normal to the, to the rest of her exam. And there was just a tiny bit of discharge, a thin white amount of discharge, which without doing cultures it's hard for me to make any kind of judgment of that. We didn't look too concerned just looking at it. But this was the finding that I had.

Q: What does narrowing at eight o'clock mean?

A: Typically the [hymeneal] tissue is pretty uniform, and pretty

A. 703

consistent all the way around. So, when you see marked narrowing - now, it normally, in some children, you can see a lot of variations especially when you get to adolescence. There can be a lot of changes because they have a lot of estrogen around and that causes a lot of flexibility to the [hymeneal] tissue.

But when you see where the [hymeneal] tissue is almost completely diminished at that one point, that's a sign of some type of penetration through the [hymeneal] tissue.

(App. 158-59). Dr. Henderson further testified, "Based on the history that [the victim] shared with me and based on my examination I felt that it was consistent with a, that she had been abused" and that it was her opinion that the victim "was sexually abused" (app. 159).

On cross examination, Dr. Henderson testified that her report did not indicate "consistent" with sexual abuse, but instead indicated "suspicious" of sexual abuse, because the report was based on the physical examination, but her testimony was based on the history the victim provided as well (app. 161-63). Dr. Henderson elaborated that "based on the history that Victim shared, and she denies any other kind of trauma to that area . . . my conclusion is . . . as I stated" (app. 163). When asked whether she based her testimony on possible untrue information from the victim, Dr. Henderson replied, "I based it on the information received by my patient, which is invaluable information any doctor receives when they are examining a patient" (app. 164). When asked whether she assumed that what the victim told her was true, Dr. Henderson responded, "Based on the way she shared it and all the information that she shared, yes" (app. 164).

Defense counsel called Dr. Medlock as an expert witness (app. 209-51). He was the Mangal family's treating physician for many years. He testified that a record from an examination on January 2, 2002, indicated that the victim's hymen was still intact, and it was his "interpretation" that "if [the hymen] is [intact], ... it would indicate there's not been sexual activity" and that "if the vagina had been penetrated [he] would expect the hymen to ... not be intact" (app. 227-28, 246-47; doc. 79). Dr. Medlock testified that the victim

A. 704

"denie[d] sexual activity" during a visit on October 20, 2003, and the victim's "[r]ectal examination reveal[ed] external examination was in normal limits" (app. 224). Dr. Medlock testified that a note dated September 30, 2004, in the victim's medical records, made by another physician in his practice, reflected that she suffered from "[post-traumatic] stress secondary to sexual abuse." He explained that this finding was "an impression or a presumptive diagnosis ... [taking] what the patient tells you, history, and then you do a physical examination. And from that you come to an impression or make a presumptive diagnosis" (app. 241-51). Dr. Medlock further testified that he had known the petitioner for years, the petitioner had done construction work for him, the petitioner had a good reputation, and he could not believe the petitioner "would be guilty of that sort of thing" (app. 226-227; doc. 79).

The victim's mother, Diane, was called by trial counsel as a defense witness (app. 253-54, 256).² She testified on direct examination that the victim had never complained to her about sexual abuse before June 15, 2004, and she never saw anything that caused her to suspect that the victim was being abused (app. 266-67). She attributed any blood that she saw on the victim's underwear to the victim's menstrual cycle, since the victim had her first period at age nine (app. 267-68). Also, the petitioner went on a trip to Germany in January 2004 to visit his brothers. He was out of the country for four weeks, but the victim did not report alleged abuse in his absence (app. 268-69). Later, on direct examination, the victim's mother testified that her daughter told her on June 15, 2004, that the petitioner "had been molesting her since she was ten" (app. 276). She testified that when the petitioner was arrested, she gave the police a statement indicating the victim had disclosed the abuse to her but the victim stated she had not allowed penetration or oral sex (app. 276-79). During an examination as to precisely when the victim made this disclosure, the mother twice testified, "I am telling the truth in what I'm saying . . . that my child was

² Trial counsel requested that the court call the victim's mother "as an adverse witness for the Court . . . [b]ecause she is a 100 percent adversary to . . . our side of the case" (app. 253-54). The trial court denied the motion (app. 255).

A. 705

violated” (app. 281). She testified that when she confronted the petitioner with what the victim had told her, the petitioner immediately denied abusing the victim and accused the victim of lying to “make trouble” (app. 291-92). The victim’s mother testified that Garrett had asked her whether her children lie. The victim’s mother testified that she told Garrett, “Sir, I believe everyone lies. I would say that my children are, are usually truthful . . .” (app. 284). She told Garrett that the only trouble the victim had gotten into at school was for drinking alcohol, and she did not report that the victim had been suspended from school for having oral sex with another student (app. 284-85). The victim’s mother testified that the petitioner had a mole or freckle on the head of his penis, and not on the shaft, as the victim had testified. Also, trial counsel introduced into evidence the victim’s mother’s drawing of the petitioner’s penis (app. 296-99).

The State’s cross examination of the mother established that she had seen the petitioner slap, punch, and kick her children, as well as call them names, referring to the victim as “whore” and “slut,” while he referred to his sons as “bastards.” The victim’s mother testified that she did not report this physical abuse because the petitioner “promised me if I ever had told anybody about what went on in our house, if I ever tried to stand up for my children as far as taking them [away] from the abuse . . . he would rather see their dead bodies laying out in front of him” (app. 307-08). She further testified that the petitioner physically abused her (app. 308-09). When asked whether she believed the victim when the victim told her about the abuse, the victim’s mother stated, “Yes, ma’am, I did, and I still do.” She was then asked why she believed the victim, and the victim’s mother testified, “Because she’s my child.” The victim’s mother continued, “She had . . . no reason to lie about something like that. . . . [I]f anybody could of seen the level of how distraught she was, the look in her eyes, the begging, please help me, that’s why I believed her” (app. 314).

The petitioner testified in his own defense and denied the allegations of abuse (app. 369-72). He testified that he had discovered a boy in the victim’s bedroom one night. This boy was someone that he did not want her to see, and that was why he made her

A. 706

sleep in the dining room (app. 343-54). On cross examination, he denied taking his children behind a closed door to discipline them. He admitted that he had installed an exterior “steel” lock on his bedroom door that required a key (app. 381-82). On redirect, he testified that he had installed the lock because his children would sneak into his room and steal money and cigarettes (app. 394).³

B. Direct Appeal

The petitioner timely served and filed a notice of appeal. He was represented by Assistant Appellate Defender LaNelle C. Durant. He filed a final brief of appellant on June 5, 2008, raising the following issue: “Did the trial judge err in failing to grant a mistrial after the State cross examined a witness for the defense on Appellant’s prior DUI convictions as character evidence?” (doc. 20-12 at 6). The State filed a final brief of respondent on May 30, 2008 (doc. 20-13).

The Court of Appeals of South Carolina affirmed the petitioner’s convictions and sentence on March 4, 2009 (doc. 20-14). The petitioner filed a timely petition for rehearing on March 19, 2009 (doc. 20-15). The Court of Appeals filed an order denying the petition on May 4, 2009 (doc. 20-16).

On June 3, 2009, the petitioner filed a petition for writ of certiorari. He presented the following issue to the Supreme Court of South Carolina: “Did the Court of Appeals err by affirming the trial court which denied a mistrial after the State cross examined a witness for the defense on Appellant’s prior DUI convictions as character evidence?” (doc. 20-17). The State filed a return to petition for writ of certiorari on June 30, 2009 (doc. 20-18). On December 17, 2009, the Supreme Court of South Carolina filed an order denying certiorari (doc. 20-19). The Court of Appeals sent the remittitur to the Spartanburg County Clerk of Court on December 22, 2009 (doc. 20-20).

³ The other witnesses for the defense were a records custodian (Leslie Mostile), the petitioner’s former neighbor (Kevin Riddle), a detention center employee (Mike Ennis) who had inspected the petitioner’s penis, the petitioner’s former employer (Jim Brock) from his residential construction job, and a former client (Elizabeth Waddell) of the petitioner (app. 202-51, 402-61).

A. 707

C. PCR

On January 6, 2010, the petitioner filed a *pro se* application for post conviction relief ("PCR") (2010-CP-42-0080), alleging the following grounds for relief:

1. Ineffective assistance of trial counsel, in that:

- a. "Failure to preserve direct appeal issue,"
- b. "Trial counsel failed to investigate [documentary] evidence and witnesses,"
- c. "Trial counsel fail to make an additional object[ion] to the sufficiency of the curative charge or move for a mistrial;" and

2. Ineffective assistance of appellate counsel.

(App. 557-62). The State filed its return on May 12, 2010 (app. 563-67).

On April 4, 2011, the Honorable J. Derham Cole held an evidentiary hearing. The petitioner was present at the hearing, and he was represented by J. Falkner Wilkes. Assistant Attorney General Suzanne H. White represented the State. The petitioner testified on his own behalf at the hearing. He also presented testimony from trial counsel Crane (app. 568-623).

Judge Cole denied relief and dismissed the application *with prejudice* in an order of dismissal filed on January 10, 2012 (doc. 20-21). The order of dismissal addressed the petitioner's claims that (1) trial counsel was ineffective in failing to investigate additional evidence and witnesses for trial; (2) trial counsel was ineffective for failing to preserve an issue for appeal regarding the improper introduction of character evidence during Dr. Medlock's testimony, when counsel failed to also object to the judge's curative instructions; (3) trial counsel was ineffective for failing to effectively cross examine witnesses, particularly the victim; (4) trial counsel was ineffective for not objecting to several jurors with biases; and (5) appellate counsel was ineffective for failing to include sufficient matter in the designation of matter on appeal for the Court of Appeals to consider the issue

A. 708

presented (app. 616-22).

On January 20, 2012, the petitioner's PCR counsel filed a motion to alter or amend judgment, pursuant to Rule 59(e), SCRCP (app. 623-33). One of the issues raised in the motion was that the PCR court failed to make sufficient specific findings of fact or rulings of law on the issue of whether trial counsel was ineffective in failing to object to the testimony of Dr. Henderson as bolstering or vouching for the victim's veracity (app. 630-31). The State made a return to the motion on February 10, 2012 (app. 634-38). On July 9, 2012, Judge Cole denied the motion, finding that "[a]lthough Applicant alleges that the issues in the Motion were raised in the hearing, but not properly ruled upon by this Court, this Court finds that the issues were not presented to the Court in the application or in an amendment and no evidence from the Applicant was presented in support of these allegations" (app. 639-40).

D. PCR Appeal

In August 2012, the petitioner's PCR appellate counsel, John R. Ferguson, timely served and filed a notice of appeal. On January 23, 2013, counsel filed a petition for writ of certiorari, raising the following questions for review:

I. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S BOLSTERING OF ITS WITNESSES?

II. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL IN RESPONSE TO THE STATE'S BOLSTERING OF ITS WITNESSES?

III. WAS TRIAL COUNSEL'S PERFORMANCE TAKEN AS A WHOLE DEFICIENT AND PREJUDICIAL TO APPELLANT?

IV. WAS THE POST-CONVICTION RELIEF COURT IN ERROR IN FINDING THAT THE BOLSTERING ISSUE WAS NOT RAISED?

V. WAS PCR COUNSEL INEFFECTIVE FOR NOT SUFFICIENTLY RAISING THE BOLSTERING ISSUE?

(Doc. 20-23). The State filed a return to the petition on April 21, 2013 (doc. 20-24), and the

A. 709

petitioner filed a reply on April 26, 2013 (doc. 20-25). On September 30, 2014, the Court of Appeals of South Carolina filed an order granting certiorari (doc. 20-26).

On January 21, 2015, the petitioner's counsel filed a brief of petitioner, presenting the following issues on certiorari;

I. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE STATE'S BOLSTERING OF ITS WITNESSES?

II. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL IN RESPONSE TO THE STATE'S BOLSTERING OF ITS WITNESSES?

III. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE QUALIFICATION OF A FORENSIC INTERVIEWER AS AN EXPERT?

IV. WAS TRIAL COUNSEL'S PERFORMANCE TAKEN AS A WHOLE DEFICIENT AND PREJUDICIAL TO APPELLANT?

V. WAS THE POST-CONVICTION RELIEF COURT IN ERROR IN FINDING THAT THE BOLSTERING ISSUE WAS NOT RAISED?

VI. WAS PCR COUNSEL INEFFECTIVE FOR NOT SUFFICIENTLY RAISING THE BOLSTERING ISSUE?

(App. 641-52). The State filed a brief of respondent on April 24, 2015 (app. 653-72), and the petitioner filed a reply on May 1, 2015 (app. 673-79).

On December 30, 2015, the Court of Appeals filed a published opinion reversing the PCR court and granting relief (app. 680-88). *See Mangal v. State*, 781 S.E.2d 732 (S.C. Ct. App. 2015) ("*Mangal I*"), *rev'd*, 805 S.E.2d 568 (2017). With regard to the claim that trial counsel was ineffective for failing to object to improper bolstering testimony, the Court of Appeals found that, as it related to Dr. Henderson's testimony, the PCR judge "erred in finding the bolstering issue was not raised because PCR counsel questioned trial counsel on the subject, and PCR counsel raised the issue again in his Rule 59(e), SCRCP, motion." *Id.* at 735. However, the court found that any bolstering issues "related to other witnesses" were "unpreserved." *Id.* at 735-36. The Court of Appeals further found that Dr.

A. 710

Henderson's testimony improperly bolstered the victim's credibility such that trial counsel's failure to object constituted deficient performance, and the petitioner was prejudiced by counsel's error as "the case lacked physical evidence and hinged on credibility." *Id.* at 737 (citations omitted).

The State filed a petition for rehearing on January 11, 2016 (app. 689-705). On January 20, 2016, the petitioner filed a response to the State's petition (app. 706-09). The Court of Appeals denied rehearing on February 22, 2016 (app. 710).

On April 11, 2016, the State filed a petition for writ of certiorari, raising the following issue:

Did the court of appeals err in reversing the PCR judge's finding that counsel was not ineffective for failing to object or move for a mistrial in response to bolstering testimony given by Dr. Henderson where the PCR judge never made such a ruling and where the court of appeals considered testimony that was not raised at the evidentiary hearing or in the motion to alter or amend?

(Doc. 20-27). On May 4, 2016, the Solicitor's Association of South Carolina submitted a brief of *amicus curiae* (doc. 20-28). On June 16, 2016, the Supreme Court of South Carolina filed an order granting certiorari to review the Court of Appeals' decision. The order provided that "[t]he parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR" (doc. 20-29). John R. Ferguson and C. Rauch Wise represented the petitioner, as the respondent, in the Supreme Court of South Carolina.

On July 18, 2016, the State filed a brief of petitioner, presenting the following issues for review:

I. Whether the Court of Appeals err[ed] in reversing the PCR judge's finding that counsel was not ineffective for failing to object or move for a mistrial in response to alleged bolstering testimony where the PCR judge never made such a finding and where the court considered testimony that was not raised at the PCR hearing or in Respondent's motion to alter or amend.

A. Whether the Court of Appeals erred in finding that the bolstering issue was preserved with respect to any of Dr. Henderson's testimony.

A. 711

B. Whether, even if this Court finds the bolstering issue was preserved, it was only preserved to the extent it was raised to the PCR judge, and in making its finding that counsel was ineffective, the Court of Appeals was not entitled to consider any other portion of Dr. Henderson's testimony.

C. Whether the Court of Appeals erred in finding counsel was ineffective for not objecting to alleged bolstering where Dr. Henderson's direct examination testimony did not constitute bolstering, counsel had a valid trial strategy in eliciting her testimony on cross-examination in an attempt to further discredit Victim, and there is no reasonable probability that the outcome would have been different had counsel objected.

(Doc. 20-30).

The South Carolina Network of Children's Advocacy Centers and the University of South Carolina Children's Law Center were permitted to participate as *amicus curiae* and filed a brief in support of the petitioner state of South Carolina, which the Supreme Court of South Carolina received on July 18, 2016 (doc. 20-31). The petitioner filed a brief of respondent on September 28, 2016 (doc. 20-32), and the State filed a reply on October 11, 2016 (doc. 20-33).

Following briefing and oral arguments by the parties and the *amicus curiae*, the Supreme Court reversed the Court of Appeal's judgment and reinstated the PCR judge's order denying PCR. *See Mangal v. State*, 805 S.E.2d 568, 576 (2017) ("*Mangal II*").⁴ The Supreme Court found that the PCR court acted within its discretion in refusing to address the improper bolstering regarding Dr. Henderson and further found that this was "not an appropriate case to excuse Mangal from his procedural default." *Id.* at 571-75. The remittitur was issued on October 20, 2017, and was filed on October 23, 2017 (doc. 20-38).

⁴ The court filed its initial opinion on July 19, 2017, but that opinion was withdrawn, substituted, and refiled on October 4, 2017. *Mangal II*, 805 S.E.2d at 568.

A. 712

II. FEDERAL PROCEEDINGS**A. Petition**

On January 8, 2018 (doc. 1-4),⁵ the petitioner, proceeding *pro se*, filed a Section 2254 petition in this court, alleging as follows

Ground One: Petitioner was denied a fair trial when the trial court and State Appellate Court failed to grant a mistrial motion after the State cross-examined a defense witness regarding Petitioner's prior DUI conviction as character evidence.

Ground Two: (A) Petitioner was denied the effective assistance of counsel when counsel failed to object to the State's improper bolstering of [its] own witness. (B) Petitioner was denied the effective assistance of counsel when counsel failed to move for a mistrial when the State improperly bolstered [its] own witnesses testimony. (C) Petitioner was denied his constitutionally guaranteed right to the effective assistance of counsel when counsel's performance taken as a whole was deficient performance that unduly prejudiced Petitioner. (D) The State [courts] erred in finding that the bolstering issue was not raised. (E) Any procedural default by PCR Counsel for failing to sufficiently raise the State's improper bolstering issue is excused by *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012).

Supporting Facts: The alleged victim was Petitioner's teenage daughter, . . . with whom Petitioner had a strained relationship with due to his [strict] parenting. [Victim] testified that Petitioner had begun committing lewd acts on her when she was ten years old and had allegedly raped her multiple times. [Victim] testified that Petitioner had taken her virginity, however, later examination by a physician established that her hymen was intact. . . .

Wiley Garrett, (hereafter "Garrett") a forensic interviewer for the Children's Advocacy Center, testified without objection from counsel that when Garrett interviewed [Victim] he found her account to be a "clear consistent, and compelling disclosure of sexual abuse." Garrett testified that [Victim] told him the sexual

⁵ See *Houston v. Lack*, 487 U.S. 266, 270 (1988) (a state prisoner's *pro se* petition for habeas corpus relief is deemed "filed" at moment of delivery to prison authorities for forwarding to district court).

A. 713

abuse became once a week when she turned 15. Garrett's report stated that [Victim] [told him] that Petitioner had sex with her three to four times a week after she was ten years old.

Dr. Nancy Henderson (hereafter "Henderson") testified for the State. Henderson testified that [Victim] retained her hymen, although there was a thin spot which could not definitely say resulted from sexual intercourse. Nevertheless Henderson classified it that way based on what [Victim] told her. Without objection Henderson testified that the information she received from [Victim] was invaluable, and she made a plain determination and considered that "[Victim] was telling the truth."

(A) & (B).

A and B will be addressed together here. The first bolstering witness was Wiley Garrett, a forensic interviewer who was "wrongfully qualified as an expert" without an objection from counsel. Garrett testified that "her ([Victim]'s) disclosure to him was [a] clear, consistent and compelling disclosure of sexual abuse."

The State in this matter had a serious problem because [Victim] . . . if believed was to have been raped multiple times yet had an "intact hymen and was a virgin." . . . To get past this fact, the State put Dr. Nancy Henderson on the stand who testified to an abnormality of the hymen, but stated "I cannot say for certain it was caused by the incident." Henderson said that the ambiguity was resolved in favor of rape "based on the history [Victim] had shared, and she denied any other kind of trauma to that area." Even though Henderson testified stating: "I can't say that the actual result I saw was caused by the penis." Henderson concluded that she "based it (her conclusion) on the information received by [Victim]."

The next instance of improper bolstering was a question advanced by the Prosecution to [Victim]'s mother about whether or not she ([Victim]'s mother) believed her. Trial counsel sat mute and [Victim]'s mother answered in the affirmative. In response to the question of why she believed [Victim] she answered: "[Victim] had [no] reason to lie about something like that." Again counsel sat mute. (emphasis added and supplied).

For reasons clearly unknown trial counsel assisted the Prosecution's case by calling [Victim]'s mother as a witness allegedly for the defense[,] [n]oting she had divorced Petitioner

A. 714

and was obviously [disgruntled] and unfavorable to Petitioner as a witness. Counsel unsuccessfully tried to get [Victim]'s mother to say that she did not believe [Victim]'s accusations, but the result was devastating in front of the jury when [Victim]'s mother said: "I do believe my daughter." This was extremely damaging coming after the Prosecution had gotten a witness to say she believed [Victim], to which the answer was not a surprise. Clearly counsel's performance was deficient and clearly seen as counsel took part in the improper bolstering.

This improper bolstering was unduly prejudicial because the credibility of [Victim] was a major issue in the case. [Victim] candidly admitted that she considered her father to be [very strict], as Petitioner would not let her date or go out at night. Not too long before the accusations, Petitioner found a boy in [Victim]'s bedroom. After Petitioner's incarceration, [Victim] was in and out of the home at night and was keeping late hours with boys.

Petitioner would submit there is no doubt [Victim] wanted Petitioner out of the way, and as soon as she accomplished that, [Victim] started smoking and drinking and using drugs. [Victim] admitted she "kinda went wild" after Petitioner's arrest and developed a drinking problem. [Victim] admitted that she had been disciplined in school for giving "oral sex to a fellow student." Even the State's witness Garrett testified [Victim] was "parent defiant."

Trial counsel had an obligation to recognize this error and lodge an objection to allow the trial court to correct the error, and further to preserve this meritorious issue for appellate review.

...

(C).

... The South Carolina Court of Appeals found that trial counsel failed to object to the sufficiency of the curative instruction or move for a mistrial. See *State v. Mangal*, S.C. Ct. App. Op. No. 2009-UP-113 (2009). Counsel's deficient performance was material and created a reasonable probability of prejudice sufficient to undermine confidence in the outcome of the trial.

(D).

The State PCR Court in [its] order denying reconsideration found that the improper bolstering issue was not raised, yet PCR Counsel did interrogate trial counsel on the issue. The essential question is not how extensive the testimony was, but whether there was [any] testimony at all on the subject. In PCR

A. 715

Counsel's motion to alter/amend PCR counsel made a more detailed argument on the issue preserving such for appellate review, so it was clearly a matter which was argued to the State PCR Court, yet that Court did not rule on the issue. Petitioner submits there is sufficient evidence in the record that the State Supreme Court should have ruled on the issue as well.

Although PCR Counsel deficiently raised the issue of bolstering as to only one witness, Petitioner in this habeas is able to argue that the other instances of bolstering proved [an] extremely damaging context where the impact of the bolstering by Dr. Henderson was maximized in that Dr. Henderson's part in the cumulative effect of the improper bolstering.

(E).

The State may argue this issue was procedurally defaulted because the PCR Court did not rule on it. However, Petitioner would submit that the record clearly reveals that the underlying claim of ineffective assistance of counsel is "a substantial" claim, as noted by the Court of Appeals and therefore can be reviewed under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012) as result of ineffective assistance of PCR Counsel.

(Doc. 1-1 at 4-12).

B. Respondent's Motion for Summary Judgment

On June 21, 2018, the respondent filed a motion for summary judgment (doc. 21) and return and memorandum (doc. 20). With regard to the bolstering claims now before the court, the respondent argued that the claims were procedurally defaulted and that the petitioner failed to show both cause for and prejudice from the default of the claims (*id.* at 42-64). By order filed June 22, 2018, pursuant to *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975), the petitioner was advised of the summary judgment procedure and the possible consequences if he failed to adequately respond to the motion (doc. 22). On August 24, 2018, after being granted two extensions of time, the petitioner filed a response in opposition to the motion for summary judgment, and the respondent filed a reply on August 29, 2018 (docs. 34, 37).

On January 23, 2019, the undersigned issued a report and recommendation that the respondent's motion for summary judgment be granted and the petition be denied

A. 716

(doc. 52). On April 8, 2019, the Honorable R. Bryan Harwell, Chief United States District Judge for the District of South Carolina, issued an order granting the respondent's motion for summary judgment with respect to Ground One and the expert qualification issue (relating to Wiley Garrett) raised in Ground Two. Judge Harwell rejected the report and recommendation as to the analysis of the petitioner's improper bolstering claims raised in Ground Two and held in abeyance ruling on these claims, which were brought pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). The court found that an evidentiary hearing was necessary on the *Strickland v. Washington*, 466 U.S.668 (1984) deficiency prong as it relates to the performance of both trial counsel and PCR counsel. Judge Harwell recommitted the matter to the undersigned with instructions to conduct an evidentiary hearing and to submit another report and recommendation regarding the improper bolstering claims and the "strategy and/or reasons regarding the same" of both trial counsel and PCR counsel. The district court further stated that the undersigned should direct the parties to brief the issue of the *Strickland* prejudice prong as it relates to both trial counsel and PCR counsel and should analyze this issue in the report and recommendation. Judge Harwell also directed the undersigned to appoint counsel for the petitioner to assist with these matters (doc. 65 at 24-27).

C. Evidentiary Hearing on *Martinez* Claims

On April 11, 2019, the undersigned appointed Derek J. Enderlin to represent the petitioner (doc. 67). Thereafter, on July 10, 2019, the undersigned set the evidentiary hearing⁶ for 10:00 a.m. on September 9, 2019, and directed the parties to brief the issue of the *Strickland* prejudice prong as it relates to both trial counsel and PCR counsel and the petitioner's bolstering claims by September 5, 2019 (doc. 78). The parties timely submitted their pretrial memoranda (docs. 80, 81). The evidentiary hearing was held on September 9, 2019 (doc. 82). The petitioner called trial counsel Crane and PCR counsel Wilkes as

⁶ The evidentiary hearing was previously scheduled for August 22, 2019, but was rescheduled based on the unavailability of trial counsel Crane on that date (see docs. 69, 73, 77).

A. 717

witnesses (see doc. 86).

Following the evidentiary hearing, the undersigned directed the petitioner to file his post-trial memorandum within 30 days of counsel's receipt of the hearing transcript and directed the respondent file his memorandum within 30 days after the filing of the petitioner's memorandum, with any reply by the petitioner filed within ten days thereafter (doc. 85). The transcript was filed on September 16, 2019 (doc. 86), and the petitioner timely filed a trial brief on October 16, 2019 (doc. 92). On November 5, 2019, the respondent moved for an extension of time, with the consent of the petitioner (doc. 93). The undersigned granted the motion through November 25, 2019 (doc. 94). The respondent timely filed a trial brief on that date (doc. 96), and the petitioner filed a reply brief on December 4, 2019 (doc. 98).

III. APPLICABLE LAW

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not

A. 718

rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Procedural Default

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner who seeks habeas corpus relief on an issue after he failed to raise that issue at the appropriate time in state court and has no further means of bringing that issue before the state courts. In such a situation, the person has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. Procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. *See Smith v. Murray*, 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings if the state has procedural rules that bar its courts from considering claims not raised in a timely fashion.

If a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed, he is barred from proceeding in state court. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. As the Supreme Court has explained:

[State procedural rules promote] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case.

Reed v. Ross, 468 U.S. 1, 10–11 (1984).

"[A] federal court ordinarily may not consider claims that a petitioner failed to

A. 719

raise at the time and in the manner required under state law unless “the prisoner demonstrates cause for the default and prejudice from the asserted error.” *Teleguz v. Pearson*, 689 F.3d 322, 327 (4th Cir. 2012) (quoting *House v. Bell*, 547 U.S. 518, 536 (2006)). To show cause, a petitioner must “show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule,” *Murray v. Carrier*, 477 U.S. 478, 488 (1986), or that “the factual or legal basis for the claim was not reasonably available to the claimant at the time of the state proceeding.” *Roach v. Angelone*, 176 F.3d 210, 222 (4th Cir. 1999). “Alternatively, Petitioner may prove that failure to consider the claims will result in a fundamental miscarriage of justice.” *McCarver v. Lee*, 221 F.3d 583, 588 (4th Cir. 2000) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). A fundamental miscarriage of justice equates to the conviction of someone who is actually innocent. However, “actual innocence” requires “factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998).

In *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), the United States Supreme Court carved out a “narrow exception” that modified the “unqualified statement in *Coleman* [501 U.S. at 754-55] that an attorney’s ignorance or inadvertence in a post conviction proceeding does not qualify as cause to excuse a procedural default.” In *Martinez*, the Court

read *Coleman* as containing an exception, allowing a federal habeas court to find “cause,” thereby excusing a defendant’s procedural default, where (1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law requires that an “ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding.”

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (quoting *Martinez*, 566 U.S. at 14-18).

The Fourth Circuit has expounded on the requirement of a “substantial” claim:

Regarding the requirement that there be a “substantial” claim, the Supreme Court held that a prisoner must “demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a

A. 720

substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” *Martinez*, 132 S. Ct. at 1318. Relatedly, to show ineffective assistance, the petitioner must make a “substantial” showing with respect to both counsel’s competency (first-prong *Strickland*) and prejudice (second-prong *Strickland*).

As to the specific elements of the ineffective assistance claim, a petitioner must make a substantial showing of incompetency, i.e., that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Further, the petitioner must make a substantial showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable, i.e., that there was a substantial, not just conceivable, likelihood of a different result.

Teleguz v. Zook, 806 F.3d 803, 815 (4th Cir. 2015) (ellipsis, some internal quotation marks, and some internal citations omitted). Significantly, “because a petitioner raising a *Martinez* claim never presented the claim in state court, a federal court considers it de novo, rather than under AEDPA’s deferential standard of review.” *Gray v. Zook*, 806 F.3d 783, 789 (4th Cir. 2015).

C. *Strickland* Test

To be entitled to relief on an ineffective assistance claim, a petitioner must show that (1) trial counsel’s performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel’s error, the result of that proceeding would have been different. *Strickland v. Washington*, 466 U.S.668, 687–94 (1984). *Strickland* does not guarantee perfect representation, only a “‘reasonably competent attorney.’” *Id.* at 687 (quoting *McMann v. Richardson*, 397 U. S. 759, 770 (1970)). There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. *Id.* at 690.

D. Improper Bolstering

“[A]ny testimony by one witness as to their opinion about the credibility of another witness” is inadmissible, “incompetent evidence.” *State v. Dawkins*, 377 S.E.2d

A. 721

298, 302 (S.C. 1989); *State v. Dempsey*, 532 S.E.2d 306, 309–10 (S.C. Ct. App. 2000) (recognizing *Dawkins* stands for the principle that a witness cannot “improperly vouch[] for the victim’s credibility”). “[A]fter *State v. Dawkins* was decided in 1989, the law was clear that **no witness** may give an opinion as to whether the victim is telling the truth.” *Thompson v. State*, 814 S.E.2d 487, 491 (S.C. 2018) (emphasis added) (quoting *Briggs v. State*, 806 S.E.2d 713, 718 (S.C. 2017)). “[T]he central point of the prohibition against improper bolstering [is that] a witness may not give an opinion for the purpose of conveying to the jury—directly or indirectly—that she believes the victim.” *Briggs*, 806 S.E.2d at 717; see *Thompson*, 814 S.E.2d at 491 (“[I]t [i]s improper for a witness to vouch for the credibility of another witness.”). “[N]o witness may give an opinion as to whether the victim is telling the truth,” and “[w]hen the testimony directly conveys the witness’s opinion that the victim is telling the truth, it is obviously improper bolstering.” *Briggs*, 806 S.E.2d at 718.

IV. ANALYSIS OF MARTINEZ CLAIMS

The petitioner’s ineffective assistance claims at issue here concern three trial witnesses: (1) forensic interviewer Wiley Garrett, (2) pediatrician Dr. Nancy Henderson, and (3) the victim’s mother. The petitioner alleges trial counsel was ineffective by failing to object to and by eliciting certain testimony from these three witnesses that had the effect of improperly bolstering the victim’s credibility. It is undisputed that the claims are procedurally defaulted. The petitioner faults PCR counsel for failing to properly raise these claims in the state proceedings, and thus he seeks to bring the claims in this court pursuant to *Martinez*.⁷ Again, to overcome the procedural default and for this court to review his

⁷ The opinions of the Supreme Court of South Carolina and the Court of Appeals of South Carolina make clear that the petitioner’s claims are defaulted under South Carolina procedural rules governing issue preservation and presentation of issues to a PCR court. Specifically, the Supreme Court of South Carolina found the petitioner’s claim regarding Dr. Henderson was not properly presented to the PCR court, and the Court of Appeals of South Carolina (which was reversed on the Dr. Henderson issue) found the petitioner’s claims regarding Garrett and the victim’s mother were not preserved for appellate review; in reaching these results, both courts relied on established state law principles governing issue preservation and presentation of issues to the PCR court. See *Mangal II*, 805 S.E.2d

A. 722

claims of ineffective assistance of trial counsel under *Martinez*, the petitioner must show that (1) the underlying ineffective assistance of trial counsel claims are substantial (i.e., have “some merit”) and (2) PCR counsel was ineffective for failing to raise the claims in the state PCR proceedings. *Buck v. Davis*, 137 S. Ct. 759, 771 (2017). Accordingly, the court will first consider whether the underlying ineffective assistance of trial counsel claims have merit and will then consider whether PCR counsel was ineffective for failing to raise the claims in the state PCR proceedings.

A. Trial Counsel

1. *Strickland* Deficiency Prong

As noted above, Judge Harwell reserved ruling on the *Strickland* deficiency prong as it relates to trial counsel, “pending an evidentiary hearing on the issue of strategy” (doc. 65 at 15, 18, 20). Further, the undersigned was directed to submit another report and recommendation regarding “the improper bolstering claims . . . and trial counsel’s strategy and/or reasons regarding same” (*id.* at 26). “A fair assessment of attorney performance requires that 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 proper measure of attorney performance [is] reasonableness under prevailing professional norms.” *Id.* at 688.

a. Wiley Garrett

The petitioner alleges that his trial counsel was ineffective for failing to object when the State bolstered the victim’s testimony though Garrett (doc. 1-1 at 7-8). As noted above, Garrett conducted two forensic interviews of the victim, and he was qualified as an expert “in the area of forensic interviewing to give opinion testimony in that area” (app. 119-22). The portion of Garrett’s testimony on direct examination that the petitioner claims is

at 576 (“This is not an appropriate case in which to excuse Mangal from his procedural default.”); *Mangal I*, 781 S.E.2d at 735–36 (“[W]e find any bolstering issues related to other witnesses are unpreserved because they were not raised in Petitioner’s PCR application, the PCR hearing, or in the Rule 59(e) motion.”).

A. 723

improper bolstering is as follows:

Q: What conclusion did you make regarding your forensic interview of victim?

A: Oh, oh. My, **my conclusion was that her disclosure was [a] clear, consistent, and compelling disclosure of sexual abuse.**

Q: Do you have an opinion then within a reasonable degree of psychological certainty, based upon your education, training, and experience, and based further upon your forensic interview of victim, whether your findings are consistent with a child who's been sexually abused?

A: Yes, I, **I do have a conclusion and yes, victim words, disclosures, descriptions, emotions, reactions are all consistent with a child who has been sexually abused.**

(App. 130; doc. 20-10 at 4, supp. app.) (emphasis added).

In the order issued on April 8, 2019, Judge Harwell stated as follows with regard to trial counsel's failure to object to Garrett's above-quoted testimony:

As mentioned above, Petitioner's trial occurred in 2007. After 1989, South Carolina law was "clear" that no witness may opine that a victim is telling the truth. *Thompson*, 814 S.E.2d at 491 (citing *Dawkins*); *Briggs*, 806 S.E.2d at 718 (same). More specifically, regarding forensic interviewers, "[a]fter *Dawkins* in 1989, . . . 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*, 806 S.E.2d at 718; see *State v. White*, 578 S.E.2d 728, 733 (S.C. Ct. App. **2003**) (considering an improper bolstering challenge and recognizing *Dawkins* "and its progeny" establish "the proper boundaries of expert testimony regarding . . . sexual abuse"), *aff'd as modified*, 605 S.E.2d 540 (S.C. 2004); *State v. Dempsey*, 532 S.E.2d 306, 309 (S.C. Ct. App. **2000**) ("[N]o psychotherapist may render an opinion on whether a witness is credible in any trial in this state. The assessment of credibility is for the trier of fact and not for psychotherapists."); *State v. Morgan*, 485 S.E.2d 112, 119 (S.C. Ct. App. 1997) ("Prejudice can result from an expert's testimony about the victim's credibility, by giving factfinders little more than a false sense of security based on the incorrect assumption that a reasonably accurate scientific explanation for behavior has been provided." (internal quotation marks omitted)), *overruled on other grounds*

A. 724

by *State v. White*, 676 S.E.2d 684 (S.C. 2009). “That such evidence is improper, in both state and federal trials, can hardly be disputed,” *Snowden v. Singletary*, 135 F.3d 732, 738 (11th Cir. 1998), and the reason is simple—“[d]etermining the weight and credibility of witness testimony . . . belongs to the jury.” *United States v. Scheffer*, 523 U.S. 303, 313 (1998).

(Doc. 65 at 12-14) (emphasis in original).

Judge Harwell found as follows, “[A]s Respondent concedes, Garrett’s above-quoted testimony constituted improper bolstering. Thus, the question is whether trial counsel made an ‘informed strategic choice,’ . . . , not to object to Garrett’s inadmissible testimony” (doc. 65 at 14) (quoting *Strickland*, 466 U.S. at 691). Judge Harwell further noted, “If trial counsel *chose* not to object pursuant to a ‘sound trial strategy,’ . . . the Court could potentially conclude his performance was objectively reasonable despite the inadmissibility of this testimony” (*id.*) (quoting *Strickland*, 466 U.S. at 689). While trial counsel did not object to Garrett’s improper bolstering testimony, he asked Garrett during cross examination if he had dealt with 16 year old girls who made similar allegations that “turned out to be untrue,” and Garrett replied, “Oh, yes, I have” (doc. 65 at 14) (citing app. 143). The district court noted that it was “unclear whether trial counsel’s apparent strategy of demonstrating fabrication—by showing inconsistencies in the victim’s reports of sexual abuse—would have been advanced by allowing Garrett to effectively testify he believed the victim’s ‘clear, consistent, and compelling disclosure of sexual abuse’ while bootstrapping that conclusion to his expert opinion” (*id.*).

Trial counsel was not asked about Garrett’s testimony in the state PCR hearing. In the federal evidentiary hearing before the undersigned, trial counsel testified he had been practicing criminal law for 30 years when he tried the petitioner’s case (doc. 86 at 9). He did not recall trying any CSC with a minor trial before the petitioner’s (*id.* at 23). He testified the whole case came down to credibility (*id.* at 11). He noted the victim’s story was “scatterbrained and changed several times” and that several people in the courtroom told him the jury would not convict the petitioner (*id.* at 12). Trial counsel acknowledged that he was not sure he knew what improper bolstering was at the time of trial (*id.* at 13, 19).

A. 725

In regards to Garrett's testimony — including his statement that part of his job was to determine whether there was fabrication and his conclusion that the victim's words, disclosures, descriptions, emotions, reactions, were all consistent with a child who has been sexually abused and were a compelling disclosure of sexual abuse — trial counsel did not consider objecting to the improper bolstering (*id.* at 14-15). He testified that if he could have prohibited Garrett from testifying he would have done so (*id.* at 16). He testified there was nothing helpful in allowing Garrett to testify that he believed the victim or that the victim was truthful, and there was definitely no strategic reason to allow Garrett to testify that way (*id.*).

As noted by the district court, it was unclear from the trial counsel's limited testimony regarding Dr. Henderson at the PCR hearing whether he understood the concept of improper bolstering and the permissible scope of an expert's testimony (app. 584, 595-96). Based upon trial counsel's testimony at the federal evidentiary hearing, it is now clear that trial counsel did not make an informed strategic choice not to object to Garrett's inadmissible bolstering testimony (doc. 86 at 14-15). Further, trial counsel testified that his strategy of demonstrating fabrication by the victim was not advanced by allowing Garrett to testify that he believed the victim or that she was truthful (*id.* at 16). As noted, leading up to the bolstering testimony at issue, Garrett had confirmed that one of the purposes of forensic interviewing was "to determine whether there's fabrication" (app. 123-24).

As Judge Harwell stated in ordering an evidentiary hearing, "As the record currently stands, the Court is unable to conclude that trial counsel consciously decided not to object Garrett's improper bolstering testimony pursuant to a valid trial strategy" (doc. 65 at 15) (citing *Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir. 1992) (explaining "courts should not conjure up tactical decisions an attorney could have made"). Trial counsel's testimony at the evidentiary hearing has now made clear that his failure to object to Garrett's improper bolstering testimony was not part of a valid trial strategy. See *Briggs*, 806 S.E.2d at 720 ("If [trial counsel] did not consider objecting, he could not have decided not to object as a matter of strategy."). Based upon the foregoing, the undersigned finds that

A. 726

the petitioner has met his burden of showing that trial counsel's representation in this regard was objectively unreasonable under prevailing professional norms.

b. Dr. Nancy Henderson

The petitioner contends that Dr. Henderson's testimony – elicited by the State on direct examination and by trial counsel on cross examination – improperly bolstered the victim's credibility (doc. 1-1 at 8-11; doc. 34 at 16-23; doc. 59 at 6-8). As noted above, the trial judge qualified Dr. Henderson as an expert "in the examination, diagnosis, and treatment of child sexual abuse" (app. 147-53).

The portion of Dr. Henderson's testimony on direct examination that the petitioner claims is improper bolstering is as follows:

Q: Doctor Henderson, do you have an opinion, within a reasonable degree of medical certainty based upon your education, training, and experience and based upon your findings on examination of Victim, whether those findings are consistent with penetrating injury?

A: Based on the history that she shared with me and based on my examination I felt that it was consistent with a, that she had been abused.

Q: All right. Also opinion as to whether she was sexually abused, that opinion is?

A: That she had been, yes, sir.

(App. 159) (emphasis added).

On cross examination, Dr. Henderson testified that her report did not indicate "consistent" with sexual abuse, but instead indicated "suspicious" of sexual abuse, because the report was based on the physical examination, but her testimony was based on the history the victim provided as well (app. 161-63). Dr. Henderson elaborated that "**based on the history that Victim shared, and she denies any other kind of trauma to that area . . . my conclusion is . . . as I stated**" (app. 163) (emphasis added). When asked whether she based her testimony on possible untrue information from the victim, Dr. Henderson replied, "**I based it on the information received by my patient, which is**

A. 727

invaluable information any doctor receives when they are examining a patient” (app. 164) (emphasis added). When asked whether she assumed that what the victim told her was true, Dr. Henderson responded, **“Based on the way she shared it and all the information that she shared, yes”** (app. 164) (emphasis added).

In *Mangal II*, the Supreme Court of South Carolina found this claim procedurally defaulted without resolving the issue on the merits. 805 S.E.2d at 576 (“We need not decide whether this was a valid trial strategy. We simply find this evidence does not support the extraordinary action of excusing Mangal’s procedural default.” (internal footnote omitted)). Given the procedural default finding, the court’s review of this *Martinez* claim remains *de novo*. See *Gray*, 806 F.3d at 789.

The respondent argues that Dr. Henderson’s direct examination did not constitute improper bolstering because the testimony pertained solely to her medical opinion concerning her examination of the victim, which necessarily included the victim’s relation of medical history and whether her findings were consistent with abuse, and she was entitled to give this opinion as a matter of state evidentiary law (doc. 96 at 48-49) (citing Rule 704, SCRE (providing that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact”) and Rule 803(4), SCRE (providing that “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history . . . “ are not excluded by the hearsay rule)). The respondent argues that Dr. Henderson “did not testify on direct that she personally felt the victim was telling the truth. Rather, her testimony was that what her examination revealed was consistent with the victim’s claim of sexual abuse” (*id.* at 53). The respondent further argues that trial counsel’s cross examination of Dr. Henderson did not bolster the victim’s testimony because the purpose was to impeach Dr. Henderson’s testimony on direct and simultaneously undermine the victim’s credibility (*id.* at 54-55).

It would have been proper for Dr. Henderson to opine that, based on her examination, the victim’s injuries were consistent with sexual abuse. However, Dr. Henderson testified that her opinion was based on the examination *and* “the history that [the

A. 728

victim] shared with [her]” (app. 159). Immediately after stating that her opinion was based, at least in part, on what the victim told her, Dr. Henderson stated, “I felt that it was consistent with a, that she had been abused” (*id.*). On cross examination, Dr. Henderson again stated that her opinion was based on her examination of the victim and the history the victim provided (app. 161-63). When trial counsel asked whether she assumed that what the victim told her was true, Dr. Henderson responded, “Based on the way she shared it and all the information that she shared, yes” (app. 164). The undersigned agrees with the Court of Appeals that “[t]here is no other way to interpret these comments other than to mean that Dr. Henderson believed [the victim] was truthful.” See *Mangal I*, 781 S.E.2d at 736-37 (citing *State v. Chavis*, 771 S.E.2d 336, 340 (S.C. 2015) (finding a child abuse assessment expert's recommendation that the defendant should not be around the victim for any reason was improper because it could only be interpreted as the expert's believing the victim's sexual abuse claims); *State v. Jennings*, 716 S.E.2d 91, 94 (S.C. 2011) (finding an expert's reports were erroneously admitted when there was “no other way to interpret the language used in the reports other than to mean the forensic interviewer believed the children were being truthful”); *Dempsey*, 532 S.E.2d at 308–10 (finding a child sex abuse expert's testimony improperly vouched for a victim's credibility when the expert concluded victim was reliable and the expert testified that a very high rate of children who made sex abuse allegations were truthful); *Dawkins*, 377 S.E.2d at 302 (holding a psychologist's testimony indicating he believed a victim's allegations were genuine was improper)).

Dr. Henderson’s testimony on direct examination that her conclusion that the victim had been sexually abused was based, at least in part, on what the victim told her and her testimony on cross examination that she assumed what the victim told her was true based on the information the victim shared and the way the victim shared it was improper bolstering testimony. Thus, the question is whether trial counsel made an “informed strategic choice” not to object to the testimony. See *Strickland*, 466 U.S. at 691.

In the PCR hearing, trial counsel was asked about Dr. Henderson’s allegedly bolstering testimony:

A. 729

[T]rial counsel admitted that he did not object when Dr. Henderson was asked whether her findings were consistent with a penetrating injury and she responded that she believed Victim was abused. On cross-examination, trial counsel stated he expected Dr. Henderson to opine that Victim was abused because her testimony was “canned testimony.” Trial counsel explained that he had been in cases with Dr. Henderson before, and he probably should have objected when she gave an opinion on the ultimate issue. On redirect, trial counsel was asked if the comment struck “a cord as improper bolstering” during trial, and trial counsel stated it did not.

Mangal I, 781 S.E.2d at 735. (See app. 570–97).⁸

In the evidentiary hearing before the undersigned, the petitioner questioned trial counsel Crane about whether he considered raising a bolstering objection to any of the testimony from Dr. Henderson (and Garrett) at the time of the 2007 trial, and he testified as follows:

The best I can recall, to give you a one-word answer would be: No. I'm not sure that back then -- I think I said it at the PCR hearing. I'm not sure that I considered bolstering. I'm not sure that even with all my years of practice, I was aware of the various cases that have said that improper bolstering should not be allowed and ought to be objected to. So I didn't object to it.

(Doc. 86 at 13). Trial counsel further testified that Dr. Henderson’s above-quoted testimony on direct examination did not strike him as bolstering, but if he could have excluded that testimony, he would have (*id.* at 17). He testified that he would have excluded any testimony that relied on history rather than physical examination if he could have (*id.*). Trial counsel further testified, “I guess maybe I have to say that I wasn’t sure that I was aware of the prohibition against bolstering, or I would have objected” (*id.* at 18). He testified that there was no strategic reason to allow Dr. Henderson to testify that she believed the victim

⁸ In the PCR hearing, trial counsel was asked about the alleged bolstering testimony in the State’s direct examination of Dr. Henderson, but he was not asked about the alleged bolstering testimony in Dr. Henderson’s cross examination testimony (see app. 583-84, 594-95). See *Mangal II*, 805 S.E.2d at 572 (“[M]ost of the testimony the court of appeals relied on to support its conclusion Dr. Henderson’s testimony was improper bolstering was actually elicited by trial counsel on cross examination. There was no reference to any of that testimony during the PCR hearing.”).

A. 730

or to allow the expert to bolster the victim's testimony (*id.* at 19). Trial counsel also agreed he should have objected to the prosecutor reading Garrett's and Dr. Henderson's statements verbatim to the jury during the closing argument. He did not have any strategic reason not to object, and he agreed that the testimony was powerful evidence (*id.* at 19-20). When asked if he recalled whether or not he knew to object to possible bolstering, trial counsel replied, "I really don't, and I apologize to Mr. Mangal for that" (*id.* at 31).

On cross examination in the evidentiary hearing, trial counsel testified that in his cross examination of Dr. Henderson, he was able to impeach her with her own report by pointing out that her report differed from her trial testimony (doc. 86 at 28). Trial counsel was asked whether, at trial, he was "trying to suggest . . . that, 'Of course, [Dr. Henderson] says this because she is an advocate'?" (*id.* at 30). Crane testified that he "might've said that" in his closing argument (*id.* at 31). While trial counsel was able to impeach Dr. Henderson in his cross examination by pointing out that her report differed from her trial testimony (app. 161-63), upon further questioning by trial counsel, Dr. Henderson testified that she did assume that what the victim told her was true "[b]ased on the way she shared it and all the information that she shared" (app. 164). As in *Briggs*, trial counsel "compounded [Dr. Henderson's] prejudicial testimony on direct examination" by again eliciting testimony from her that she believed the victim was telling the truth. *See Briggs*, 806 S.E.2d at 721.

Based upon the foregoing, it is clear that trial counsel's failure to object to Dr. Henderson's improper bolstering testimony was not part of a valid trial strategy. *See Briggs*, 806 S.E.2d at 720 ("If [trial counsel] did not consider objecting, he could not have decided not to object as a matter of strategy."). The undersigned finds that the petitioner has met his burden of showing that trial counsel's representation in this regard was objectively unreasonable under prevailing professional norms.

c. Victim's Mother

The petitioner alleges that his trial counsel was ineffective for not objecting to the State's cross examination of the victim's mother, which he contends constituted

A. 731

improper bolstering (doc. 1-1 at 7-11). The portion of the victim's mother's testimony that the petitioner claims is improper bolstering is as follows:

Q: [D]id you question [the victim] about why she had waited so long?

A: Yes, of course. I mean that kept running through my mind why, why did she not, why did she not come to me.

Q: And did she tell you why?

A: She told me she was afraid because he promised to hurt her brothers and myself if she ever, ever told anybody.

Q: At that time did you believe what your daughter was telling you?

A: Yes, ma'am, I did, and I still do.

Q: What made you believe her?

A: Because she's my child.

Q: Yes, ma'am.

A: She had . . . no reason to lie about something like that. . . . [I]f anybody could of seen the level of how distraught she was, the look in her eyes, the begging, please help me, that's why I believed her.

(App. 314) (emphasis added).

The respondent contends in the motion for summary judgment and the post-evidentiary hearing trial brief that this testimony does not constitute improper bolstering because it did not come from a prosecution witness (doc. 20 at 63; doc. 96 at 67-69). However, Judge Harwell has previously rejected this argument, stating, "[A]s mentioned above, '**no** witness may give an opinion as to whether the victim is telling the truth'" (doc. 65 at 19) (quoting *Briggs*, 806 S.E.2d at 718) (emphasis added in J. Harwell's order).

The respondent further argues that, even if the court finds that the State's cross examination of the victim's mother bolstered the victim's credibility, it was not improper bolstering because the State had the right to question the victim's mother about

A. 732

prior consistent statements of the victim in order to refute the petitioner's implicit assertion of recent fabrication by the victim (doc. 96 at 70-73) (citing Rule 801(d)(1)(B), SCRE) (other citations omitted). The rule cited by the respondent provides that a prior statement by a witness is not hearsay if the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive" Rule 801(d)(1)(B), SCRE. However, the State's cross examination of the victim's mother was not limited to inquiring about the victim's prior consistent statements. Rather, the State specifically asked the victim's mother if she believed her daughter and the reasons why she believed her, which elicited the testimony set forth above (app. 314). See *Tome v. United States*, 513 U.S. 150, 157–58 (1995) (discussing Fed. R. Civ. P. 801(d)(1)(B) and stating that the purpose of the rule is to rebut an alleged fabrication or motive, not to "bolster[] the veracity of the story told.").⁹ As Judge Harwell stated, "This testimony unmistakably conveyed the mother's opinion that she believed her daughter was telling the truth about the alleged abuse" (doc. 65 at 19) (citing *Briggs*, 806 S.E.2d. at 719 (finding testimony that "clearly conveyed to the jury that [the witness] believed the victim" was improperly bolstering)).

Based upon the foregoing, the victim's mother's above-quoted testimony was improper bolstering, and, therefore, the question is whether trial counsel made an "informed strategic choice" not to object. See *Strickland*, 466 U.S. at 691.

Trial counsel was not asked about the victim's mother's testimony in the state PCR hearing. In the evidentiary hearing in this case, trial counsel testified he did not recognize the above-quoted testimony as improper bolstering at the time, he had no strategic reason not to object to the testimony, and he would have excluded the testimony if possible (doc. 86 at 20-21). Trial counsel confirmed that he never made a decision to allow bolstering testimony in order to get other information in front of the jury (*id.* at 37).

⁹ "Rule 801(d)(1)(B), SCRE is based upon its counterpart under the Federal Rules of Evidence." *State v. Fulton*, 509 S.E.2d 819, 824 (S.C. Ct. App. 1998).

A. 733

Based upon the foregoing, it is clear that trial counsel's failure to object to the victim's mother's improper bolstering testimony was not part of a valid trial strategy. See *Briggs*, 806 S.E.2d at 720 ("If [trial counsel] did not consider objecting, he could not have decided not to object as a matter of strategy."). The undersigned finds that the petitioner has met his burden of showing that trial counsel's representation in this regard was objectively unreasonable under prevailing professional norms.

2. *Strickland* Prejudice Prong

To satisfy *Strickland*'s prejudice prong, the petitioner must show a "reasonable probability" that the outcome of trial would have been different had the jury not heard the improper bolstering testimony. See 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the . . . jury." *Id.* at 695. "*Strickland* asks whether it is 'reasonably likely' the result would have been different," and the "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). "In jurisdictions such as South Carolina, where a jury must return a unanimous verdict to convict, the prejudice prong of *Strickland* is met where 'there is a reasonable probability that at least one juror would have struck a different balance.'" *Hope v. Cartledge*, 857 F.3d 518, 524 (4th Cir. 2017) (quoting *Wiggins v. Smith*, 539 U.S. 510, 537 (2003)).

As noted by Judge Harwell in the April 8, 2019 order, "strong arguments can be made for and against *Strickland* prejudice" in this case (doc. 65 at 20). The respondent admits that "the central issue in this case was whether the victim or the petitioner was telling the truth" (doc. 96 at 57, 61, 73-74). However, the respondent argues that the petitioner cannot show prejudice from the alleged errors because the victim's testimony was not the only evidence presented by the State to support her credibility. Specifically, the respondent notes that Dr. Henderson's expert testimony concerning her gynecological findings supported the victim's claims (doc. 96 at 57-58, 61-63). Importantly, however, Dr. Henderson's testimony was that, based on the examination alone, it was unclear whether

A. 734

the victim's narrowed but otherwise intact hymen was caused by penetration or some other trauma, but, based on the victim's history denying any other kind of trauma to that area, Dr. Henderson opined that she found the narrowing was caused by abuse (see app. 157-63). Thus, Dr. Henderson's testimony regarding her gynecological findings was based on her opinion that the victim was truthful, making her testimony particularly prejudicial. See *Mangal I*, 781 S.E.2d at 737 ("Given a lack of physical evidence, we believe Dr. Henderson's testimony was critical because she explained how Victim—who claimed full penetration occurred on multiple occasions—had a narrowed but otherwise intact hymen. As a result, Dr. Henderson's improper testimony insinuating that she found Victim credible was particularly prejudicial.").

Similarly, in *Thompson v. South Carolina*, an expert testified the victim suffered from post-traumatic stress disorder, that the victim's interview was compelling for sexual abuse, and that it was one of the most compelling interviews the expert had conducted. 814 S.E.2d 487, 490-91 (S.C. 2018).¹⁰ The Supreme Court of South Carolina found that the "testimony most certainly served to directly enhance the credibility of Victim" and noted that the prosecutor repeated the statements to the jury in closing. *Id.* at 491. Likewise, here, the State emphasized Dr. Henderson's *expert* testimony in the closing argument (app. 510-12). The court in *Thompson* concluded that "[t]he devastating prejudicial effect of [the expert's] improper bolstering testimony is . . . clear." 814 S.E.2d at 494. While the PCR court had concluded that the petitioner in *Thompson* was not prejudiced by trial counsel's deficient performance because properly admitted evidence overwhelmingly established the petitioner's guilt, *id.* at 492, the state Supreme Court

¹⁰ Judge Harwell referred the parties to cases in which they might find the *Strickland* prejudice analysis helpful (doc. 65 at 22 n.23). The *Thompson* case is one of those cases (*id.*) (citing *Gabaree v. Steele*, 792 F.3d 991, 999-1000 (8th Cir. 2015); *Thomas v. United States*, 596 F. App'x 808, 810 (11th Cir. 2015); *Engesser v. Dooley*, 457 F.3d 731, 738-39 (8th Cir. 2006); *Earls v. McCaughtry*, 379 F.3d 489, 495-96 (7th Cir. 2004); *Dorsey v. Chapman*, 262 F.3d 1181, 1186 (11th Cir. 2001); *Olesen v. Class*, 164 F.3d 1096, 1102 (8th Cir. 1999); *White v. Nooth*, 322 F. Supp. 3d 1077, 1092-93 (D. Or. 2018); *Parmelee v. Piazza*, 622 F. Supp. 2d 212, 229-30 (M.D. Pa. 2008); *Thompson*, 814 S.E.2d at 494-95; *Briggs*, 806 S.E.2d at 722-23).

A. 735

reversed, finding that “[t]he properly admitted evidence of Petitioner’s guilt was not strong enough to overcome trial counsel’s failure to object to [the expert’s] inadmissible bolstering testimony.” *Id.* at 495. The same is true here.

The respondent argues that the testimony of the victim’s brother supported the victim’s claims (doc. 96 at 57-58, 61-63). Specifically, the victim’s brother testified that the victim told him the abuse started when she was ten and continued until she was 16 years old. He further testified that, on numerous occasions, the petitioner took the victim into a locked room, and she would leave visibly upset and crying and go to the bathroom (app. 96-98). While this is incriminating testimony, as in *Thompson*, the properly admitted evidence of the petitioner’s guilt here is not strong enough to overcome trial counsel’s failure to object to the inadmissible bolstering testimony of Garrett, Dr. Henderson, and the victim’s mother.

The respondent further argues that trial counsel impeached the credibility of Garrett’s opinion through not only his cross examination of Garrett, but through his cross examination of the victim and his direct examination of her mother concerning their failure to tell Garrett relevant information (doc. 96 at 62). Further, Garrett conceded that he had cases where 16 year old girls had lied about being sexually abused, and he did not speak to the petitioner about the allegations against him (see app. 139-43). Trial counsel then used these discrepancies in arguing in his closing that “Wiley Garrett believes [the victim]. But Wiley Garrett didn’t have all the information” (see app. 480-81). The respondent further notes that trial counsel suggested in his closing argument that Dr. Medlock’s testimony further undermined the basis for Garrett’s belief in the victim’s credibility (doc. 96 at 62-63).

Importantly, however, the State emphasized Garrett’s *expert* testimony in its closing argument, repeating Garrett’s testimony and telling the jury that Garrett did not think the victim was lying (app. 510) (“And yes, I’ve had teenagers who came in lying, and no, she wasn’t in my opinion. That’s what [Garrett] said. . . .”). Similarly, in *Briggs*, trial counsel testified in PCR proceedings that the case against his client turned on the credibility of the victim. 806 S.E.2d at 722. Despite the fact that the petitioner in *Briggs* did not

A. 736

strongly deny the accusations, instead telling detectives he was “sick and needed help, and the fact that two jailhouse informants testified the petitioner admitted the offenses, the Supreme Court of South Carolina upheld the PCR court’s determination that the petitioner was prejudiced by his trial counsel’s failure to object to the forensic interviewer’s testimony that it was her “purpose” to “find[] out if something happened” or “to figure out what has occurred.” *Id.* at 719-20, 722-23. The state Supreme Court reiterated that “‘the impermissible harm’ from improper bolstering ‘is compounded’ when the witness ‘is qualified as an expert.’” *Id.* at 722 (quoting *South Carolina v. Kromah*, 737 S.E.2d 490, 499 (S.C. 2013)). Moreover, “although an expert’s testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts.” *Kromah*, 737 S.E.2d at 499;

The respondent further asserts the victim’s mother’s bolstering testimony could not have prejudiced the petitioner in light of the mother’s repeated assertions on direct examination “that she believed her daughter’s report of molestation by Petitioner” (doc. 20 at 64; *see also* doc. 96 at 73). However, Judge Harwell has previously rejected this argument (doc. 65 at 19). Specifically, Judge Harwell noted that on direct examination, the mother testified *she herself* was “telling the truth” that her daughter was violated— not that she *believed* her daughter (*id.*; *see app.* 281). In contrast, on cross examination, the victim’s mother was asked whether she believed her daughter, and she responded that she did and gave several reasons why she believed her (*app.* 314).

The respondent also argues that trial counsel presented several well-respected members of the community who testified to the petitioner’s good character and that trial counsel “mounted a virtual war on [the victim’s] credibility,” establishing a motive for the victim to fabricate the charges against the petitioner (doc. 96 at 28-29, 58-59, 63-64, 74-75). Specifically, Kevin Riddle, a senior investigator in the Spartanburg Public Defender’s Office, who had lived next door to the Mangal family, testified that he did not “believe much of what comes out of [the victim’s] mouth” and that the victim’s social life

A. 737

improved following the petitioner's arrest (app. 404, 408-10, 413-14). Contractor Jim Brock testified to the petitioner's good reputation and that the allegations were out of character for him (app. 448-49), and Elizabeth Waddell testified that the petitioner had done construction for her, and she trusted the petitioner "100 percent" (app. 456-57). As noted by the respondent, the general themes of trial counsel's closing argument were that the victim's various inconsistent statements demonstrated that she was lying; that the charges against the petitioner were brought because both she and her mother had motives for wanting the petitioner out of their lives, and those motives had nothing to do with sexual abuse of the victim; and that jurors should believe his character witnesses (app. 466-69).

The importance of the believability of the victim to the State's case against the petitioner is only reinforced by the respondent's arguments. Here, the case lacked physical evidence, and there were no witnesses to the sexual abuse testified to by the victim. In a similar case, the Court of Appeals for the Seventh Circuit found in *Earls v. McCaughtry* that the petitioner was prejudiced by his trial counsel's failure to object to a social worker's expert testimony that, in her interview with the victim, she was looking for things to determine if the victim was being truthful, and she did not see anything that would indicate the victim was not being truthful. 379 F.3d 489, 493, 495-96 (7th Cir. 2004). The court noted that "the sole issue before the jury was whether [the victim] was telling the truth" as "[t]here was no physical evidence of abuse and no witnesses who could corroborate [her] version of the events" *Id.* at 495-96. The court noted that the social worker's testimony was "pivotal." *Id.* at 496. Likewise, the testimonies of the State's expert witnesses (Garrett and Dr. Henderson) were pivotal to the case against the petitioner, and both "wandered into assessing the credibility of [the victim's] accusation - an issue that should have been left solely for the jury to determine." *Id.*

The respondent also notes that trial counsel argued in closing and the trial judge instructed jurors that it was their duty, alone, to determine the believability and credibility of the witnesses (see app. 472, 481-82, 522-23). The trial judge likewise instructed jurors that even though Garrett and Dr. Henderson had been qualified as experts,

A. 738

“[t]hat does not mean that you must accept [their] opinion[s]” (see app. 122, 152-53). While “[a] jury is presumed to follow its instructions,” *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citation omitted), “[m]erely giving general instructions as to witness credibility is not sufficient to give confidence that the outcome was not tainted by prejudice.” *United States v. Luck*, 611 F.3d 183, 190 (4th Cir. 2010). See also *State v. Makins*, App. Case No. 2016-002495, 2019 WL 4180050, at *5 (S.C. Ct. App. Sept. 4, 2019) (finding that “[a]n isolated statement, buried in the midst of the circuit court’s jury instructions and unconnected to any specific witness or statement, could not cure the prejudice” of allowing testimony of witness that implied she believed the victim was telling the truth with respect to allegations of sexual abuse) (citing *Dempsey*, 532 S.E.2d at 310 (noting trial court’s curative instructions during and immediately following child sexual abuse counselor’s bolstering testimony cured any prejudice flowing from the improper vouching)).

Given the importance of the jury’s assessment of the victim’s credibility in this case and the lack of overwhelming evidence of the petitioner’s guilt, the undersigned recommends that the district court find that the petitioner has met the prejudice prong of *Strickland* because there is a reasonable probability that at least one juror would have struck a different balance had the jury not heard the improper bolstering testimony (see doc. 65 at 20).¹¹

Based upon the foregoing, the petitioner has met his burden under *Martinez* of showing that the underlying ineffective assistance of trial counsel claims have “some merit.” Accordingly, the undersigned will now consider whether PCR counsel was ineffective

¹¹ The undersigned is mindful that the Court of Appeals for the Fourth Circuit has held that cumulative error by trial counsel cannot provide a basis for habeas relief. See *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) (rejecting petitioner’s argument “that the cumulative effect of his trial counsel’s individual actions deprived him of a fair trial”); see also *Mueller v. Angelone*, 181 F.3d 557, 586 (4th Cir. 1999) (“Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in *Fisher* ...”). Here, particularly with regard to the improper bolstering claims as to the State’s experts, the petitioner has shown a “reasonable probability” that the outcome of trial would have been different had the jury not heard the improper bolstering testimony of each of the witnesses considered individually.

A. 739

for failing to raise the claims in the state PCR proceedings. See *Buck*, 137 S. Ct. at 771.

B. PCR Counsel

1. *Strickland* Deficiency Prong

The *Strickland* deficiency prong requires the petitioner to show PCR counsel's representation was objectively unreasonable "under prevailing professional norms." *Strickland*, 466 U.S. at 688. In his order, Judge Harwell stated as follows with regard to PCR counsel's representation of the petitioner:

"After *Dawkins* in 1989, certainly after *Douglas* in 2009 and *Smith* in 2010, 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*, 806 S.E.2d at 718. All three decisions—*Dawkins*, *Douglas*, and *Smith*—were established law when the PCR hearing occurred in April 2011. App. 616. Thus, the improper bolstering claims—including that regarding Garrett, a forensic interviewer—would have been viable in the state PCR proceedings, yet were not properly raised by PCR counsel.

It is undisputed that PCR counsel failed to properly raise the claim concerning Dr. Henderson and failed altogether to raise the claims concerning Garrett and the victim's mother. See *Mangal II*, 805 S.E.2d at 576 (finding the claim concerning Dr. Henderson was procedurally defaulted); *Mangal I*, 781 S.E.2d at 735–36 (indicating the claims concerning Garrett and the victim's mother "were not raised" in the PCR court). In particular, it is unclear why PCR counsel did not raise the claim regarding Garrett—an expert witness who gave improper bolstering testimony—when he did raise the (albeit untimely) claim regarding Dr. Henderson.

(Doc. 65 at 23). Judge Harwell thus reserved ruling on the *Strickland* deficiency prong as it relates to PCR counsel, pending "[a]n evidentiary hearing as to PCR counsel's strategy and/or reasons" regarding his "failure to properly raise the improper bolstering claims in the state PCR proceedings" (doc. 65 at 23-24). Further, the undersigned was directed to submit another report and recommendation regarding "the improper bolstering claims . . . and PCR counsel's strategy and/or reasons regarding same" (*id.* at 26).

A. 740

a. Wiley Garrett

PCR counsel Wilkes testified that he has been practicing law since 1989, had handled “a lot” of PCR cases before he represented the petitioner, and has been successful in a number of those other cases (doc. 86 at 58-59). PCR counsel understood that the petitioner would have to prove both error by trial counsel and resulting prejudice in order to prevail under *Strickland*, and he believed that it was strategically advantageous to narrow the issues in PCR and avoid raising weak claims (*id.* at 59-60). In order for him to better determine what claims to raise on the petitioner’s behalf, before the PCR hearing, he spoke with the petitioner, reviewed the trial transcript, reviewed the records from the direct appeal, and talked with trial counsel Crane and discussed Crane’s trial strategy. While he did not recall their conversation because of the passage of time, PCR counsel testified that he would have relied upon the conversation in deciding upon the claims he raised (*id.* 60-61).

When PCR counsel was retained by the petitioner, the petitioner had already filed the PCR application (doc. 86 at 61). PCR counsel attempted to raise additional claims, including that Dr. Henderson’s testimony on direct examination bolstered or vouched for the victim’s credibility, by way of a document that he presented to the PCR judge and counsel for the respondent at the outset of the PCR hearing, which was held on April 4, 2011 (*id.* at 39, 42, 61-63, 65-66). He did not raise any issue of bolstering as to the testimony of Garrett or the victim’s mother (*id.* at 39). Although he attempted to recreate his reasoning process as to why he did not raise claims relating to these two witnesses through his review of the relevant portions of the transcript and Judge Harwell’s order, he clearly testified that he did not have any independent recollection of why he did not raise those allegations (*id.* at 44-47, 49-55, 68-74, 76-77). PCR counsel testified that he believed he might have had strategic reasons for failing to include improper bolstering issues regarding their testimony (doc. 86 at 49-53). He acknowledged that in prior conversations with the petitioner’s counsel he had stated that if he missed these things it was clear error (*id.* at 53).

PCR counsel testified that he believed his strategic reason for not including Garrett’s testimony as part of the improper bolstering issue was that it was not “wrong under

A. 741

the law at the time” (doc. 86 at 45). He further indicated that he believed the Supreme Court of South Carolina’s decision in *State v. Hill* “was still allowing that sort of testimony in and holding a tight line saying that, ‘Well, the witness did not actually say they believed them or specifically vouch their credibility’” (*id.* at 45-46). PCR counsel testified that he did not recall Garrett’s testimony to be that Garrett believed what the victim said, and thus he “did not see that testimony as crossing the line of *Dawkins* and any other case” (*id.* at 48). He believed Dr. Henderson’s testimony did cross the line, but not Garrett’s (*id.* at 49). He wished he had put every possible vouching instance in the record: “It would’ve been so much better. And although unforeseen, it would have been – it would have resulted in very dramatic – dramatically different results. . . . I should’ve been much more aggressive and included those. . . . I think failure to be very aggressive and add everything in was clearly fatal to my case” (*id.* at 76).

Assuming PCR counsel was referring to *South Carolina v. Hill*, 715 S.E.2d 368 (S.C. 2011) in his above-quoted testimony, it is clear that he could not have relied on this case for his decision not to raise the bolstering issue as to Garrett’s testimony, because the state PCR hearing was held on April 4, 2011 (app. 568-623), and *Hill* was decided on July 27, 2011. Nonetheless, as argued by the petitioner, the case does not support PCR counsel’s position that Garrett’s testimony was not objectionable as improper bolstering (doc. 92 at 25-26). In *Hill*, the court stated:

[T]he forensic interviewer never addressed the veracity of Victim. He testified only that he saw the types of details in Victim's interview that he would look for to determine whether a child had been coached. He gave no opinion on whether Victim was being truthful, or even that Victim had not, in fact, been coached. Accordingly, we find no reversible error in the admission of this testimony.

715 S.E.2d at 376–77 (S.C. App. 2011), *overruled on other grounds by State v. Stukes*, 787 S.E.2d 480 (S.C. 2016). Here, unlike in *Hill*, Garrett *did* address the veracity of the victim by testifying that one of the purposes of forensic interviewing is “to determine whether there’s fabrication” (app. 123-24) and that he concluded, based on his forensic interview of

A. 742

the victim, “that her disclosure was [a] clear, consistent, and compelling disclosure of sexual abuse” (app. 130). That testimony is much more similar to the testimony that the Court of Appeals of South Carolina found was improper bolstering in 2000 in *State v. Dempsey*. In that case, the court found that where a child sexual abuse counselor’s testimony included how he determined whether a child was telling the truth, his specific finding that child victim’s answers and responses did not include any abnormality that would lead him to believe that child victim was not telling the truth, his testimony that children were being truthful in 95 percent of instances in which sexual abuse was alleged, and his conclusion that child victim in that case was being reliable, constituted improper vouching for the child victim. *Dempsey*, 532 S.E.2d at 308-09 (citing *Dawkins*, 377 S.E.2d 298 (testimony of psychiatrist who treated child victim of sexual assault was improper where psychiatrist answered “yes” to solicitor’s question of whether, based on his examination and observations of the victim, he was “of the impression that [the victim’s] symptoms [were] genuine”); *State v. Morgan*, 485 S.E.2d 112, 119 (S.C. Ct. App. 1997) (“We have said before, and we will say it again, this time with emphasis-no psychotherapist may render an opinion on whether a witness is credible in any trial in this state. The assessment of credibility is for the trier of fact and not for psychotherapists.”) (quoting *State v. Milbradt*, 756 P.2d 620, 624 (Or. 1988))), *overruled on other grounds by State v. White*, 676 S.E.2d 684 (S.C. 2009)).

The respondent suggests that the Supreme Court of South Carolina’s decision in *State v. White*, 605 S.E.2d 540 (S.C. 2004) supports Wilkes’ testimony that, at the time of the petitioner’s trial, forensic interviewers were not prohibited from giving the type of testimony now at issue (doc. 96 at 60-61). Importantly, the respondent has previously conceded that Garrett’s testimony was “inadmissible under state law if a proper objection had been raised” (doc. 20 at 51; see doc. 65 at 12). Moreover, the testimony in *White* was different than the testimony at issue here. In *White*, the court rejected the appellant’s argument that a psychotherapist who treated the victim was improperly permitted to testify that “the victim’s symptoms were consistent with those of a recent trauma sufferer “

A. 743

605 S.E.2d at 544. The court concluded that the psychotherapist's testimony was "consistent with the probative purpose of admitting rape trauma evidence, i.e., to refute the defendant's contention that the sex was consensual and to prove that a sexual offense occurred." *Id.* Garrett's testimony is similar to that at issue before the Supreme Court of South Carolina in *Thompson*, in which a forensic interviewer testified that the victim's "interview was ruled compelling for physical abuse, sexual abuse, and psychological abuse" and was "among the most compelling interviews that I've conducted, not only because of the amount of detail that she was able to provide, but also the emotional intensity that she was clearly experiencing in the room, in—in having to provide her disclosure." 814 S.E.2d at 490-91. In *Thompson*, the court concluded that, well before the trial in 2008, trial counsel "was on notice that it was improper for a witness to vouch for the credibility of another witness. The [testimony of the forensic interviewer] unmistakably conveyed to the jury her belief that Victim was telling the truth about the abuse." *Id.* at 492. Likewise, here, at the time of the PCR proceedings in 2011, PCR counsel should have been on notice that testimony similar to that provided by Garrett was improper bolstering. See *id.* at 491 (citing *Kromah*, 737 S.E.2d 490; *Jennings*, 716 S.E.2d 91; *Smith v. State*, 689 S.E.2d 629 (S.C. 2010); *Dawkins*, 377 S.E.2d at 302; *Briggs*, 806 S.E.2d at 718; *Dempsey*, 532 S.E.2d at 308-09).

As the respondent notes (doc. 96 at 15), PCR counsel testified at the evidentiary hearing before the undersigned that it was in his "strategic advantage to narrow the issues for a [c]ourt," and "it can be counterproductive to raise weak issues to a [c]ourt" (doc. 65 at 60). See *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) ("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues"). Counsel was not required to raise all nonfrivolous claims in the PCR proceeding. See *Bell v. Smith*, 236 F.3d 149, 164 (4th Cir. 2000) (citations omitted). However, as Judge Harwell stated, "In particular, it is unclear why PCR counsel did not raise the claim regarding Garrett—an expert witness who gave improper bolstering

A. 744

testimony—when he did raise the (albeit untimely) claim regarding Dr. Henderson” (doc. 65 at 23). As noted, PCR counsel testified that he “did not see [Garrett’s] testimony as crossing the line of *Dawkins* and any other case”; however, he believed Dr. Henderson’s testimony did cross the line (doc. 86 at 48-49). To the extent the respondent contends that PCR counsel’s “sound strategy” was to raise the stronger bolstering argument (as to Dr. Henderson) while “winnowing out” the weaker bolstering arguments (as to Garrett and the victim’s mother), the undersigned disagrees. As discussed above, PCR counsel’s belief that Garrett’s testimony was not objectionable was in error. Notably, the respondent in the instant case has *conceded* that Garrett’s testimony was objectionable as bolstering, but has strongly argued that Dr. Henderson’s testimony was *not* objectionable. Further, as the petitioner points out, PCR counsel attempted to raise several issues in the PCR hearing, only one of which regarded the bolstering issue (as to Dr. Henderson) (doc. 92 at 31-32). However, PCR appellate counsel centered the PCR appeal on the bolstering issue with regard to all three witnesses (Garrett, Dr. Henderson, and the victim’s mother) and specifically stated:

The crux of the matter is that Petitioner’s **strongest argument** for ineffective assistance of [trial] counsel was the **pervasive bolstering** by the State of the Prosecutrix. Counsel raised that argument in so cursory a fashion that the hearing judge missed it and ruled that it had not been raised at all. Precedent says that if the judge had ruled on the issue, he would have been compelled to grant [the petitioner] a new trial. . . .

(App. 651) (emphasis added). See *United States v. Allmendinger*, 894 F.3d 121, 126 (4th Cir. 2018) (finding that “appellate counsel may render deficient performance by failing to raise ‘issues [that] are clearly stronger than those presented’”) (citations omitted).

Based upon the foregoing, it is clear that PCR counsel’s failure to raise the issue of Garrett’s improper bolstering testimony in the PCR proceedings was not part of a valid strategy. The undersigned finds that the petitioner has met his burden of showing that trial counsel’s representation in this regard was objectively unreasonable under prevailing professional norms.

A. 745

b. Dr. Nancy Henderson

As Judge Harwell stated in his order, “It is undisputed that PCR counsel failed to properly raise the claim concerning Dr. Henderson . . . ” (doc. 65 at 23). As set out above, PCR counsel testified at the evidentiary hearing that he attempted to raise additional claims, including that Dr. Henderson’s testimony on direct examination bolstered or vouched for the victim’s credibility, by way of a document that he presented to the PCR judge and counsel for the respondent at the outset of the PCR hearing (doc. 86 at 39, 42, 61-63, 65-66). The document was submitted and marked for identification as Defense Exhibit 1 at the evidentiary hearing before the undersigned (*id.* at 65).¹² PCR counsel testified, “I included Dr. Henderson’s [testimony], because I believed that it crossed the line with what I understood the case law to be.” He acknowledged that he did not raise a claim of bolstering through trial counsel’s cross examination of Dr. Henderson (*id.* at 40). PCR counsel did not file the document with the Clerk of Court and did not formally amend the application, and he acknowledged that he “should have. No question” (*id.* at 66, 75). He explained that it was his customary practice to try allegations in this manner (*id.* at 66). As set out above, the PCR judge ruled that the claim was not preserved in the order denying the petitioner’s Rule 59(e) motion, and, ultimately, the Supreme Court of South Carolina found that the claim was not preserved for appellate review because it was not timely and sufficiently presented to the PCR judge (*id.* at 56, 77-78).¹³ PCR counsel testified at the evidentiary hearing that he had no strategic reason not to properly preserve the improper bolstering issue concerning Dr. Henderson’s testimony (*id.* at 56).

Based upon the foregoing, it is clear that PCR counsel’s failure to properly

¹² The exhibit is entitled “Applicant’s Additional Evidence” and consists of a seven-page document setting out six issues and listing the evidence supporting each issue, along with copies of the supporting evidence (see def. ex. 1). The bolstering issue regarding Dr. Henderson’s direct examination testimony is listed as Issue VI (doc. 86 at 65; see def. ex. 1).

¹³ Following the evidentiary hearing in this case, the respondent agreed to stipulate that Defense Exhibit 1 is not included in the Spartanburg Clerk of Court’s PCR record (docs. 88, 89).

A. 746

raise the issue of Dr. Henderson's improper bolstering testimony was not part of a valid strategy. The undersigned finds that the petitioner has met his burden of showing that PCR counsel's representation in this regard was objectively unreasonable under prevailing professional norms.

c. Victim's Mother

In the evidentiary hearing before the undersigned, PCR counsel testified that he did not recall making a conscious decision not to raise the issue of bolstering as to the victim's mother's testimony (doc. 86 at 50). However, he believed he did not raise it because trial counsel Crane asked the questions that led to the allegedly bolstering testimony (*id.* at 51-52). He explained that he did not think defense attorneys were prohibited from asking a witness whether they believed the victim (*id.* at 52). He specifically agreed that, if the prosecutor had asked these same questions on direct (or on cross if it was not raised on direct), "there would clearly be a problem," and he would have preserved this issue (*id.* at 54-55).

It is clear from the record that the prosecutor asked the relevant questions on cross examination of the victim's mother (see app. 314). The prosecutor pointedly asked the victim's mother whether she *believed* the victim when she revealed that her father had been sexually abusing her, and the victim's mother responded that she did. In response to further questioning, she testified to her reasons for believing the victim: "She had ... no reason to lie about something like that. ... [I]f anybody could of seen the level of how distraught she was, the look in her eyes, the begging, please help me, that's why I believed her" (*id.*). The respondent argues that any bolstering in the State's cross examination of the victim's mother was appropriate (and thus PCR counsel's representation could not be objectively unreasonable in failing to raise the issue) because the victim's mother's testimony on direct examination "was to the effect that she believed her daughter's accusations" (doc. 96 at 73). The respondent also argues that improper bolstering only occurs when a party elicits evidence that bolsters the credibility of another witness called by that party (*id.* at 67). As discussed above, Judge Harwell previously rejected both of

A. 747

these arguments (doc. 65 at 19).

Based upon the foregoing, it is clear that PCR counsel's failure to raise the issue of the victim's mother's improper bolstering testimony was not part of a valid strategy. The undersigned finds that the petitioner has met his burden of showing that PCR counsel's representation in this regard was objectively unreasonable under prevailing professional norms.

2. *Strickland* Prejudice Prong

The *Strickland* prejudice prong requires the petitioner to show a reasonable probability that but for PCR counsel's deficient performance, the result of the state PCR proceedings would have been different. *Juniper v. Zook*, 117 F. Supp.3d 780, 790 (E.D. Va. 2015); *Runnigeagle v. Ryan*, 825 F.3d 970, 982 (9th Cir. 2016). As pointed out by Judge Harwell, "This analysis largely hinges on whether the underlying ineffective-assistance-of-trial-counsel claims would have been successful; in other words, the prejudice analysis for PCR counsel dovetails with the *Strickland* analysis for trial counsel" (doc. 65 at 24) (citing *Juniper*, 117 F. Supp. 3d at 790). As discussed above, the undersigned finds that the petitioner's underlying ineffective assistance of trial counsel claim is substantial. The undersigned further finds that the petitioner has shown a reasonable probability that had PCR counsel properly raised the bolstering claims the result of the PCR proceedings would have been different.¹⁴

Based upon the foregoing, the undersigned concludes that, pursuant to *Martinez*, the petitioner has shown that his claims of ineffective assistance of trial counsel are substantial and that his PCR counsel was ineffective in failing to properly raise the issues in the state habeas proceedings. Accordingly, cause and prejudice exists to excuse

¹⁴ Indeed, as discussed above, the Court of Appeals of South Carolina, which found that the issue of bolstering was raised with regard to Dr. Henderson's testimony, found that trial counsel's failure to object constituted deficient performance and that the petitioner was prejudiced by counsel's error as "the case lacked physical evidence and hinged on credibility." *Mangal I*, 781 S.E.2d at 737. In *Mangal II*, the Supreme Court of South Carolina's reversed that decision, find that the PCR court acted within its discretion in refusing to address the issue and further found that this was "not an appropriate case to excuse Mangal from his procedural default." 805 S.E.2d at 576.

A. 748

the petitioner's procedural default of the improper bolstering claims alleged in Ground Two, and the district court should thus consider the merits of the petitioner's otherwise defaulted ineffective assistance of trial counsel claims. See *Martinez*, 566 U.S. at 17.

V. MERITS REVIEW

The respondent argues that the court's consideration of evidence presented at the federal evidentiary hearing is limited to the examination of whether the petitioner can show cause for and prejudice resulting from the procedural default under *Martinez* (doc. 96 at 23-26). The respondent relies on the case of *Fielder v. Stevenson* in which the Honorable J. Michelle Childs, United States District Judge for the District of South Carolina, considered the respondent's motion to strike an affidavit that a Section 2254 petitioner submitted in response to the respondent's motion for summary judgment. C.A. No. 2:12-cv-412-JMC, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013). Judge Childs noted that Section 2254(e)(2) "sets limits on a petitioner's ability to expand the record in a federal habeas proceeding" and specifically provides:

[I]f a petitioner has failed to diligently develop his evidence in state court, he may present the evidence in a federal habeas court only if his claim relies on "(1) a new rule of constitutional law, made retroactive to cases on collateral review ... that was previously unavailable; or (2) a factual predicate that could not have been previously discovered through the exercise of due diligence."

Id. (quoting 28 U.S.C. § 2254(e)(2)). Judge Childs further noted that "courts have held that § 2254(e)(2) does not similarly constrain the court's discretion to expand the record to establish cause and prejudice to excuse a petitioner's procedural defaults." *Id.* (citations omitted). The court noted that "*Martinez* does not directly provide the authority for a petitioner to expand the record in order to further develop facts that could have been presented in the state court proceeding." *Id.* at *4 (citations omitted). Judge Childs determined that the affidavit at issue presented evidence in support of the claim that PCR was ineffective and thus caused the petitioner to default, but the affidavit also presented evidence "regarding the shooting [in the underlying case] which could have been presented

A. 749

in the state proceeding and which could also impact any analysis on the underlying ineffective assistance of counsel claim.” *Id.* The court granted the motion to strike the affidavit, concluding as follows:

Such facts [alleged in the affidavit] could serve to strengthen the underlying ineffective-assistance-of-counsel claim, thereby strengthening Petitioner's argument that he suffered prejudice as a result of PCR counsel's performance. Allowing Petitioner's unchallenged statements to be considered at this point would constitute an end run around the general rule that evidence supporting an ineffective-assistance-of-counsel claim should be presented in the state court tasked with adjudicating that issue.

Id. at *5.

The respondent urges the court to follow *Fielder* and other nonbinding authority and argues that the court may not consider the evidence presented in the evidentiary hearing in considering the merits of the underlying defaulted claims of ineffective assistance of trial counsel (doc. 96 at 23-26). Here, unlike in *Fielder*, the district court concluded that an evidentiary hearing was necessary on the *Strickland* deficiency prong as it relates to the performance of both trial and PCR counsel in the petitioner's *Martinez* claims (doc. 65 at 24) (citing *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007) (“In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court.”); *Martinez*, 566 U.S. at 14 (explaining a court may “hear” the procedurally defaulted claim “as an equitable matter”); *Gray*, 806 F.3d at 789 (explaining a federal court considers a *Martinez* claim de novo); *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016) (discussing evidentiary hearings in the context of *Martinez*); see, e.g., *Teleguz*, 806 F.3d at 806–07, 820 (hearing an appeal from a district court that had allowed testimony on a *Martinez* claim); *Stokes v. Stirling*, C.A. No. 1:16-cv-00845-RBH, 2018 WL 4678578, at *3 (D.S.C. Sept. 28, 2018) (involving an “evidentiary hearing on the *Martinez* claims”); *Belmar v. Clarke*, C.A. No. 3:16CV455, 2018 WL 1568680, at *1 (E.D. Va. Mar. 30, 2018) (explaining the court had held an evidentiary hearing on a *Martinez* claim

A. 750

because the petitioner had “sufficient preliminary showing”).

The Court of Appeals for the Ninth Circuit recently addressed this exact issue and concluded:

We hold that 28 U.S.C. § 2254(e)(2), which precludes evidentiary hearings on claims that were not developed in state court proceedings, did not prohibit the district court from considering the evidence adduced at the *Martinez* hearing to determine the merits of [the petitioner’s] underlying [ineffective assistance of counsel] claim. When a district court holds an evidentiary hearing to determine whether a petitioner’s claim is excused from procedural default under *Martinez*, it may consider that same evidence to grant habeas relief on the underlying claim.

Jones v. Shinn, No. 18-99006, 2019 WL 6442931, at *2 (9th Cir. Nov. 29, 2019). The court reasoned as follows:

As we have previously recognized and now explicitly hold, *Martinez*’s procedural-default exception applies to merits review, allowing federal habeas courts to consider evidence not previously presented to the state court. The Supreme Court explained in *Martinez* that if the prisoner’s state court attorney is ineffective, “the prisoner has been denied fair process and the opportunity to comply with the State’s procedures and obtain an adjudication on the merits of his claims.” 566 U.S. at 11, 132 S. Ct. 1309. The Court’s concern was with the prisoner’s opportunity to “vindicat[e] a substantial ineffective-assistance-of-trial-counsel claim,” a claim which “often depend[s] on evidence outside the trial record.” *Id.* at 11, 13, 132 S. Ct. 1309. The Court held that the federal habeas court may hear a claim of ineffective assistance of trial counsel where the initial state collateral proceeding “may not have been sufficient to ensure that proper consideration was given to a substantial claim.” *Id.* at 14, 132 S. Ct. 1309.

In *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc), which did not produce a majority opinion, a four-judge plurality held that *Martinez* recognized that determining “whether there has been IAC often requires factual development in a collateral proceeding.” *Id.* at 1246 (W. Fletcher, J., plurality). Determining whether counsel’s performance was deficient often requires asking the attorney to state the strategic or tactical reasons for his actions, and determining prejudice often requires discovery and an evidentiary hearing to assess the effect of the deficient performance. *Id.* at 1246–47. As the district court explained in

A. 751

denying the State's motion to stay,

[I]t is simply illogical, and extraordinarily burdensome to the courts and the litigants, in a post-*Martinez* world, for a court to allow full evidentiary development and hearing on the *Martinez* “claim,” but not allow consideration of that very same evidence as to the merits of the underlying trial-counsel IAC claim because his constitutionally ineffective PCR counsel failed to raise that claim.

Jones v. Ryan, 2018 WL 5066494, at *4.

While the Supreme Court held in *Cullen v. Pinholster* that a federal habeas court is ordinarily confined to the evidentiary record from state court, it held that the court was limited to “the record that was before the state court that adjudicated the claim on the merits.” 563 U.S. 170, 180, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (emphasis added). Because the underlying claim in a *Martinez* case has not been adjudicated on the merits in a state-court proceeding, “*Martinez* would be a dead letter if a prisoner's only opportunity to develop the factual record of his state PCR counsel's ineffectiveness had been in state PCR proceedings, where the same ineffective counsel represented him.” *Detrich v. Ryan*, 740 F.3d 1237, 1247 (9th Cir. 2013)]. We have explained that “*Martinez* may provide a means to show ‘cause’ to overcome the default and reach the merits of the new claim.” *Dickens v. Ryan*, 740 F.3d 1302, 1321 (9th Cir. 2014). The Supreme Court in *Martinez* recognized that “[c]laims of ineffective assistance at trial often require investigative work.” 566 U.S. at 11, 132 S.Ct. 1309. Courts may require expanded records to reach the merits of these claims.

Other courts have reached the same conclusion as our four-judge plurality from *Detrich*. The Eighth Circuit held that *Martinez* provided an exception to § 2254(e)(2) in *Sasser v. Hobbs*, 735 F.3d 833, 853–54 (8th Cir. 2013). The Fifth Circuit has also noted that if the district court found cause and prejudice for the procedural default of any claim, “[i]t should then revisit the merits of any such claim anew,” and its cause and prejudice findings “may directly address its merits determination of certain elements of that claim.” *Barrientes v. Johnson*, 221 F.3d 741, 771, 771 n. 21 (5th Cir. 2000). See also *Woods v. Sinclair*, 764 F.3d 1109, 1138 (9th Cir. 2014) (citing the four-judge plurality from *Detrich* and remanding to the district court to determine whether defendant's IAC claims were substantial and whether PCR counsel was ineffective for

A. 752

failing to raise them, potentially with an evidentiary hearing and an opportunity to expand the record).

We conclude that 28 U.S.C. § 2254(e)(2) does not prevent a district court from considering new evidence, developed to overcome a procedural default under *Martinez v. Ryan*, when adjudicating the underlying claim on de novo review.

Id. at *7-8 (footnote omitted). See *Belmar*, 2018 WL 1568680, at *2-11 (considering evidence developed in hearing on *Martinez* claims in ruling on the merits of underlying ineffective assistance of trial counsel claim). The undersigned recommends that the district court likewise find that the evidence developed in the hearing before the undersigned may be considered in adjudicating the underlying ineffective assistance of trial counsel claims on de novo review.

As discussed, the undersigned finds that the petitioner has met his burden under *Martinez* of showing both that his underlying ineffective assistance of trial counsel claims have merit under the standards of *Strickland* and that his PCR counsel was ineffective under the standards of *Strickland* in failing to properly raise the bolstering issues in the state habeas proceeding. As the United States District Court for the Eastern District of Virginia has observed:

Although *Martinez* separates the first and second elements, the two blend together. Specifically, the prejudice prong for habeas-level ineffectiveness requires a consideration of the merits of the underlying trial-level ineffectiveness claim, because *Strickland* prejudice requires consideration of “whether it is ‘reasonably likely’ the result would have been different” in that proceeding. *Harrington v. Richter*, 562 U.S. 86, 112, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). In reviewing a *Martinez* claim, a court asks whether the state-level habeas proceeding would have come to a different result if habeas counsel brought forward the trial-level ineffectiveness claim. “Thus, the facts that bear on the *Strickland* prejudice analysis and the *Martinez* substantiality analysis will largely be the same,” because both questions ask a court to consider the merits of that underlying claim. *Teleguz v. Davis*, No. 7:10-cv-254, 2014 WL 3548982, at *24 (W.D. Va. July 17, 2014). Somewhat circuitously, therefore, the *Martinez* exception to the procedural-default bar includes within it consideration of the merits of the procedurally defaulted

A. 753

claim.

Juniper, 117 F. Supp.3d at 790. For the reasons set forth at length above, the petitioner has shown that his trial counsel's performance fell below an objective standard of reasonableness by failing to object to and by eliciting improper bolstering testimony with regard to witnesses Garrett, Dr. Henderson, and the victim's mother. Moreover, the petitioner has shown that there is a reasonable probability that, but for his trial counsel's unprofessional errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 694. Accordingly, for the reasons discussed above, the undersigned recommends that the district court grant the petitioner relief on the improper bolstering claims raised in Ground Two.

VI. CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the undersigned recommends that the district court deny the respondent's motion for summary judgment and grant the petitioner's habeas petition as to the improper bolstering claims raised in Ground Two.

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

December 18, 2019
Greenville, South Carolina

A. 754

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
300 East Washington Street
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

The Grose Law Firm, LLC
404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groslawfirm.com
Web: GroseLawFirm.com

January 6, 2020

The Honorable J. Derham Cole
P O Box 1744
180 Magnolia Street, 2nd Floor
Spartanburg, SC 29304-1744

Re: *George Branham, II v. State of South Carolina*
Case Number 2014-CP-28-00703

Dear Judge Cole:

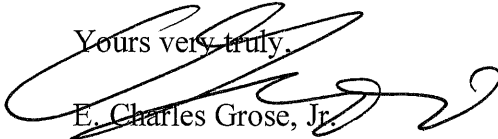
By letter dated October 28, 2019, I provided Your Honor with a copy of the order of the Honorable R. Bryan Harwell in *Farid Ahmad Mangal v. Warden, Perry Correctional Institution*, C/A No. 6:18-cv-00106-RBH, filed on April 4, 2019, which granted Mr. Mangal an evidentiary hearing on his claims of ineffective assistance of counsel. By letter dated December 23, 2019, I provided Your Honor with a copy of the Report & Recommendation of the Honorable Kevin F. McDonald, dated December 18, 2019 "recommend[ing] the district court grant [Mr. Mangal] relief on the improper bolstering claims" raised in his petition for a writ of *habeas corpus*. Enclosed please find Judge Harwell's order dated January 3, 2019 granting Mr. Mangal's petition for a writ of *habeas corpus*, vacating his conviction, and ordering his releases from custody unless the State retries him.

By email dated January 3, 2020, I understand the State plans to file a response to Mr. Branham's Rule 59(e), SCRCF motion, which was filed on February 25, 2019.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide additional information.

With kindest regards, I am

Yours very truly,


E. Charles Grose, Jr.

cc: Mr. George Branham, II
Megan H. Jameson, Esquire
Samuel Key, Esquire
Clerk of Court, Kershaw County

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Farid Ahmad Mangal,)
a/k/a Farid Ahmad Maugal,)
)
Petitioner,)
)
v.)
)
Warden,)
Perry Correctional Institution,))
)
Respondent.)
_____)

Civil Action No.: 6:18-cv-00106-RBH

ORDER

Petitioner Farid Ahmad Mangal, a state prisoner,¹ filed a petition for federal habeas relief under 28 U.S.C. § 2254 alleging, among other claims, that his trial counsel was ineffective by failing to object to and by eliciting improper bolstering testimony² at his jury trial in a South Carolina court. The Court previously ordered the Magistrate Judge to conduct an evidentiary hearing on the improper bolstering claims raised in Ground Two of Petitioner's § 2254 petition.³ *See* ECF No. 65. The matter now returns to the Court for review of the Report and Recommendation ("R & R") of United States Magistrate Judge Kevin F. McDonald, who recommends denying Respondent's motion for summary judgment and granting Petitioner habeas relief as to the improper bolstering claims raised in Ground Two of his

¹ Petitioner has been in state custody since 2004, and he was convicted in 2007.

² "Improper bolstering is 'testimony that indicates the witness believes the victim, but does not serve some other valid purpose.' Improper bolstering also occurs when a witness testifies for the purpose of informing the jury that the witness believes the victim, or when there is no other way to interpret the testimony other than to mean the witness believes the victim is telling the truth." *Chappell v. State*, __ S.E.2d __, __, 2019 WL 7341490, at *3 (S.C. Ct. App. Dec. 31, 2019) (internal citation omitted) (quoting and citing *Briggs v. State*, 806 S.E.2d 713, 717–18 (S.C. 2017)).

³ The Court granted Respondent's motion for summary judgment with respect to Ground One and the expert qualification issue raised in Ground Two and denied a certificate of appealability as to those issues. *See* ECF No. 65 at p. 26. The Court held in abeyance its ruling on the improper bolstering claims. *Id.* at pp. 26–27.

§ 2254 petition. *See* ECF No. 99.⁴

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with this Court. *See Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court is charged with making a de novo determination of those portions of the R & R to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Neither party has filed objections to the R & R, and the time for doing so has expired.⁵ In the absence of objections to the R & R, the Court is not required to give any explanation for adopting the Magistrate Judge’s recommendations. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). The Court reviews only for clear error in the absence of an objection. *See Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (stating that “in the absence of a timely filed objection, a district court need not conduct de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation’” (quoting Fed. R. Civ. P. 72 advisory committee’s note)).

After a thorough review of the record in this case, the Court finds no clear error. Accordingly, the Court **ADOPTS** the Magistrate Judge’s R & R [ECF No. 99], **DENIES** Respondent’s motion for summary judgment [ECF No. 21] as to the improper bolstering claims raised in Ground Two of

⁴ The Magistrate Judge issued the R & R in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.).

⁵ Objections were due yesterday, January 2, 2020. *See* ECF No. 99; *see also* Fed. R. Civ. P. 72(b)(2) (requiring a party to serve and file specific written objections within fourteen days after being served with the R & R); Rule 8(b) of the Rules Governing Section 2254 Cases (same). Respondent did not file any objections or any motion for an extension of time to do so.

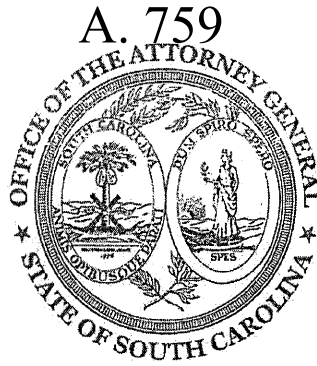
Petitioner's § 2254 petition, and **GRANTS** Petitioner's § 2254 petition as to the improper bolstering claims. Pursuant to 28 U.S.C. §§ 2243 and 2254, the Court **VACATES** Petitioner's March 16, 2007 convictions for criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the second degree (two counts), lewd act upon a child, and incest. The Court **ORDERS** that Petitioner be released from custody unless the State of South Carolina retries him within 120 days of the date of this Order.⁶

IT IS SO ORDERED.

Florence, South Carolina
January 3, 2020

s/ R. Bryan Harwell
R. Bryan Harwell
Chief United States District Judge

⁶ See *Herrera v. Collins*, 506 U.S. 390, 403 (1993) (explaining “[t]he typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner”); *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) (“[F]ederal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court.”); *Wolfe v. Clarke*, 718 F.3d 277, 291 (4th Cir. 2013) (“In the absence of extraordinary circumstances, the proper disposition is generally, as the district court recognized, the release of a successful habeas petitioner, subject to rearrest and retrial.”); *Austin v. Plumley*, 565 F. App’x 175, 191–92 (4th Cir. 2014) (“If a § 2254 petitioner is entitled to habeas relief, the court should ‘dispose of the matter as law and justice require.’ 28 U.S.C. § 2243.”).



ALAN WILSON
ATTORNEY GENERAL

February 10, 2020

The Honorable J. Derham Cole
PO Box 1744
180 Magnolia Street, 2nd Floor
Spartanburg, SC 29304-1744

Re: George Stanley Branham, Jr., #347471 v. State of South Carolina
2014-CP-28-0703

Dear Judge Cole:

Enclosed please find a copy of the Return to 59(e), SCRCP, Motion in the above-captioned case for filing in your office.

Sincerely,

Samuel L. Key
Assistant Attorney General

SK/em
Enclosure(s)

cc: E. Charles Grose, Jr.

STATE OF SOUTH CAROLINA
COUNTY OF KERSHAW

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
)
)

George Stanley Branham, Jr., # 347471,

) 2014-CP-28-0703
)
)

Applicant,

v.

) RETURN TO 59(e), SCRPC, MOTION
)
)

State of South Carolina,

Respondent.

FILED FOR RECORD
2020 FEB - 7 PM 1:38
ANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

In response to George Branham's rule 59(e), SCRPC, motion to reconsider submitted February 25, 2019, the State makes this return:

A. Separation of Powers (Argument first raised in 59(e))

Branham's complaint regarding this Court's order is without merit. Both parties provided proposed orders to the Court, as requested, and after review of the opposing orders, the Court elected to adopt the State's order denying relief. Once the Court signed the order and it was filed, the order was no longer that of an advocate, but that of the Court. *See Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) ("The preparation and finalization of a PCR order is often a collaborative effort. We recognize the prevailing party often prepares a proposed order for the PCR court. . . . 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.")

The procedure complained of is the common practice in South Carolina for PCR cases. PCR is a civil action in the Court of Common Pleas, governed by the Rules of Civil Procedure; therefore, its orders should be administered the same way as all other civil matters in the state. Therefore, the Court did not err, and Branham's motion to reconsider this issue should be denied.

B. Incomplete Standard of Review

Branham argues the order of dismissal does not recognize the requirement that strategic decisions made by trial counsel must be reasonable. However, the order of dismissal does recognize that attorney performance is measured by its reasonableness under professional norms. See Order of Dismissal p. 10 (citing *Butler v. State*, 286 S.C. 411, 334 S.E.2d 813 (1985)). For a decision to be reasonable, it must be valid. As such, the order did not overlook the appropriate standard of review.

C. Counsel's failure to object to hearsay statements made by the victim's mother (Tr. 135-36)

Branham argues the order errs as a matter of law by concluding all hearsay evidence is not prejudicial if it is testified to by a medical expert. The victim's mother's (Mother) challenged hearsay statements are from pg. 135-36 of the trial transcript.

Hearsay is a statement made by someone other than the person testifying offered for its truth. Rule 801, SCRE. Hearsay is generally inadmissible. Rule 802, SCRE.

Mother testified the victim had a history of issues with her privates. Mother testified she took the victim "to the doctor a lot" because the victim kept getting urinary tract infections (UTI), and the doctor would prescribe antibiotics for the victim. Trial Tr. 136. Mother further testified she would ask the doctor "what was going on," and the doctor would "just say [the victim's] vagina was] red and irritated and that [the doctor] didn't want to mess with it because [the doctor] didn't

want to make it worse.” Trial Tr. 36. Mother testified this was a common occurrence. Trial Tr. 136.

Branham’s counsel is correct Counsel was deficient for failing to object to Mother’s above referenced testimony because it is inadmissible hearsay. However, Mother’s testimony regarding the victim’s history of UTIs did not prejudice Branham because it is cumulative to Dr. Saunders’s admissible testimony that came later. Further, Mother’s testimony the doctors would tell her the victim’s vagina was red and irritated and the doctors did not want to make it worse did nothing to harm Branham’s defense theory.

Branham argues the Court misapplied Rule 803(4), SCRE, in finding Dr. Saunders’ testimony—that was cumulative to Mother’s testimony—admissible. The Court did not err.

Rule 803(4), SCRE, provides an exception to the rule against hearsay for statements for purposes of medical diagnosis or treatment. Specifically, statements that fall into this hearsay exception are:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment

Rule 803(4), SCRE.

Here, Dr. Saunders testified she used the victim’s medical history, along with her own observations, when diagnosing the victim. Dr. Saunders stated that in her review of the victim’s medical records, there were instances where previous doctors had thought the victim had UTIs. However, in reviewing those lab reports, Dr. Saunders discovered there was no infection present in the victim’s urine cultures. Trial Tr. 323. Dr. Saunders testified the medical history of previous vaginal bleeding, that was thought to be caused by UTIs but was not, was significant. Trial Tr.

323. Based on the victim's past medical history and her own observations, Dr. Saunders diagnosed the victim with physical characteristics consistent with past penetration. Trial Tr. 322.

Dr. Saunders's testimony that the victim's past diagnoses of UTIs were unfounded, based on the lab results, was relevant to Dr. Saunders's diagnosis of the victim as displaying characteristics of past penetration; therefore, this testimony was admissible under Rule 803(4), SCRE. Mother's testimony regarding the victim's prior UTIs was not prejudicial because it was merely cumulative to Dr. Saunders's admissible testimony regarding the victim's history of UTIs. *See State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). Because Mother's testimony regarding the victim's UTIs was cumulative to Dr. Saunders's testimony, the Court did not err and should deny Branham's motion to reconsider this issue.

As for Mother's testimony the doctor's told her the victim's vagina was red and irritated, Branham cannot show this prejudiced him because it did nothing to devalue Branham's defense strategy at trial. On re-direct, Mother testified, "[Branham] tried to always say that every time [the victim] c[a]me back from her dad's house, she had a yeast infection or urinary tract infection, and [Branham] always tried to tell [her] that he thought something was going on at her father's house." Trial Tr. 164. In closing, Counsel argued that Branham knew the victim's vagina was bothering her when she would return from her father's house, and Branham would recommend that she be taken to the hospital. Trial Tr. 437. Counsel argued that Branham would not have urged Mother to take the victim to the hospital if he was the one who was molesting the victim. Trial Tr. 437. This argument, while ultimately unsuccessful, was a reasonable argument against these allegations. Because Counsel was able to use Mother's testimony regarding the victim's prior history of

redness and irritation to his advantage, the improper hearsay testimony did not prejudice Branham. Therefore, the Court did not err, and Branham's motion to reconsider this issue should be denied.

Further, the victim's testimony was properly corroborated in several significant ways such that Mother's improper hearsay testimony did not prejudice Branham. Specifically, Mother's testimony she walked into the kitchen and saw Branham down the hall lying on top of the victim with both their pants down corroborates the victim's version of events. Trial Tr. 123-27; 171-74.

This case is not a typical child sex case that hinges on the credibility of the victim. This case is different because Mother actually witnessed Branham lying on top of the victim with their pants down around their ankles. Because the victim's testimony was properly corroborated by what Mother actually saw, no prejudice resulted from Mother's inadmissible hearsay testimony about how previous doctors had described the victim's vagina after she was seen for suspected UTIs. Therefore, the Court did not err in finding no prejudice resulted from Mother's inadmissible hearsay testimony, and Branham's motion for reconsideration of this issue should be denied.

D. Counsel's questioning regarding prior allegations of sexual misconduct against Branham (Tr. 157-58)

Branham argues Counsel's questioning of Mother regarding prior allegations of sexual misconduct against Branham was not a reasonable trial strategy. Branham argues that as a result of this line of questioning, the jurors heard misleading information that Branham had abused another child, which is improper character evidence.

Counsel's overall defense strategy was that people were coaching the victim to lie about the alleged abuse. PCR Tr. 40. Specifically, Counsel testified the strategy was "that they were lying to the - - like they had done in the past to get [Branham] out of the picture because [Mother] was going to lose her kids, and I guess they didn't want to expose her drug use." PCR Tr. 40. Counsel then asked Mother, "[H]as anybody ever made a *false* allegation against Mr. Branham in

your family? . . . A *false* allegation of sexual abuse?" Trial Tr. 157 (emphasis added). The trial court sustained the State's objection and instructed the jury to disregard the question." Trial Tr. 157-58.

Counsel's questions were based on a valid reasonable trial strategy. Counsel's questions were if anyone had ever made false sexual abuse allegations against Branham. Counsel had reason to believe the family had made prior false sexual assault allegations against Branham—Branham was first accused of touching Mother's son; however, it was later determined that the son's paternal uncle, and not Branham, was that perpetrator. This line of question is reasonable because Counsel's strategy was to show the victim was lying and had been coached. It was important for Counsel to ask this question because it shows the victim's family has made false accusations against Branham before, and it was essential to attack the family's credibility. Because this line of questioning was based upon a valid reasonable trial strategy, Counsel was not deficient.

Further, the trial court instructed the jury to disregard the questions. The trial court's instruction to disregard the questions cured Counsel's alleged deficiency for asking these questions. *See State v. George*, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) ("If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured."). Because the jury was instructed to disregard the questions—if anyone in Mother's family had ever made false sexual abuse allegations against Branham—no prejudice resulted for the questions.

Because Counsel had a valid strategic reason for pursuing this line of questioning—to try and show the victim's family coached the victim into making these allegations because the family had made false allegations against Branham before, and because the trial court instructed the jury

to disregard the questions, Counsel was not ineffective. Therefore, the Court did not err, and Branham's motion to reconsider this issue should be denied.

E. Counsel's failure to object to the qualification of Debbie Elliott as an expert in child abuse assessment and forensic interviewing

Branham argues the Court's conclusion is incorrect and ignores appellate court decisions that were available to Counsel at the time of Branham's trial in August 2011. Branham cites to *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (2017), to support his argument that Counsel was deficient for failing to object to Elliott's qualification as an expert in child abuse assessment and forensic interviewing. Branham's reliance on *Briggs* is misplaced for two reasons: (1) the portion of *Briggs* Branham quotes in his motion for reconsideration is not the relevant portion of the opinion discussing the qualification of an expert witness, and (2) the relevant portion of the *Briggs* analysis shows that Counsel was not deficient for failing to object.

"The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). In making a fair assessment of attorney performance, a court must make every effort 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.

First, Branham quotes *Briggs* for its holding that no witness can vouch for the credibility of another witness, and argues trial counsel should have known to object to such testimony. However, the quoted portion of *Briggs* has nothing to do with whether trial counsel was deficient for failing to object to a witness being qualified as an expert. The relevant portion of *Briggs* is discussed below.

In *Briggs*, our Supreme Court reversed the PCR court's finding that trial counsel was deficient for not objecting to a forensic interviewer being qualified as an expert. 421 S.C. at 331-32, 806 S.E.2d at 721. The Court in *Briggs* examined its opinion in *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), and clarified, "We did not say it was error [to qualify a forensic interviewer as an expert], and specifically recognized 'there may be a case in which qualification of an expert in this field is proper.'" *Briggs*, 421 S.C. at 332, 806 S.E.2d at 721 (footnote omitted) (quoting *Douglas*, 380 S.C. at 503 n.2, 671 S.E.2d at 608 n.2). The *Briggs* Court concluded,

In light of this history of permitting forensic interviewers to testify as experts, we simply cannot say it was unreasonable for [trial counsel] to not object to the qualification of [the forensic interviewer] as an expert in child abuse assessment in the August 2010 trial.

421 S.C. at 333, 806 S.E.2d at 722.

Applying the *Briggs* analysis here, at Branham's trial in August of 2011, Counsel was not deficient for failing to object to Elliott's qualification as an expert witness. In light of the history of permitting forensic interviewers to testify as experts, Counsel's decision not to object was reasonable. *See Briggs, supra*. Therefore, the Court did not err, and Branham's motion to reconsider this issue should be denied.

F. Counsel's failure to object to portions of Debbie Elliott's testimony

Branham argues the Court overlooked our Supreme Court's holding in *Briggs*. Branham is correct that *Briggs* recognized since *State v. Dawkins*, 297 S.C. 386, 377 S.E.2d 298 (1989), competent trial counsel should know to object—absent a valid trial strategy—when a forensic interviewer improperly bolsters a victim's credibility. However, a closer look at *Briggs* shows (1) Counsel may have a valid reason for opening the door to such testimony, and (2) if Counsel opens the door to such testimony, the testimony is not impermissible.

In *Briggs*, the Court advised:

Under certain circumstances, it may be proper for the State to ask an expert about coaching. For example, if defense counsel accused the child's mother or father in opening statement or on cross-examination of coaching the child to make an accusation they knew to be untrue, such a line of questioning to an expert could be admissible.

One can even envision a scenario in which coaching is implied, or otherwise becomes an issue without such a direct accusation. Under any of those circumstances, where the testimony is offered to address coaching as a disputed issue, it may be reasonable for counsel to decide not to object.

421 S.C. at 326, 806 S.E.2d at 718.

Here, Counsel made coaching an issue, by stating in his opening statement, "Children don't always tell the truth. Children can be coached." Trial Tr. 115. First, Counsel articulated a valid trial strategy—to attack the victim's and Mother's credibility to show the victim had been coached into making these allegations against Branham as the family had done before. Because Counsel's strategy was reasonable, Counsel was not deficient. Based on this valid strategy, Counsel opened the door to the State's questioning Elliott about coaching. Because Counsel opened the door, the State asking Elliott about coaching was not improper bolstering, but was offered to address coaching as a disputed issue. Therefore, if Counsel had objected, the objection would likely have been overruled because Counsel opened the door to such testimony. Because the objection would have been overruled if made, Branham cannot show prejudice resulted from Counsel's alleged deficiency.

As for Branham's argument the Court overlooked our Supreme Court's holding in *Smalls* regarding overwhelming evidence, Branham's reliance on *Smalls* is misplaced. In *Smalls*, our Supreme Court stated, "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2019).

The Court went on to instruct that overwhelming evidence of guilt “is one significant factor the court must consider—along with the specific impact of counsel’s error and other relevant considerations—in determining whether the applicant has met his burden of proving prejudice.” *Id.* at 190, 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.* at 191, 810 S.E.2d at 845 (emphasis added).

Here, as stated above, Counsel was not deficient for opening the door to Elliott’s testimony regarding coaching. However, weighing the impact of Elliott’s alleged improper testimony against the other admissible evidence at trial, the likelihood of a different outcome is without merit. Further, this case presents a combination of physical and corroborating evidence so strong prejudice cannot be met. First, the victim testified regarding the alleged sexual abuse, and Mother’s admissible testimony properly corroborated the event. Mother walked into the kitchen and saw Branham on top of victim in the hall. This alone is convincing enough for the jury to determine Branham’s guilt. Therefore, Counsel’s alleged errors for failing to object to Elliott’s testimony regarding the RATAC method, and allegedly impermissible bolstering testimony did not prejudice Branham because there was other independent overwhelming evidence of his guilt. Accordingly, the Court did not err on this issue, and Branham’s motion to reconsider this issue should be denied.

G. Counsel’s failure to retain and consult with an independent medical expert

Branham argues the Court erred in finding Counsel was not deficient for failing to seek funding for an independent medical expert to review the medical evidence. Branham argues

Counsel reviewing the photographs with Dr. Saunders, who was not an independent expert, was deficient. Branham simply failed to meet his burden of proof as to prejudice because the independent expert presented at the PCR hearing agreed with Dr. Saunders's conclusions. Because Dr. Rosa's testimony failed to show how hiring an independent expert would have benefitted Counsel, the Court did not err on this issue.

H. Failure to object to hearsay testimony by Dr. Saunders (Tr. 323-24)

Branham argues the Court misapplied Rule 803(4), SCRE, the medical exception to the rule against hearsay, because the opinion at issue in Dr. Saunders' testimony improperly vouched for the victim's credibility. The testimony at issue, as alleged in Applicant's amended application, was Dr. Saunders' testimony regarding information obtained from prior medical records not offered in trial. Applicant specifically cited to pages 323-24 of the trial transcript for this testimony. Branham argues the Court misapplied Rule 803(4), SCRE, in finding Dr. Saunders' testimony admissible. The Court did not err.

Rule 803(4), SCRE, provides an exception to the rule against hearsay for statements for purposes of medical diagnosis or treatment. Specifically, statements that fall into this hearsay exception are:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment

Rule 803(4), SCRE.

As noted above, Dr. Saunders testified she used the victim's medical history, along with her own observations, when diagnosing the victim. Dr. Saunders stated that in her review of the victim's medical records, there were instances where previous doctors thought the victim had UTIs. However, in reviewing those lab reports, Dr. Saunders discovered there was no infection present in the victim's urine cultures. Trial Tr. 323. Dr. Saunders testified the medical history of previous vaginal bleeding, that was thought to be caused by UTIs but was not, was significant. Trial Tr. 323. Based on the victim's past medical history and her own observations, Dr. Saunders diagnosed the victim as displaying physical characteristics consistent with past penetration. Trial Tr. 322.

Dr. Saunders's testimony that the victim's past diagnoses of UTIs were unfounded, based on the lab results, was relevant to Dr. Saunders's diagnosis the victim as displaying characteristics of past penetration; therefore, this testimony was admissible under Rule 803(4), SCRE. The Court did not err, and Branham's motion to reconsider this issue should be denied.

I. Failure to object to jury charge and State's closing argument (Tr. 427: 456)

Branham argues the Court's order overlooks *State v. Rayfield*, 369 S.C. 106, 631 S.E.2d 2344 (2006). However, Branham's reliance on *Rayfield* is misplaced because *Rayfield* explained it was not error for the trial court to charge section 16-3-657 of the South Carolina Code when the trial court does not unduly emphasize that portion of the charge and the charge as a whole comports with the law. 369 S.C. at 117-118, 631 S.E.2d at 250.

Here, the trial court did not unduly emphasize section 16-3-657. The trial court charged the jury, "However, the testimony of an alleged victim in a criminal sexual conduct case need not be corroborated." Trial Tr. 456. At the end of the trial court's credibility charge, the trial court instructed, "All these things you will consider bearing in mind that you should give the defendant

the benefit of any reasonable doubt.” Trial Tr. 456. The trial court’s charge did not unduly emphasize section 16-3-657, and the charge as a whole comported with the law; therefore, this Court did not err, and Branham’s motion to reconsider this issue should be denied.

J. Failure to object to pitting of the witnesses (Tr. 401-02)

Branham argues Counsel was deficient for not objecting to the State pitting Branham against the victim, Mother, and Investigator Lyons. Branham further argues Counsel did not offer any strategic reasons for not objecting. Specifically, Branham argues the State pitted him against other witnesses by asking, “So all these people, [Mother], [the victim], Investigator Lyons, they’re all lying?” However, Branham has not overcome *Strickland*’s high bar and presumption that Counsel was effective.

Judicial scrutiny of counsel’s performance must be highly deferential. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). A fair assessment of attorney performance requires that 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. *Id.* Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. *Id.*

As noted in the Court’s order, Branham was still able to attack Mother’s credibility by testifying to her history of drug abuse. Further, the State’s question did little, if anything, to discredit Counsel’s strategy of coaching and attacking the victim’s and Mother’s credibility. Because this question did not harm Counsel’s overall strategy, the Court did not err, and Branham’s motion to reconsider this issue should be denied.

K. Failure to object to prior consistent statements exceeding the scope of Rule 801(d)(1)(D), SCRE (Tr. 191; 265) (Tr. 125; 266; 268-71; 313-14)

Branham argues the Court erred in finding Counsel was not ineffective for failing to object to several witnesses' testimony that was inadmissible hearsay. Branham argues these statements are hearsay because they are not prior consistent statements under Rule 801(d)(1)(D), SCRE.

A statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case . . . where the declarant is the alleged victim and the statement is limited to the time and place of the incident." Rule 801(d)(1)(D), SCRE.

Portions of the witnesses' testimony did go beyond the time and place limitations of Rule 801(d)(1)(D), SCRE. However, the admissible physical evidence and corroborating evidence in this case—namely Mother's testimony she actually saw Branham on top of the victim with his pants down—leaves little question as to whether the inadmissible hearsay testimony changed the outcome in the case. Therefore, the Court did not err in finding Branham suffered no prejudice, and Branham's motion to reconsider should be denied.

L. Failure to object to the replay of the child's videotaped interview

Branham argues the videotape of Elliott's interview with the victim is essentially videotaped testimony without an opportunity for contemporaneous cross-examination. Branham does not argue the forensic interview was inadmissible, but he argues Counsel should have objected to the video being re-watched by the jury during deliberations. Branham has not shown any prejudice resulted from Counsel's alleged deficiency in failing to object to the jury watching the video again, because Counsel's objection would have been subject to the trial court's discretion.

“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.” *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). “Instead, *Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Id.* (quoting *Strickland*, 466 U.S. 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 111-12 (quoting *Strickland*, 466 U.S. at 693, 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112.

Branham has not shown the trial court would have ruled in his favor. It is Branham’s burden to prove he was prejudiced by Counsel’s alleged error; here, Branham has failed to meet that burden. Branham has failed to show a substantial likelihood of a different result had Counsel objected; therefore, the Court did not err, and Branham’s motion to reconsider this issue should be denied.

M. Cumulative error

The Court did not err in its refusal to apply the cumulative error doctrine. The propriety of the cumulative error analysis is an unsettled question of law in South Carolina. See *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002). The Fourth Circuit Court of Appeals has rejected the cumulative error analysis stating “ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively.” *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998).

Recently, in *Smalls v. State*, our Supreme Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. 422 S.C. at

194, 810 S.E.2d at 864 (“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).

Based on the foregoing case law, the Court did not err in dismissing Branham’s cumulative error allegation; therefore, Branham’s motion to reconsider this issue should be denied.

I. Conclusion

The State submits this Court’s order of dismissal filed February 15, 2019, contains the findings of facts and conclusions of law as required by section 17-27-80 of the South Carolina Code and Rule 52(a) SCRCP. The Order is an accurate reflection of the findings and amendment is not necessary to support the ruling; therefore, Applicant’s motion should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

SAMUEL L. KEY
Assistant Attorney General

February 4, 2020

By: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

State of South Carolina)	In the Court of Common Pleas
)	Fifth Judicial Circuit
County of Kershaw)	2014-CP-28-00703

George Stanley Branham, II,)	
)	
Applicant,)	
)	
vs.)	Transcript of Record
)	
State of South Carolina,)	
)	
Respondent.)	
)	
_____)	

February 4, 2016
Columbia, South Carolina

B E F O R E:

The Honorable J. Derham Cole, Judge

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

Kristy G. Goldberg, Esquire
Attorney for the Applicant

J. Clayton Mitchell, III, Esquire,
Assistant Attorney General
Attorney for the Respondent

Elizabeth B. Harris, CVR-M-CM
Circuit Court Reporter

I N D E X

	<u>Witness/Description</u>	<u>Page No.</u>
1		
2		
3	Olga Rosa	
4	<i>Voir Dire</i> Examination by Ms. Goldberg.	7
5	<i>Voir Dire</i> Examination by Mr. Mitchell.	9
6	Direct Examination by Ms. Goldberg	10
7	Cross-examination by Mr. Mitchell.	17
8	Redirect Examination by Ms. Goldberg	22
9	Examination by the Court	23
10		
11	George Branham	
12	Direct Examination by Ms. Goldberg	24
13	Cross-examination by Mr. Mitchell.	30
14	Redirect Examination by Ms. Goldberg	37
15	Examination by the Court	37
16		
17	Jason Kirincich	
18	Direct Examination by Ms. Goldberg	38
19	Cross-examination by Mr. Mitchell.	61
20	Redirect Examination by Ms. Goldberg	75
21		
22	Closing Argument by Ms. Goldberg.	77
23	Closing Argument by Mr. Mitchell.	97
24	Final Closing Argument by Ms. Goldberg.	113
25	Certificate Page.	122

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Page No.</u>
A-1	SLED Report	6
A-2	Emergency Room Report	6
A-3	Photographs	6
A-4	Copy of Handwritten Note.	6

1 MR. MITCHELL: May it please the court, Judge?

2 THE COURT: Yes.

3 MR. MITCHELL: This is *George Branham vs. The State of*
4 *South Carolina*. The case number is 2014-CP-28-00703. Mr.
5 Branham was indicted July 2011 for criminal sexual conduct
6 with a minor first degree. It was tried before Judge
7 Newman and was sentenced to fifty years' imprisonment. A
8 notice of appeal was filed and an *Anders* brief was
9 submitted. He's filed this timely application for
10 post-conviction relief in August of 2014. He filed -- an
11 amendment was made in this case and should be part of your
12 packet.

13 THE COURT: I don't have it.

14 MS. GOLDBERG: I have a copy, Your Honor. It's
15 clocked January 25, 2016.

16 MR. MITCHELL: I note Mr. Branham is present and
17 represented by Ms. Goldberg, and I'll turn it over to her.

18 THE COURT: Ms. Goldberg.

19 MS. GOLDBERG: Thank you, Your Honor. May it please
20 the court? As the attorney general informed you, this does
21 arise out of a jury trial conviction for a criminal sexual
22 conduct defense. The amended application was filed January
23 25th and was given to the attorney general in advance of
24 this hearing. For the record, I'll just generally go over
25 these allegations.

1 THE COURT: Well, let me just say this. That's not
2 necessary because ---

3 MS. GOLDBERG: Okay.

4 THE COURT: --- it's part of the record, but let me
5 ask you this. You've got amended application, starts out
6 11-A through J. Are those the sole allegations on which
7 your client is proceeding on his application for
8 post-conviction relief?

9 MS. GOLDBERG: Yes, Your Honor.

10 THE COURT: All right, wait a minute. Take the phone,
11 please. Take the phone.

12 (A PAUSE.)

13 THE COURT: All right, Ms. Goldberg. Excuse me.

14 MS. GOLDBERG: Thank you. May it please the court?
15 This amended application does cover all the substantive
16 allegations that we would be covering today. However, I
17 probably should have included an argument regarding the
18 cumulative, cumulative nature of the errors. I don't
19 think that's any surprise to the attorney general that I've
20 filed ---

21 THE COURT: You just want to make it K means all the
22 above, cumulatively speaking, as error -- I mean, causes of
23 prejudice?

24 MS. GOLDBERG: Yes.

25 THE COURT: Okay. That suit you, Mr. Mitchell?

O. ROSA - *VOIR DIRE* EXAMINATION BY MS. GOLDBERG

6

1 MR. MITCHELL: Yes, sir.

2 THE COURT: All right, we've got K, cumulative.

3 MS. GOLDBERG: At this time, I would like to go ahead
4 and save some of the court's time and energy by premarking
5 and admitting 1, 2, 3, 4 documents into evidence. These
6 were all actual exhibits offered in the jury trial, so they
7 are a part of the record. They'll just be used during this
8 hearing, and there's no objection to these by the state.

9 THE COURT: Well, I understand you want to put them in
10 record. Are they included in the transcript?

11 MS. GOLDBERG: They're, they're mentioned in the
12 transcript.

13 THE COURT: No, no. I mean are they actually attached
14 to the transcript?

15 MS. GOLDBERG: No, sir.

16 THE COURT: Okay. Well, you can make them exhibits.

17 (SLED REPORT MARKED INTO EVIDENCE AS APPLICANT'S
18 EXHIBIT NUMBER 1.)

19 (EMERGENCY ROOM REPORT MARKED INTO EVIDENCE AS
20 APPLICANT'S EXHIBIT NUMBER 2.)

21 (PHOTOGRAPHS MARKED INTO EVIDENCE AS APPLICANT'S
22 EXHIBIT NUMBER 3.)

23 (COPY OF HANDWRITTEN NOTE MARKED INTO EVIDENCE AS
24 APPLICANT'S EXHIBIT NUMBER 4.)

25 MS. GOLDBERG: Your Honor, I'll -- Your Honor, with

O. ROSA - *VOIR DIRE* EXAMINATION BY MS. GOLDBERG

7

1 that being said, at this time applicant would call our
2 first witness, Dr. Olga Rosa.

3 OLGA ROSA, BEING DULY SWORN,
4 TESTIFIES AS FOLLOWS:

5 CLERK OF COURT: Please have a seat. State your full
6 name, please.

7 WITNESS: Last name is Rosa, R-o-s-a. First name is
8 Olga, O-l-g-a.

9 *VOIR DIRE* EXAMINATION BY MS. GOLDBERG:

10 Q. Thank you. Where do you currently work?

11 A. I work with University of South Carolina School of
12 Medicine, Department of Pediatrics, and at Palmetto Health
13 Children Hospital.

14 Q. Tell me about your education and experience and
15 background.

16 A. I completed the medical school from '82 to '86 at the
17 University of Puerto Rico School of Medicine. I did my
18 residency program in pediatrics from '86 to '89 at the
19 Children Hospital, University Children Hospital in San
20 Juan, Puerto Rico. I completed a fellowship in forensic
21 pediatrics at Bryan University School of Medicine in
22 Providence, Rhode Island, and that's my educational
23 profile.

24 Q. How long have you been with USC School of Medicine?

25 A. Since 2004 October.

1 Q. What is your current job title?

2 A. My current job title, I am a child's pediatrician and
3 I'm the director of the statewide Medical Response System
4 to child abuse and neglect for the state.

5 Q. Can you describe generally what that entails, your
6 current job?

7 A. That entails -- I wear two hats. That entails, I do
8 medical evaluations and assessments for children that are
9 referred to our program for suspected abuse and neglect; as
10 well as I direct, coordinate, develop the medical response
11 system across the state for child abuse and neglect;
12 training of medical providers; guidelines, clinical
13 guidelines to practice in this field.

14 Q. Do you do that in conjunction with other physicians,
15 or are you in charge of that program? What is your ---

16 A. I am in charge of the program. I have a network
17 currently of eighteen providers, healthcare providers.
18 Eleven of them, if my memory serves me right, are
19 physicians and the rest are mid-level providers, nurse
20 practitioners.

21 Q. Do you also do consulting work?

22 A. Yes, I do.

23 Q. For, for cases like this?

24 A. Court cases, solicitors, defense attorneys, yes.

25 Q. You have been retained to consult on both sides of

O. ROSA *VOIR DIRE* EXAM BY MS. GOLDBERG /BY MR. MITCHELL

9

1 cases?

2 A. Yes, ma'am.

3 Q. Criminal cases?

4 A. Criminal and family court.

5 Q. And DSS cases ---

6 A. Yes, ma'am.

7 Q. --- as well? Have you been qualified as an expert in
8 court before?

9 A. Yes, ma'am.

10 Q. Approximately how many times?

11 A. Well, I've been here eleven years, so I have at least
12 a couple trials a year, so.

13 Q. And what fields have you been qualified in?

14 A. I'm both board certified in general pediatrics, as
15 well as board certified in child abuse pediatrics. So, in
16 both fields.

17 MS. GOLDBERG: Your Honor, at this time I would ask to
18 qualify the witness as an expert in child abuse pediatrics.

19 MR. MITCHELL: And I'd just ask a couple questions.

20 THE COURT: Okay.

21 *VOIR DIRE* EXAMINATION BY MR. MITCHELL:

22 Q. Dr. Rosa, you said you testified at trials. That's
23 usually when -- you said both sides, right?

24 A. I have provided -- you know, some of the cases that I
25 do for -- on request of the defense, they don't make it to

O. ROSA - *VOIR DIRE* EXAMINATION / DIRECT EXAMINATION

10

1 trial.

2 Q. Okay. Now, when -- the cases you have testified in,
3 are those cases where you physically examined the child
4 victim?

5 A. Sometimes I have. I'm the one physically examining.
6 The child victim has come through the children hospital in
7 Palmetto, or sometimes we do medical consultation and
8 review of numerous records for, for the child.

9 Q. Okay. So, you have based opinions off just records
10 previously?

11 A. Yes. It's a practice of medicine.

12 MR. MITCHELL: No further questions.

13 WITNESS: Thank you.

14 MR. MITCHELL: And no objection to her being
15 qualified.

16 THE COURT: Okay.

17 MS. GOLDBERG: Thank you, Your Honor.

18 DIRECT EXAMINATION BY MS. GOLDBERG:

19 Q. Ms. Rosa, you were asked by the applicant in this case
20 to consultant in this matter. Is that correct?

21 A. That's correct.

22 Q. Do you remember what documents you reviewed related to
23 this case?

24 A. I reviewed, I read the transcript. I focused on the
25 transcript on the medical aspects, you know, the, the, the

O. ROSA - DIRECT EXAMINATION BY MS. GOLDBERG

11

1 part of the physicians involved in the case. I also
2 reviewed the medical records for the child, the visits to
3 the Care House of the Pee Dee for a medical assessment, and
4 also the records for the visit to the Kershaw ED, as well
5 as a prior visit a year before to Lexington Medical Center,
6 and I viewed and listened to the whole CD, compact disc,
7 for the forensic interview.

8 Q. Were there also some photographs?

9 A. Yes, ma'am.

10 MS. GOLDBERG: Beg the court's indulgence.

11 BY MS. GOLDBERG:

12 Q. Doctor, I'm going to hand you what has been marked as
13 Applicant's Exhibit Number 3 and entered into evidence by
14 consent of the state. Can you describe -- let me ask you
15 first. Are those the photographs you've reviewed in
16 consulting this case?

17 A. Yes, ma'am. They were previously labeled State
18 Exhibit 16 and 15.

19 Q. Those were the exhibit numbers used in the transcript
20 at trial?

21 A. That's correct.

22 Q. Can you explain to the judge what those photographs
23 are?

24 A. The photographs depict the, the hymenal tissue of the
25 child on both photographs.

1 Q. Now based on your experience, how would photographs
2 like that be taken?

3 A. The photographs are taken as part of the full medical
4 assessment of the child. This is the area where we
5 examining -- exam the anal genital, you know, region and
6 these photographs are taken. The child is usually lying
7 down, put in what we call a frog leg position so we can --
8 and then we use traction and separation of the external
9 labia, which is the, the genitalia, the outer genitalia of
10 the child. And then we separate it to take a look at the
11 more deeper tissues, which is the hymen. It's the ring
12 that covers the entrance to the vagina.

13 Q. Is a particular instrument used to take those
14 photographs?

15 A. Yes. You can use a colposcope. In this case, I
16 understand Dr. Saunders used a colposcope.

17 Q. Can you spell that for the record?

18 A. Colposcope, c-o-l-p-o-s-c-o-p-e.

19 Q. And that is how Kathy Saunders said she took the
20 photographs?

21 A. Yes.

22 Q. Have you taken photographs with that instrument
23 yourself before?

24 A. Yes, ma'am.

25 Q. And you've seen other photographs taken, like, from

O. ROSA - DIRECT EXAMINATION BY MS. GOLDBERG

13

1 those types of instruments before, correct?

2 A. Yes, ma'am.

3 Q. Are photographs taken from a colposcope generally --
4 do they generally produce a good quality photograph?

5 A. Yes. It depends, of course, always depends on the
6 digital camera that is attached to the colposcope, the
7 imaging software, and of course the skill of the examiner
8 that is taking the photograph.

9 Q. Do those photographs appear to you to be of a good
10 quality, and I guess by that I'm asking you do they appear
11 to be in focus? Do they appear to be something that you
12 can look at and actually determine what you're seeing?

13 A. Yes. That's correct.

14 Q. Do you recall -- now in the transcript, the individual
15 who took those photographs, you said that was Kathy
16 Saunders, correct?

17 A. Kathy Saunders, correct.

18 Q. And she is a nurse practitioner?

19 A. Yes, ma'am. She's a doctor in nurse practice.

20 Q. Okay, Ph.D. in nurse practice?

21 A. That's correct.

22 Q. Okay. Do you recall what her testimony was regarding
23 those photographs?

24 A. Yes, ma'am.

25 Q. And what was that?

1 A. Dr. Saunders started describing, you know, as part as
2 what we do, describing the shape of the hymen, and in this
3 case is, you know, angular, basically a ring. She also
4 indicated that, the posterior ring of the hymen. So, the
5 way you look at this is think about the face of a clock.
6 So, the posterior ring is basically from 3:00 to 9:00, and
7 she indicated that the area on the posterior ring was
8 narrow and that there was scar tissue. And I can be a
9 little bit more precise if ---

10 Q. Yes, ma'am.

11 A. So, she indicated that the posterior ring from 5 to
12 7:00 -- think again about the face of a clock -- was
13 attenuated. Basically as being blunted. It's narrower,
14 and she indicate that there was a presence of what she
15 called avascularity. A, V as in Victor,
16 a-s-c-u-l-a-r-i-t-y, and basically what that means is that
17 it's lacking in blood vessels, and that it could be that
18 area could be a scar.

19 Q. And that was on the same area she's referring to?

20 A. Yes, ma'am.

21 Q. She also testified to some redness in the area.

22 A. Yes. She also testified that there was, she observed
23 redness at the entrance, the surrounding -- it's like -- we
24 call it the vestibule. Think about your house and think
25 about the foyer. You know that's the part just before you

1 get into the living room, that. Think about the living
2 room and the sofa as the hymen. So, basically that
3 entrance was red and around the urethra, which is the area
4 from where the urine flows, was red.

5 Q. And I think we've gone over this, but just a little
6 bit more specific detail. How familiar are you with this
7 particular type of -- with viewing this particular type of
8 area of the body, the photographs? You said you've taken
9 photographs yourself?

10 A. Yes.

11 Q. And do you have any idea how many times?

12 A. Well, I've been practicing full-time child abuse
13 pediatrics since the year 2000, and prior to that in part
14 of my general pediatric practice I have done such. And
15 also as part of general pediatric practice to look at the
16 genital area just to inspect it of children, both males and
17 females, during their well-child check up to make sure that
18 everything is, you know, where it's supposed to be.

19 Q. Based on your medical experience, was what Ms.
20 Saunders or Dr. Saunders stated a correct statement of what
21 can be seen in the photographs?

22 A. I'm sorry. Repeat the question again.

23 Q. Let me ask you a different way. What do you see when
24 you look at the photographs?

25 A. When I look at the photographs, I agree with Dr.

1 Saunders regarding the appearance of redness and the shape
2 of the hymen. However, I did disagree with Dr. Saunders
3 regarding the presence of the avascularity area or scar
4 tissue, as well at the attenuated region from 5 to 7:00 on
5 the hymen, on the posterior hymen.

6 Q. You do not see the presence of any scar tissue in
7 those photographs?

8 A. That's correct.

9 Q. Either healed scar tissue, new scar tissue, any
10 difference in that regard, or you don't see any scar tissue
11 at all?

12 A. There is no scar tissue.

13 Q. Does it appear to be a normal hymen?

14 A. That would be correct, except for the redness, of
15 course, but the redness is located to vestibule and the
16 area around the urethra.

17 Q. And what does that mean?

18 A. It's a normal exam except for the redness but, you
19 know, she's -- she was seven at the time. So, redness is
20 kind of common at that age, too, because of they don't
21 clean themselves that well.

22 Q. And to be fair, children who have been sexually abused
23 can have a normal appearance of a hymen, correct?

24 A. Yes, ma'am. That, that is the most common result of
25 an evaluation for sexual abuse in a child. 96% of all

O. ROSA - DIRECT EXAMINATION / CROSS-EXAMINATION

17

1 children that come with an allegation of sexual abuse have
2 completely normal exams. And I know that's kind of
3 difficult for people to understand that, but that is what
4 the research shows.

5 Q. And again, children who have not been sexually abused,
6 they would also have a normal hymen, correct?

7 A. That would be correct. That's, that's -- the
8 importance about medical assessments on children, medical
9 history is primarily very important when we are assessing
10 children for sexual abuse because there's usually no
11 difference between the exam of a child that has not been
12 sexually abused and a child that has been sexually abused.

13 Q. But in your opinion, the medical evidence at trial
14 that there was an existence of scar tissue on this child,
15 that was incorrect?

16 A. I disagree completely, yes.

17 MS. GOLDBERG: No further questions.

18 CROSS-EXAMINATION BY MR. MITCHELL:

19 Q. All right, Dr. Rosa, so you take issue with the scar
20 tissue, with the presence of scar tissue. Is that right?

21 A. Both the presence of scar tissue and the definition
22 that an attenuation from 5 to 7:00 should be considered
23 abnormal.

24 Q. Okay, but you still conclude that it's likely that the
25 victim was subject to sexual abuse, though, right?

O. ROSA - CROSS-EXAMINATION BY MR. MITCHELL

18

1 A. That is correct.

2 Q. Okay. So, you agree with parts of this and disagree
3 with just the scar tissue and the 5 to 7:00?

4 A. That would be correct, sir.

5 Q. Okay. So, there is a redness?

6 A. Yes, sir.

7 Q. Around the urethra area, right?

8 A. And the vestibule, which is not what I said. The
9 entrance. You know, you separate the labia and then you
10 see redness.

11 Q. So, you reviewed the testimony of both Dr. Saunders
12 and Dr. Connell. Is that correct?

13 A. That's correct.

14 Q. All right. Now, Dr. Connell testified.

15 MR. MITCHELL: And if Your Honor is following along,
16 it's on page 197.

17 BY MR. MITCHELL:

18 Q. It starts that: There were no signs of trauma in her
19 examination.

20 A. On his examination of ---

21 Q. His examination.

22 A. --- Dr. Foy? Yes. That's okay.

23 Q. So, no signs of trauma, and how would that examination
24 differ from the colposcope?

25 A. The colposcope actually is the tool that we use for

O. ROSA - CROSS-EXAMINATION BY MR. MITCHELL

19

1 magnification, better light, and for photo documentation.

2 So, there should be no -- you know, there's been clear
3 indications that what you see with your naked eye with no
4 colposcope should not differentiate at all from what you
5 see with a colposcope.

6 Q. Okay.

7 A. Okay?

8 Q. And Dr. Connell testified -- well, I'll withdraw that.
9 Yeah, Dr. Connell testified that the genital area can heal
10 quickly. Is that right?

11 A. And he is absolutely correct.

12 Q. Now, is that part of the reason why a lot of these
13 exams would not have evidence of scar tissue and things
14 like that, because of the healing of a young child?

15 A. That is correct. Just compare the -- you know, I
16 don't want to make anybody uncomfortable. Just the process
17 of healing on the genital tissues is pretty similar to the
18 healing that occur -- let's say that today you bite the
19 inside of your cheek, and by Sunday you don't know where
20 you, you bite your cheek because it's gone. It's the same
21 kind of tissue. It heals quickly with most of the time not
22 residue of any trauma. That's why the majority of exams
23 actually are normal.

24 Q. Okay. In your report you say approximately 96% will
25 have completely normal anogenetalia examination. Is

1 that ---

2 A. That is correct.

3 Q. --- correct? Okay.

4 A. That is correct.

5 Q. Now, this could happen from -- this is -- upon your
6 examination, is it consistent that that was past
7 penetration in the genitalia area?

8 A. Can you ask the question again? I'm not sure -- I'm
9 not understanding clearly. When I reviewed the
10 photographs, this what I can tell. When I reviewed the
11 photographs, it's a complete, normal exam except for the
12 redness, but we don't consider redness, you know, abnormal
13 at this age group, but that I didn't see any healing
14 residue or acute, acute trauma at the time that the
15 photographs provided during the transcript of the trial.
16 But again as I said, that does not deny that there was not
17 past penetration because as we have already discussed, the
18 healing process and the time that the child may disclose,
19 it goes pretty fast.

20 Q. Okay, and that's consistent with what Dr. Connell
21 testified to?

22 A. That would be correct.

23 Q. Okay, and you also reviewed a number of medical
24 records of the victim. Well, I guess not a number but a
25 few. Two separate visits, right?

O. ROSA - CROSS-EXAMINATION BY MR. MITCHELL

21

1 A. Yes. I reviewed the Kershaw ED emergency room,
2 emergency department visit on the -- I think she went there
3 on the 8th. That was when she was seen by Dr. Foy Connell
4 and have the forensic evidence collection performed Ms.
5 Schaffer, a forensic nurse. And then I reviewed the record
6 from almost a year before that she went to Lexington
7 Medical Center Emergency Department.

8 Q. Okay. So, she had gone to the emergency room because
9 of, I guess, supposed injuries to her genitalia a year
10 before this second exam, right?

11 A. Well, she, according to what is documented on the
12 medical record of that visit in Lexington on December 15,
13 2008, she presented because of vaginal pain of one-day
14 duration.

15 Q. Okay. Just to be clear, is your conclusion that the
16 victim was sexually assaulted or had been previously
17 sexually assaulted, correct?

18 A. That's correct.

19 Q. And do you have a copy of your report with you?

20 A. I have the original that I provided to Ms. Goldberg.

21 MR. MITCHELL: Actually, that's all the questions I
22 have. Thank you.

23 WITNESS: You're welcome.

24 MS. GOLDBERG: Brief follow up, Your Honor?

25 REDIRECT EXAMINATION BY MS. GOLDBERG:

1 Q. Dr. Rosa, your testimony was that there was a
2 completely normal physical exam in this case, correct?

3 A. That's correct.

4 Q. No physical evidence indicating abuse either way,
5 correct, abuse or non-abuse?

6 A. Well, abuse is a, is a medical diagnosis and you use
7 both history and medical exam, okay?

8 Q. Correct. So, that's exactly what I'm getting the
9 differentiation at. It's based on the history or the
10 report from the patient and the medical exam, correct?

11 A. Yeah. That's a complete medical assessment, yes.

12 Q. Okay. Correct. So, the medical exam itself, there's
13 no evidence of trauma, scarring?

14 A. The physical findings, there's, there's -- at the
15 moment of the photographs were provided, the physical
16 findings showed no evidence ---

17 Q. Right.

18 A. --- of penetrating trauma at the time of the
19 photographs were taken, correct.

20 Q. And, therefore, any conclusion medically speaking of
21 the presence of abuse, that would be based solely on the
22 report from the patient, correct?

23 A. That would be based -- it would be the complete
24 medical assessment, you know, because a normal exam do
25 support the statement of the child.

O. ROSA - DIRECT EXAMINATION / EXAMINATION BY THE COURT 23

1 Q. It -- and I understand. A normal exam could be
2 something you would see with an abused patient or a non-
3 abused patient?

4 A. That would be correct, yes.

5 Q. So, the distinguishing factor in this case is only the
6 report of the child?

7 A. It's always the medical history. In all, in all --
8 not only in abuse but in any kind, in any, any visit to the
9 doctor, the diagnosis is primarily 90% on the medical
10 history.

11 Q. Like when you say your ankle hurts and you get a
12 diagnosis of tendinitis.

13 A. Correct.

14 Q. It's because that's what the patient says?

15 A. Exactly.

16 MS. GOLDBERG: No further questions.

17 EXAMINATION BY THE COURT:

18 Q. Let me be sure I understand what your testimony is,
19 Dr. Rosa. If you, if you had been called to testify in the
20 trial of this, do I understand that you would have
21 testified that you believe the records reflect a normal
22 medical exam?

23 A. I will have testified that the child had a normal
24 physical exam. Then when I'm -- where asked about my
25 complete medical assessment, then I will have provided that

1 opinion about the diagnosis.

2 Q. And what would your opinion have been?

3 A. Sexual abuse.

4 THE COURT: Thank you.

5 Anything else?

6 You may step down.

7 (THE WITNESS EXITS THE STAND.)

8 MS. GOLDBERG: Beg the court's indulgence.

9 (A PAUSE.)

10 MS. GOLDBERG: At this time I'd call George Branham.

11 GEORGE S. BRANHAM, II, BEING DULY

12 SWORN, TESTIFIES AS FOLLOWS:

13 CLERK OF COURT: Please have a seat there, sir. State

14 your full name for the record.

15 DIRECT EXAMINATION BY MS. GOLDBERG:

16 Q. State your name, please.

17 A. George Stanley Branham, II.

18 Q. All right, Mr. Branham, when were you first arrested?

19 A. It was December the 8, 2009.

20 Q. Did you have a plea or a trial?

21 A. A trial.

22 Q. And what sentence did you receive?

23 A. Fifty years.

24 Q. Is that the only sentence you're serving right now?

25 A. Yes, ma'am.

1 Q. Where are you housed?

2 A. At the Lee County correctional facility.

3 Q. After you were arrested December 8th, did you stay in
4 jail the entire time while your charges were pending?

5 A. Yes, ma'am.

6 Q. Who was your first attorney in this matter?

7 A. Neal Riley.

8 Q. He did not represent you at trial, correct?

9 A. No, ma'am.

10 Q. Was he relieved in your case?

11 A. Yes, ma'am, he was.

12 Q. When did Mr. Kirincich get involved?

13 A. I don't remember the exact date.

14 Q. Do you remember -- well, let me -- when was your
15 trial?

16 A. It was October of 2011.

17 Q. It looks like it was actually the last week in August
18 of 2011. Do you recall how far in advance of that you --
19 Mr. Kirincich became your attorney?

20 A. Maybe two or three months.

21 Q. What -- when he represented you, did he meet with you
22 at the jail?

23 A. Yes, ma'am, he did. Once.

24 Q. Did he review the discovery with you?

25 A. We reviewed a CD of the forensic interview.

1 Q. Did you have conversations discussing your defense
2 strategy and how you were going to proceed at trial?

3 A. I don't recall any defense strategy.

4 Q. What charge were you convicted of at trial?

5 A. Criminal sexual conduct first degree.

6 Q. In addition to your prison sentence, what other
7 requirements did that conviction put on you?

8 A. To register for the rest of the life.

9 Q. As a sex offender?

10 A. Yes, ma'am.

11 Q. Did you ever ask for a plea deal or plea negotiation
12 in this case?

13 A. No, ma'am.

14 Q. Did you ever receive one?

15 A. No, ma'am.

16 Q. Did you always want a trial?

17 A. Yes, ma'am.

18 Q. Do you understand if our PCR case here wins, if it's
19 successful, then your charge won't be dismissed. You'll
20 just be given the right to a new trial. Do you understand
21 that?

22 A. Yes, ma'am.

23 Q. Is that what you want?

24 A. Yes, ma'am.

25 Q. You testified in trial. Is that right?

1 A. Yes, ma'am.

2 Q. What -- the allegations at trial, were they regarding
3 this offense occurring on a particular date?

4 A. On December the 8, 2009.

5 Q. And you testified about what happened on that day?

6 A. Yes, ma'am.

7 Q. What was your defense?

8 A. My defense?

9 Q. Was it -- did you tell the jury that you were
10 innocent? Did you tell the jury -- what you did tell the
11 jury generally?

12 A. I didn't really have a chance to speak on my defense.

13 Q. Did you admit to the allegations?

14 A. No, ma'am.

15 Q. During the trial, your attorney asked the victim's mom
16 about a second allegation that had been made against you by
17 a different child.

18 A. Yes, ma'am.

19 Q. Do you recall that?

20 A. Yes, ma'am.

21 Q. Did you discuss this in advance of trial, of using
22 this as a trial strategy?

23 A. Yes, ma'am.

24 Q. What did you discuss?

25 A. I wanted to show a history of coaching where they were

1 coaching their kids to make -- or the dad was coaching his
2 kids to make false allegations against me, to get back at
3 me for allegedly taking his wife.

4 Q. You had discussed that fully and all the evidence
5 there might be about that?

6 A. That was brought up. I don't -- I wouldn't say we
7 discussed it fully.

8 Q. Was this at your meeting at the jail?

9 A. Yes, ma'am.

10 Q. Okay. So, well in advance of trial?

11 A. Yes, ma'am.

12 Q. Do you have a concern or a problem now with the way
13 that that information was brought up by your lawyer during
14 trial?

15 A. Yes, ma'am.

16 Q. And what is that?

17 A. Well, the jury wasn't allowed to hear it.

18 Q. Wasn't allowed to hear what?

19 A. That there was a prior false allegation of abuse.

20 Q. You said prior false allegation of abuse. Was there
21 ever any kind of determination on that allegation by
22 anyone?

23 A. The child was seen by, I guess, counselors at the
24 Assessment Resource Center, ARC for short, in Columbia and
25 they went through a forensic interview with the child, and

1 the child ended up admitting that he was coached by his
2 father to make false allegations against me. This was all
3 documented, and I had the documentation. That was also
4 given to Mr. Kirincich, I believe.

5 Q. And the jury wasn't allowed to hear the end result of
6 that?

7 A. No, ma'am.

8 Q. Based on that result, do you think this should have
9 been brought up at all?

10 A. Yes, ma'am, absolutely.

11 Q. Did you ever discuss with your lawyer the possibility
12 of having a medical expert consulted in this case?

13 A. I don't recall.

14 Q. Was Mr. Kirincich retained or appointed?

15 A. Appointed.

16 Q. Did you know that you could get funding to hire a
17 medical expert to consult on this case?

18 A. No, ma'am.

19 Q. To your knowledge, did he ever consult with anyone?

20 A. No, ma'am.

21 Q. Do you believe -- in the amended application, it
22 states that you believe the court and your lawyer should
23 not have allowed the forensic interview videotape to go
24 back to the jury room. Why is that?

25 A. Well, I believe it places prejudicial emphasis on her

G. BRANHAM - DIRECT EXAMINATION / CROSS-EXAMINATION

30

1 testimony. I mean, certainly they wouldn't have allowed
2 her to walk back in the jury room and testify again.

3 MS. GOLDBERG: Beg the court's indulgence.

4 (A PAUSE.)

5 MS. GOLDBERG: No further questions.

6 THE COURT: Let me ask, Ms. Goldberg. Is this one of
7 the allegations in the amended complaint?

8 MS. GOLDBERG: Oh, it is, Your Honor. On the amended
9 application, I think it's probably the very -- it's J.
10 It's the very last one.

11 THE COURT: Oh, okay.

12 CROSS-EXAMINATION BY MR. MITCHELL:

13 Q. Good morning, Mr. Branham.

14 A. Good morning.

15 Q. Let's see, so you were charged with CSC first. Is
16 that right?

17 A. Yes, sir, I was.

18 Q. Okay, and then you went to trial, correct?

19 A. Yes, sir.

20 Q. And you testified in your own defense, right?

21 A. Yes, sir.

22 Q. Okay. Now, just to give a little factual background,
23 this is based off -- this is what the state alleged, okay?
24 This is they alleged that you were on top of Ms. Scott's
25 daughter, who was, I think, three years old at the time,

1 and this was witnessed by her mother, correct?

2 THE COURT: Let me ask you not to blow into that
3 microphone, please. You can turn it down if you need to,
4 but don't blow into it.

5 BY MR. MITCHELL:

6 Q. Is that basically what was alleged that night of
7 December 8th, I believe?

8 A. Yes, sir.

9 Q. Okay, and Ms. Scott gave a statement to the police
10 that night, right?

11 A. I believe so.

12 Q. And that's -- she testified at trial that's what she
13 saw, right?

14 A. Yes, sir.

15 Q. Okay, and that night you also didn't give a statement
16 but you made a comment that you were just trying to help
17 her wipe. Is that right?

18 A. No, sir. I never made that comment.

19 Q. Right, but that's what the state ---

20 A. That's what is alleged.

21 Q. Right, and you ---

22 A. Yes, sir.

23 Q. --- denied that?

24 A. Yes, sir.

25 Q. You denied that when you took the stand at trial,

1 right?

2 A. Right.

3 Q. Okay. So, you had a chance to tell your story and
4 explain that incident, right?

5 A. No, not exactly.

6 Q. Okay. Now, you did testify you believed the child had
7 been previously abused. Is that right?

8 A. She had witnessed the abuse of her brother by their
9 uncle.

10 Q. By their -- I'm sorry, what was that?

11 A. Their father's ---

12 Q. Father?

13 A. --- brother.

14 Q. Okay, but you, but you believed that she had been
15 molested, right?

16 A. She was there when the abuse was occurring, so.

17 Q. I'm not talking about the brother; I'm talking about
18 her, the victim.

19 A. I believe that she was abused.

20 Q. Okay.

21 A. Yes, sir.

22 Q. And you testified to that at trial, too, right?

23 A. Right.

24 Q. Now, you did talk about in your testimony at trial
25 that there had been two prior allegations made, right?

1 A. Two prior allegations?

2 Q. Of sexual abuse, right?

3 A. One ---

4 Q. That she, she ---

5 A. One was made by her brother.

6 Q. Okay.

7 A. That turned out to be a false allegation.

8 Q. Right.

9 A. And there was a incident where she was in kindergarten
10 class, and this is documented. A little boy during that
11 time inserted his finger in her. That was one reason we
12 took her to the medical center in Lexington.

13 Q. And you testified that was false, too, right?

14 A. That was false?

15 Q. Right -- or that, that was true, right?

16 A. That was true.

17 Q. Okay. So, you were trying to show that there was
18 history of coaching here and that this girl could be kind
19 of manipulated to make these allegations against you,
20 right?

21 A. Yes, sir.

22 Q. Okay, and that's what you wanted to try to bring out
23 through your testimony, correct?

24 A. Right.

25 Q. And you were able to do that to an extent?

1 A. I mean, sorry?

2 Q. You don't have to agree with that.

3 A. I, I wasn't able to bring it up. It was briefly
4 discussed.

5 Q. The victim's mother, Ms. Scott, testified that she
6 witnessed you committing this act that night, correct?

7 A. Yes, sir.

8 Q. Okay. So, it was kind of her word versus your word
9 when you testified, right?

10 A. Yes, sir.

11 Q. Okay. Now, so as far as the medical expert, returning
12 you to requesting funding for a medical expert, you did
13 request funding for another kind of expert, correct? Do
14 you have ---

15 A. Not that I know of.

16 Q. --- any knowledge of that?

17 A. No. No knowledge of that whatsoever.

18 Q. Okay, and you also take issue with the video going
19 back to the jury room after the cases was over, right?

20 A. Yes, sir. There's been several cases reversed because
21 of that.

22 Q. The video was entered into evidence, correct?

23 A. The video was.

24 Q. Okay. So, you deny committing the act that Ms. Scott
25 alleged that night, right?

1 A. I do.

2 Q. Do you then deny making the statement that you were
3 just trying to help her wipe that was overheard by
4 Investigator Lyons, right?

5 A. I never made that statement.

6 Q. Okay, and it was your testimony the victim could be
7 influenced to say these things that she was saying?

8 A. Yes, sir.

9 Q. And you testified that you were the primary caregiver
10 for these children, correct?

11 A. No, sir.

12 Q. You did not testify to that?

13 A. No. I said I worked. My girlfriend did not work.

14 Q. Right.

15 A. She was the primary caregiver; I was the primary
16 provider for the family.

17 Q. Okay, the primary provider for these children, right?

18 A. Yes, sir.

19 Q. And you testified you cared for these children, and
20 you would have never done such a thing, right?

21 A. Right.

22 Q. You also were able to testify that you believe Ms.
23 Scott had a drug problem. Is that right?

24 A. I knew she did.

25 Q. And that was, that was the way you phrased the events,

1 right? That y'all had an argument over her drug use which
2 led her to make these allegations that night, right?

3 A. Yes, sir. When I came in, she had been abusing drugs.
4 That's what I was not able to disclose to the jury.

5 Q. Okay.

6 A. The reason for the argument that we had.

7 Q. But you did testify to that, right? That was before
8 the jury. You testified you had an argument over drugs and
9 that she had been doing drugs, right?

10 A. Right. She claims that we were arguing over
11 cigarettes.

12 Q. Right. So, you also testified and believed that the
13 child had been abused and that you encouraged Ms. Scott to
14 have this reported and to seek treatment, right?

15 A. Yes, sir.

16 Q. And that was, you know, to show you care about the
17 kids. You have a suspicion that something had happened
18 maybe with her father or her father's brother, right?

19 A. Right.

20 Q. And your father also testified about Ms. Scott doing
21 drugs, too, right?

22 A. Yes, sir.

23 Q. Okay.

24 MR. MITCHELL: All right, those are all the questions
25 I have. Thank you.

G. BRANHAM REDIRECT EXAMINATION / EXAMINATION BY THE COURT 37

1 MS. GOLDBERG: Briefly, Your Honor.

2 REDIRECT EXAMINATION BY MS. GOLDBERG:

3 Q. You testified on cross that you weren't able to tell
4 the jury everything you wanted.

5 A. No.

6 Q. Is that just specifically details about why you think
7 they were coached, or was there something else?

8 A. Well, the reason for the argument, I was at a
9 neighbor's house. He informed me that she was over there
10 trying to borrow money earlier and that they had gave her
11 money, that I wasn't allowed to tell the jury any of that.
12 That's how I found out she had purchased drugs and when I
13 got back, she was under the influence.

14 Q. Okay.

15 MS. GOLDBERG: All right, no further questions.

16 EXAMINATION BY THE COURT:

17 Q. You said you weren't permitted to testify about
18 certain things, but who, who prevented you?

19 A. The judge, the solicitor. They kept objecting to it.

20 Q. I see. Okay.

21 A. The judge said it was hearsay.

22 Q. Anything else?

23 A. No, sir.

24 THE COURT: All right, you may step down.

25 (THE WITNESS EXITS THE STAND.)

J. KIRINCICH - DIRECT EXAMINATION BY MS. GOLDBERG

38

1 MS. GOLDBERG: At this time, applicant would call
2 Jason Kirincich.

3 JASON KIRINCICH, BEING DULY SWORN,
4 TESTIFIES AS FOLLOWS:

5 CLERK OF COURT: Please have a seat there, sir.
6 Please spell your last name.

7 WITNESS: My first name's Jason, last name's
8 Kirincich, K-i-r-i-n-c-i-c-h.

9 DIRECT EXAMINATION BY MS. GOLDBERG:

10 Q. Mr. Kirincich, where are you currently employed?

11 A. The Kershaw County Public Defender's Office.

12 Q. What -- how long have you worked there?

13 A. Since 2007.

14 Q. Do you remember approximately when you started
15 representing Mr. Branham?

16 A. It was a probably April of 2011. Might have been
17 earlier, might have been a little later, so March to May,
18 but I would say April.

19 Q. Were you familiar with this case before that time?

20 A. Not factually. I knew who Mr. Branham was. He had
21 written a letter to me at one point. I may have seen him
22 in passing at the jail or in the courtroom.

23 Q. This wasn't one of the cases where you started out as
24 second seat and then took over?

25 A. No.

1 Q. Tell us a little bit, just to kind of help the court
2 and the judge, just tell us a little bit factually about
3 the case and the background when you got it, what the
4 allegations were.

5 A. The allegation was that Mr. Branham was living with
6 Ms. Scott and a, a number of children. I believe she has
7 several children. I don't know if they have any in common
8 on Road over in Elgin, which is in Kershaw County.

9 Allegation was that Ms. Scott got up in the middle of
10 the night. I, I don't remember the reason why, but she got
11 up in the middle of the night. She said she saw Mr.
12 Branham on top of the child in the hallway and stopped him
13 from doing whatever she saw. I believe law enforcement was
14 called that night, and I think those statements were
15 referenced by Mr. Mitchell when he was talking to Mr.
16 Branham.

17 Q. Do you -- did you meet with Mr. Branham in jail in
18 preparation for this case?

19 A. Yes.

20 Q. Do you have any idea how many times you met with him?

21 A. It was definitely more than one time. I would say I
22 probably met with him numerous times the week before, but I
23 don't have an exact number.

24 Q. Did you help, help him prepare a defense for this
25 case?

1 A. Yes. We had talked. He had given me witness names of
2 people that he thought might be helpful. Obviously this
3 had happened in the early-morning hours, late-night hours.
4 Excuse me. The only witnesses there on the scene would
5 have been the child, Mr. Branham, and, and Jessica, but we
6 had discussed calling -- I think he had a friend Rachel.
7 His parents were notified that they could be on the witness
8 list, several people that he wanted called as basically
9 character witnesses.

10 Q. What defense did you plan for this case?

11 A. Talking with Mr. Branham, he had told me about the
12 incident that happened at the school. I believe the
13 father's brother's name is Mark. I could be wrong on that.
14 That Mark had abused the children. There was an issue with
15 the child's grandmother really having a deep dislike for
16 Mr. Branham. He believed that part of the coaching was
17 coming from the child's grandmother. Ms. Scott had the
18 issue with Mr. Branham about the drugs; they were arguing
19 about that. So, strategy wise, talking with him, it was
20 going to be that they were lying to the -- like they had
21 done in the past to get him out of the picture because Ms.
22 Scott was going to lose her kids, and I guess they didn't
23 want to expose her drug use.

24 Q. So, one of your plans in the defense here was to
25 allege coaching?

1 A. That's right.

2 MS. GOLDBERG: Beg the court's indulgence.

3 Q. All right, you have your transcript with you?

4 A. Yes, ma'am.

5 Q. All right, if you will look on page 64 of that
6 transcript?

7 A. Yes, ma'am, I'm there.

8 Q. All right, if you'll follow with me lines 12 through
9 19, just briefly look at that.

10 MR. MITCHELL: What's that page number?

11 MS. GOLDBERG: 64.

12 BY MS. GOLDBERG:

13 Q. Now, I'll state for the record this testimony on page
14 64, this is an in-camera pretrial hearing of Ms. Elliott.
15 This is not before the jury.

16 A. Okay.

17 Q. Based on the record. This is where you first start
18 mentioning other siblings and the history here. Do you see
19 that?

20 A. 12 through 19?

21 Q. Yes.

22 A. Yes, ma'am.

23 Q. Mentioning other siblings?

24 A. Yes.

25 Q. Prior issues, and then the court mentions there:

1 You can ask about that if you wish, but I think
2 that's clearly not a part of this case.

3 Is that right?

4 A. That's right.

5 Q. Okay. At no time during the pretrial hearings in this
6 case -- I'll ask -- that's not there. At any time during
7 the pretrial hearings in this case, did you ask the court
8 for any kind of instructional ruling or order as far as
9 your ability to get into past events and whether there was
10 evidence of past coaching?

11 A. I don't remember that, and if it's not in the
12 transcript, then no.

13 Q. From what the court said just based on that one
14 question alone, it appears that the court was already
15 inclined to not permit other allegations unrelated to this
16 case, correct?

17 A. I think looking back at line 17 ---

18 Q. Yes.

19 A. --- specifically. Yeah, that's exactly what Judge
20 Newman was probably intimating.

21 Q. So during the pretrial hearings, you had a reason to
22 understand that the court may now allow that path of
23 testimony?

24 A. Yes, ma'am.

25 THE COURT: Ms. Goldberg.

1 MS. GOLDBERG: Yes, sir.

2 THE COURT: Excuse me for interrupting but ---

3 MS. GOLDBERG: No. Please.

4 THE COURT: --- that's not what, that's not what the
5 transcript reflects.

6 MS. GOLDBERG: Well, I'm going to get -- that it ---

7 THE COURT: The judge said go ahead if you want to.

8 MS. GOLDBERG: He -- correct. He said go ahead if you
9 want because this is pretrial, and then he just says but
10 it's: Clearly not a part of this case. But I'm going to
11 direct you now to what did happen in front of the jury.

12 THE COURT: Okay.

13 MS. GOLDBERG: And that is page 157 and 158.

14 BY MS. GOLDBERG:

15 Q. All right, on this page 157, line 20, and this is in
16 front of the jury: Ms. Scott, has anybody ever made a false
17 allegation against Mr. Branham in your family? She said:
18 As in? And you said: A false allegation of sexual abuse.
19 Those are your questions, correct?

20 A. Yeah. Looking back at line 5, I'm the one asking the
21 questions, that's correct.

22 Q. Okay, and those objections were sustained?

23 A. Yes, ma'am.

24 Q. After this portion of the testimony in front of the
25 jury, did several conversations take place thereafter about

1 whether that information was admissible or not?

2 A. I, I don't, I don't recall.

3 Q. From your memory, not from looking at particular --
4 but do you remember making those arguments about the
5 admissibility of coaching testimony?

6 A. I, I don't recall.

7 Q. But you will agree that at this point in time, the
8 jury, the jury is aware that you asked a question about
9 whether or not there's been another false allegation made,
10 correct?

11 A. Correct.

12 Q. And the jury doesn't know the answer to any of that?
13 They're not allowed to hear the answer to that?

14 A. Unless it's somewhere else, I mean, because Judge
15 Newman sustained the objection from the state. Then, then
16 -- that's right, they did not learn the answer to that.

17 Q. Jury would've never known about the possibility of a
18 sexual allegation without -- if you hadn't brought it up.
19 Is that right?

20 A. I'm sorry. I wasn't -- repeat your question.

21 Q. That's fine. The jury ---

22 A. Jury ---

23 Q. --- would have never known that there was a second
24 allegation ---

25 A. An additional allegation.

1 Q. --- if you hadn't asked that, an additional
2 allegation. Is that right?

3 A. I would agree with that, yes.

4 Q. And the jury never found out that it was actually
5 unfounded?

6 A. Again, I don't, I don't recall, but I, I imagine with
7 Judge Newman sustaining the objection, it was not brought
8 up again.

9 Q. Now at Mr. Branham's trial, a forensic interviewer
10 testified. Is that right?

11 A. Yes, ma'am.

12 Q. That begins on page 218 of the transcript, and this is
13 Debbie Elliott.

14 A. I'm there.

15 Q. All right. Ms. Elliott was ultimately offered as an
16 expert in forensic interviewing and child abuse assessment
17 -- that's actually on page 220 -- without objection by you.
18 Why didn't you object to her being offered as an expert?

19 A. You know, now we can definitely say it's a mistake. I
20 should have. At the time -- this is all pre *Kromah*.

21 Specifically in this case, I, I don't remember. I don't
22 remember if I had been through another case and a witness
23 had been offered as an expert without objection. I don't
24 remember why at this time, but clearly a mistake now.

25 Q. Was there any trial strategy that it was based on?

1 A. No, absolutely not.

2 Q. Throughout her testimony -- she testified for quite a
3 while, lengthy testimony. Is that right?

4 A. I, I don't remember.

5 Q. You don't remember? That's fair, and she did testify
6 in -- to what the interview -- the process of an interview,
7 what efforts are made to ensure children are telling truth
8 and lies. Do you recall that?

9 A. I don't, but if you have it in the record, I can, I
10 can look at it. Might...

11 (A PAUSE.)

12 A. Ms. Goldberg, to answer your question, I've looked at
13 the record. It looks like the bottom of page 224 she talks
14 about the difference between the truth and a lie and the
15 competency exercise that we do with children to assess
16 that.

17 Q. All right, here we go. All right, we'll go through
18 her testimony. I'll take you back to 221. If you look
19 generally at that page, she describes how the interview is
20 done in a child-friendly setting. Line 15 says:

21 Geared towards gathering information, giving the
22 child tools that are developmentally appropriate
23 in order for the child to disclose or tell what's
24 happened to them or if anything's happened to
25 them in a way that's safe for them so that they

1 know ---

2 Line 21.

3 --- where it's stressed to them they need to tell
4 the truth.

5 No objection there?

6 A. No, ma'am, no objection.

7 Q. And then it further goes on:

8 The rules of the room are explained to them, like
9 if you don't know an answer, just tell me you
10 don't know. Don't make up something.

11 You didn't generally object to that description and
12 emphasis on truth?

13 A. No, ma'am, I did not.

14 Q. Page 223, I'm going to skip over some of these. I'll
15 do the page 224, line 22:

16 And also about the truth and a lie and take --
17 I'm talking, asking children to tell me the truth
18 but also have to elicit from whether they
19 understand what that means, if they, if they
20 understand what the truth means and the
21 difference between truth and a lie and what those
22 consequences are, and we have the truth/lie
23 competency exercise that we do.

24 She continues. That's all on that page. No objection
25 to that. Is there any strategic reason why there's no

1 objection to any of this?

2 A. No strategic reason and no objections.

3 Q. Any other reason for no objections to any of this?

4 A. No, ma'am.

5 Q. Later she discusses, generally speaking, she discusses
6 a lot of psychological theories about children: child abuse
7 accommodation syndrome, delayed, delayed disclosure. She
8 wasn't qualified as a psychiatrist, psychologist, was she?

9 A. I'd have to go back and look, but what you tell me is
10 no, she was not qualified as that.

11 Q. Any reason that you didn't object to that type of
12 testimony?

13 A. No, ma'am.

14 Q. Page 231, lines -- beginning on line 5:

15 When I brought her in, I went over the rules of
16 the room and most importantly stressed to her the
17 need to tell me the truth about everything, and I
18 conducted the truth/lie competency exercise with
19 her, and she completed it and answered every
20 question correctly.

21 Then she continued. Basically she:

22 Determined that she understands the difference
23 between the truth and a lie and the consequences
24 of lying.

25 So, Ms. Elliott testified that she could determine

1 whether or not this child is telling the truth or lying.

2 Any -- no objection there? Any ---

3 A. No objection.

4 Q. Any reason why you didn't object to that?

5 A. No, ma'am.

6 Q. On page 232, just at the top Ms. Elliott quotes or
7 recites what the child told her happened, the facts of the
8 incident, a statement which is also in the video, the
9 statement from the victim. Any particular reason why you
10 didn't object to that prior consistent testimony --
11 statement testimony?

12 A. No, ma'am, not that I can think of that...

13 Q. Page 233, lines 23 and down: Was there anything about
14 the child's disclosure that would cause you to believe it
15 was the result of third-party influence? Next page,
16 answer: No. Question: In your expert opinion, was her
17 disclosure affected by suggestibility or coaching in any
18 way? Answer: No. Any particular reason you didn't object
19 to those?

20 A. No, ma'am.

21 Q. Page 238, line 13:

22 Ms. Elliott, in you expert opinion, based on the
23 video, based on your actual interviews with the
24 child, she gave you a, a detailed ---

25 That wasn't the actual the part.

1 MS. GOLDBERG: Beg the court's indulgence. Looking
2 for the correct line.

3 (A PAUSE.)

4 BY MS. GOLDBERG:

5 Q. End of page 239, bottom of 2 -- line 24, the solicitor
6 asks Ms. Elliott's conclusion. Ms. Elliott says:

7 My conclusion was that the child had been
8 chronically sexually abused by Bubba, George
9 Branham.

10 Any reason you did not object to that?

11 A. No. There's no reason.

12 Q. Right after that on page 240, she begins to state her
13 recommendations and that the child enter therapy, which is
14 on line 8: Have no contact with George Branham
15 specifically. Any reason you didn't object to any of this?

16 A. No reason.

17 Q. You did make the argument that the forensic video
18 should have been -- even though there's a statute that
19 provides for it, that it should not be admitted just
20 because it's inadmissible hearsay and bolstering. You made
21 that argument, right?

22 A. I, I don't remember specifically in this case, but if
23 it's in there, you can point me to it.

24 Q. But you never made those arguments regarding the
25 forensic interviewer's actual testimony?

J. KIRINCICH - DIRECT EXAMINATION BY MS. GOLDBERG

51

1 A. No, I did not.

2 Q. Should you have objected to all of that?

3 MR. MITCHELL: Objection. Calls for speculation.

4 It's not relevant what he thinks now as to what he should
5 have done.

6 THE COURT: Well, isn't any expert's opinion always in
7 hindsight?

8 MR. MITCHELL: I'm sorry?

9 THE COURT: Isn't any expert's opinion in a
10 post-conviction relief case always based upon hindsight?

11 MR. MITCHELL: Well, he's not an expert.

12 THE COURT: Why isn't he?

13 MR. MITCHELL: You can't have an expert in law on a
14 PCR. He's just testifying as a fact witnesses as to
15 his ----

16 THE COURT: Well, I understand that.

17 MR. MITCHELL: --- strategy.

18 THE COURT: But he, he can certainly, since he's the
19 trial counsel, he can render an opinion as to what he did
20 or why he did it or whether he thought it was effective or
21 ineffective.

22 MR. MITCHELL: Well, I think that's the ultimate
23 question. I don't think he can give testimony on whether
24 he was ineffective or, or effective.

25 THE COURT: Well, I understand I have to decide that,

J. KIRINCICH - DIRECT EXAMINATION BY MS. GOLDBERG

52

1 but certainly lawyers can have opinions about that. That's
2 what, that's what it's all about. You have to establish
3 professional norms, don't you?

4 MR. MITCHELL: You do.

5 THE COURT: I mean, it has to be deficient in
6 relationship to the standard of reasonable, professional
7 norms.

8 MR. MITCHELL: That's it.

9 THE COURT: Okay. Overruled.

10 BY MS. GOLDBERG:

11 Q. Should you have objected to these?

12 A. Ms. Goldberg, you asked me about a number of times.

13 Q. Yes, sir. That's right. Go ahead.

14 A. I would say the majority of them I would agree with
15 you right now. I should have object -- objected to them
16 and I can see that, that I should have objected to them at
17 the time.

18 Q. Generally speaking, our, our case law and our court
19 rules regarding not allowing one witness to bolster the
20 testimony of another witness, those have been around since
21 you've become a lawyer. Is that true?

22 A. That's correct.

23 Q. And the rules that one witness can't vouch for the
24 veracity of another witness, those have been around since
25 you became a lawyer?

1 A. Correct.

2 Q. The evidence rules regarding prior consistent
3 statements, those have been around since you've been a
4 lawyer, is ---

5 A. Correct.

6 Q. --- that right? Did you ever consult with a medical
7 expert in this case?

8 A. I did not hire a medical expert or consult with an
9 independent expert. I did meet with Dr. Saunders to review
10 the, the photos with her prior.

11 Q. Okay, prior to trial?

12 A. Prior to trial.

13 Q. And did she basically tell you what her testimony was
14 going to be, or was the conversation different than that?
15 What was the conversation about?

16 A. I don't remember the specifics of the conversation,
17 but she, she told me what her testimony was going to be.

18 Q. So you could anticipate it?

19 A. Right.

20 Q. Any particular reason why you never consulted an
21 independent medical expert in this matter?

22 A. Not that I can recall. I, I never asked for a medical
23 expert. I asked for another asked expert and it was
24 denied.

25 Q. Do you know why that was?

1 A. Judge Newman, who tried the case, was also our chief
2 administrative judge at the time. I made an *ex parte*
3 motion for a psychosexual examination for Mr. Branham.
4 Judge Newman denied it with the explanation that in cases
5 such as these, the defense can continue to hire every
6 expert that the state hires, and we're just going to find
7 one that has a different opinion.

8 Q. I'm, I'm sorry, just -- I didn't follow that. Go
9 ahead.

10 A. For each expert that the state has, and, and I'm
11 trying to remember exactly what Judge said, so I apologize.
12 It was denied because for each expert that the state has,
13 if the defense was to hire an expert, it would just be --
14 we'd find someone who just said something different than
15 what the state expert said. At the time, that was his, his
16 reasoning for denying the psychosexual examination through
17 -- Dr. Mackie or McKie is who we, we attempted to hire.

18 Q. There were some medical records offered in evidence in
19 this case. Do you recall that?

20 A. I recall that they were, they were entered. I don't
21 recall what they are.

22 MS. GOLDBERG: Beg the court's indulgence.

23 (A PAUSE.)

24 BY MS. GOLDBERG:

25 Q. I'm going to hand you what was previously marked as

1 Applicant's 1 and 2 and agreed to the state that they'd be
2 admissible as exhibits. Do those appear to you to be the
3 documents that were entered into evidence during trial?

4 A. If I can have just a moment to look at them?

5 (A PAUSE.)

6 A. Ms. Goldberg, I don't remember if these were the ones
7 that were entered in. I see that Dr. Connell was the
8 emergency room physician that saw the child, and this looks
9 like the sexual assault examination protocol. I mean, I
10 would say that those are the ones because they're relevant
11 to this case. I remember Dr. Connell.

12 Q. And they're marked as exhibits?

13 A. Correct.

14 Q. From the trial? Just generally, if I were to say that
15 the transcript reflects that there were no objections made
16 to those records being entered into evidence, would you
17 have any reason to disagree with that?

18 A. No, ma'am.

19 Q. Any recollection as to why there was no objection to
20 those?

21 A. No, ma'am.

22 Q. On page 323, all right, I'm going to start by reading
23 with line 1. This is Dr. Saunders's testimony. Well, I'm
24 starting with line 2:

25 Child and father reported that on at least two

1 occasions, she had presented to the emergency
2 room with vaginal bleeding, painful urination, so
3 we know something is going on. It was thought to
4 be a urinary tract infection, but indeed when
5 they cultured the urine, which is the most
6 definitive and specific test for the urinary
7 tract infection, indeed there was no infection
8 present.

9 Dr. Saunders wasn't the doctor on any of these prior
10 cases where the child went to the hospital, correct?

11 A. Which prior cases when she went? I mean, I, I ---

12 Q. The one she is referring to where there were cultures
13 from the UTIs. She's referring to reviewing the records.
14 Is that right?

15 A. I don't remember, but that was not Dr. Saunders's job
16 to see this child beforehand. So, I would agree with you.

17 Q. Further, she's saying that this information came from
18 the child and the father, possibly in conjunction with the
19 medical records.

20 A. I'm sorry, just reading that one specific paragraph,
21 I, I don't know the context of what she was, what she was
22 referring to.

23 Q. Was, to your knowledge, was this anything she had
24 personal knowledge about?

25 A. To my knowledge, no, she would not have personal

1 knowledge of it.

2 Q. It appears to be hearsay?

3 A. Yes.

4 Q. Any reason there wasn't an objection to that?

5 A. No, ma'am.

6 Q. Back to 135, page 135 and 136, the same topic -- or,
7 actually, this is page 136, lines 8 through 13, and the
8 mother of the child testified:

9 We took her to the doctor a lot. She kept
10 getting urinary tract infections. The doctor
11 would give her an antibiotic.

12 So, she's testifying as to what doctors had told her
13 and what doctors had diagnosed and prescribed. Is that
14 right?

15 A. That, that looks like the child's mother is testifying
16 about taking her to the doctor.

17 Q. Right, and the -- what the doctor told her was going
18 on?

19 A. Correct.

20 Q. Any -- would you consider that to be hearsay?

21 A. Again, in the context of the questioning, I, I, I
22 don't, I don't know, you just, from just looking at this
23 one paragraph now.

24 Q. Okay.

25 A. But whenever she says what the doctor told us, you

1 could say that alone would be hearsay.

2 Q. All right. Page 314. That starts on 313. I
3 apologize. If you'll look on 313, beginning on line 20
4 going through the next page, the rest of that paragraph,
5 just go ahead and look at that real quick.

6 (A PAUSE.)

7 A. Yes, ma'am. I read that paragraph.

8 Q. Okay. Dr. Saunders is testifying about the history
9 that was provided to her by the child's father, Mark Scott,
10 right?

11 A. That's right.

12 Q. Mark Scott didn't testify in this case at all, did he?

13 A. I don't remember him testifying, no.

14 Q. Okay. Would this all be hearsay?

15 A. Yes, ma'am.

16 Q. Any reason, though, there was no objection there?

17 A. No, ma'am, there's no reason for it.

18 Q. Do we even know where Mark Scott got this information,
19 whether it was from the child, the mom, the grandmom?

20 A. Even looking at that statement -- I mean, that
21 paragraph I wouldn't know.

22 Q. All right, and then when you finally put up a case,
23 the defendant testified. Is that right?

24 A. Yes, ma'am.

25 Q. Look at 4 -- if you'd look at 401 and 402. I'll give

1 you a minute to read the recross by Ms. Berry.

2 (A PAUSE.)

3 A. Yes, ma'am. I've read it.

4 Q. Is there any reason you didn't object pitting the
5 witnesses in this situation?

6 A. No, ma'am.

7 Q. The state directly asks the defendant whether or not
8 other witnesses, including the victim, are liars -- lying.
9 Is that correct?

10 A. That's correct.

11 Q. All right, and no objection?

12 A. No objection.

13 Q. And if I said that in the original cross-examination
14 by Ms. Berry there were other incidents and there was no
15 objection to those, would you recall any reason for not
16 objecting?

17 A. No, ma'am.

18 Q. Now, in the charges to the jury at the end of the
19 case, there was a reference made to the statute that exists
20 regarding sexual assault cases where the victim does not
21 have to be corroborated. Are you familiar with what I'm
22 talking about?

23 A. I am.

24 Q. That statute?

25 A. Yes.

J. KIRINCICH - DIRECT EXAMINATION BY MS. GOLDBERG

60

1 Q. Okay. There's no objection in the transcript
2 regarding that. Is there any particular reason why you
3 didn't object to that as part of the jury instructions?

4 A. No, there's no reason.

5 Q. After the trial was over, the jury sent several notes.
6 Is that right?

7 A. I don't remember that, but that happens a lot.

8 Q. Okay. All right. One of them, and the transcript
9 shows that they requested to ask -- to watch the forensic
10 video again. Do you remember that in this case?

11 A. I do not.

12 Q. Okay. Do you remember how or by what mechanism they
13 watched the video?

14 A. I do not remember.

15 Q. Okay. Any particular reason why you didn't object to
16 their watching the video again?

17 A. No, ma'am. No.

18 MS. GOLDBERG: No further questions.

19 THE COURT: We need to take a break before you get
20 started? How long you think it will be?

21 MR. MITCHELL: I'm sorry?

22 THE COURT: I said do we need to take a short break
23 before you get started? How long you intend to be?

24 MR. MITCHELL: I think probably no more than twenty
25 minutes, thirty minutes. I wouldn't mind taking a quick

1 break, though.

2 THE COURT: All right, let's take a break. Let's take
3 fifteen minutes.

4 You can step down, but don't discuss your testimony
5 during the break.

6 (OFF THE RECORD.)

7 MR. MITCHELL: All right, may it please the court?

8 CROSS-EXAMINATION BY MR. MITCHELL:

9 Q. Good afternoon, Mr. Kirincich.

10 A. Good afternoon.

11 Q. How are you?

12 A. Doing well. Thank you.

13 Q. All right, thanks for being here with us today. Let's
14 see. All right, so going into the trial, what would you --
15 how would you characterize the overall defense strategy?

16 What did, what did you hope to get in front of the jury?

17 A. That starting with Ms. Scott, Ms. Jessica Scott, they
18 were lying and the, the child had been coached. I believe
19 the main person we thought was doing the coaching was the
20 maternal grandmother, whose name I don't recall.

21 Q. She testified at trial as well, right?

22 A. The maternal grandmother?

23 Q. Is that right?

24 A. I, I don't remember.

25 Q. All right. So, Mr. Branham gave a -- or he said

1 something along the lines that he was trying to help the
2 child wipe. Is that correct?

3 A. I don't, I don't know exactly where it is in the
4 transcript, but what I remember and I guess what I've seen
5 today helped to remember that. That was a statement that
6 was attributed to him through Deputy Mike Lyons, I believe.

7 Q. And that's something that you challenged, correct?

8 A. That I challenged that he made that statement?

9 Q. You challenged the admissibility of the statement.

10 A. I don't remember specifically.

11 Q. Okay.

12 A. If there was ---

13 Q. If it was in the record, then the record speaks for
14 itself.

15 A. Was there *Denno* hearing?

16 Q. I'm sorry?

17 A. I don't know if you were referring to something.

18 Q. Oh, no, I wasn't. I guess, you know, the *Denno*
19 hearing at 88 ---

20 A. Okay, that's ---

21 Q. --- where Investigator Lyons testified, I think it's
22 something along the lines of the victim had trouble
23 cleaning herself, and he had to check and make sure she did
24 a good job. Does that mesh with what you recall?

25 A. Yes.

1 Q. All right. So, there was, you know, a false
2 allegation as a result of some coaching. That was part of
3 the main defense strategy, the broad strategy. Is that
4 accurate?

5 A. Sounds accurate, yes, sir.

6 Q. And do you have a transcript up there?

7 A. Yes, sir.

8 Q. Okay. Let's turn to 185, 186.

9 A. Okay. I'm there.

10 Q. Okay, and that's -- and you were able to get out a bit
11 on these false allegations.

12 A. I'm sorry. Was that your question?

13 Q. Yes. Were, were you able to get out whether these
14 allegations, whether these previous allegations were made?

15 A. It appears from looking at page 185 of the transcript
16 I had questioned Ms. Jessica Scott, who was the child's
17 mother, about accusations, referring to them as false
18 accusations, and she answered those questions.

19 Q. Okay, and that was all in front of the jury. Is that
20 right?

21 A. Yes, sir, I'm assuming so, that this was not a
22 proffered statement or anything.

23 Q. It doesn't seem to be in-camera or anything. So,
24 that's kind of how you were able to argue in closing that,
25 first off, Ms. Scott was not credible and second off, that

1 the child had been influenced. Is that right?

2 A. Again, this case was some time ago.

3 Q. Oh, I understand.

4 A. If you have a specific reference in the transcript,
5 I'll be glad to look at it, but ---

6 Q. Okay.

7 A. --- I don't, I don't disagree with you.

8 Q. Okay. I'll move on to the statements or the forensic
9 interview with Ms. Elliott. I know you went through this
10 pretty thoroughly with Ms. Goldberg. I won't belabor the
11 point too much, but this case was tried in 2011. Is that
12 right?

13 A. Yes, sir.

14 Q. Okay, and *Kromah*, the case of *State vs. Kromah* is the
15 case most cited in support of these arguments that some of
16 these statements should not come in. Is that right?

17 A. Yes.

18 Q. So like you testified, this was all pre *Kromah*. Is
19 that right?

20 A. Yes, sir

21 Q. Okay. What, what kind of -- had you had much
22 experience with CSC cases before this?

23 A. I'm trying to remember one, and I don't remember doing
24 any of these on my own prior to this. I remember sitting
25 in court with someone else during a...

1 Q. Okay.

2 A. Might not have been a CSC with a minor. It might have
3 just been a CSC.

4 Q. Okay. Well, have you dealt with any cases where there
5 have been interviews done ---

6 A. Yes.

7 Q. --- on children before?

8 A. Yes.

9 Q. So in 2011, did the state kind of consistently offer
10 these forensic interviewers as experts?

11 A. Across the board statewide?

12 Q. Right, or in, just in, in your experience, had you
13 seen that?

14 A. Yes.

15 Q. So, the state was offering these interviewers as
16 experts in forensic interviewing and family dynamics and
17 whatnot, right?

18 A. Definitely in the forensic interviewing of children.

19 Q. The family dynamics may be how they do it nowadays.
20 So in your experience with that, had there been much
21 success in arguing this type of testimony wasn't proper,
22 and by type of testimony, I mean bolstering of the child
23 interviewee?

24 A. From what I remember, pre *Kromah*, no, those, those
25 challenges were not often successful.

1 Q. So, the state was doing this a lot. They were
2 offering these people and this testimony was getting before
3 a jury. Is that, is that fair to say?

4 A. Yes.

5 Q. Now *Kromah*, it kind of sets out -- I don't know how
6 familiar you are with *Kromah* now, but it kind of sets out I
7 think in those, sets out a list of do nots and a list of --
8 or a couple things that are permissible. Are you familiar
9 with that generally?

10 A. Generally.

11 Q. Okay. Now, in the list of things that are proper, the
12 interviewer can describe the child's behavior and demeanor.
13 Is that consistent with what you know about that?

14 A. I don't, I don't disagree with you, but I, I don't, I
15 don't have the case in front of me and I don't have the
16 list.

17 Q. So, Judge Newman presided over this case?

18 A. Yes, sir.

19 Q. And he was the chief admin like you said, right?

20 A. Yes, sir.

21 Q. Okay. So, he would have heard all the *ex parte*
22 motions for funding at the time. Is that right?

23 A. Whenever I had the case. I, I don't remember if he
24 was chief admin whenever Mr. Riley had the case.

25 Q. Okay. So, your, in your representation of Mr.

1 Branham, you would deal with Judge Newman leading up this
2 trial, and then he actually presided over this one, right?

3 A. That's correct. We, we made one motion in front of
4 Judge Newman, who set the case for trial.

5 Q. What, what motion was that?

6 A. I don't remember how long Mr. Branham had been in
7 jail. I, I don't know if he had had a motion to even set
8 his bond. When I got the case, we did a motion for either
9 bond setting or bond reduction, and Judge Newman I want to
10 say ordered a PR bond if the case was not tried by the end
11 of August 2011.

12 Q. Okay. So, you kind of treated it as a speedy trial
13 motion?

14 A. That's correct.

15 Q. So, you were able to meet with Mr. Branham because he
16 had not yet been granted bond, right?

17 A. I don't know if he had bond or if he just couldn't
18 make bond at the time.

19 Q. Okay. So, he, he was at the jail, though?

20 A. He was at the jail.

21 Q. And you testified you did meet with him more than once
22 in anticipation of preparing for this trial, right?

23 A. Yes.

24 Q. And over -- in forming a strategy, you would base off
25 what your client tells you generally, right?

1 A. I would say each case is different. I mean, some
2 cases you can just look at the discovery, I mean, but the
3 client controls the case to a large extent. I remember
4 this case I did talk to Mr. Branham about prior
5 allegations, about coaching. I think we had requested
6 records from the school that the child attended where she
7 was a victim of abuse in the class.

8 Q. So in this case specifically, you did base your
9 strategy off of your discussions, factual discussions with
10 Mr. Branham?

11 A. Yes.

12 Q. And that's you came up with, you know, the victim had
13 been coaching -- had been coached and that there had been
14 previous false allegations, right?

15 A. Correct.

16 Q. You made an *ex parte* motion for an expert. What,
17 what, what kind of expert would you have had, if you
18 recall?

19 A. We wanted to hire Dr. Geoff McKie or Mackie to do a
20 psychosexual examination for Mr. Branham.

21 Q. What did you hope to accomplish by getting that order
22 for funding?

23 A. I hoped to accomplish so we could hire Mr. -- Dr.
24 McKie and present something to the jury that, that this was
25 not in Mr. Branham's nature, his profile.

1 Q. Just anything to mitigate his responsibility?

2 A. Yes.

3 Q. Okay. Now, moving to the issue of whether you should
4 have requested funding for a medical expert, did you have
5 any reason to believe that the child was not actually
6 abused?

7 A. I would say, I'd say yeah. I mean, based on my
8 client's statement to me. Whether she was abused or not, I
9 guess I, I, I don't know, but my client's statement was
10 firm from the first time I met him that he was not the
11 perpetrator. I believe she was abused based on his telling
12 me that she'd been abused prior to this.

13 Q. Okay. So, and part of the defense wasn't that there
14 was no abuse, right? I mean, Mr. Branham readily admitted
15 that?

16 A. Yeah. I don't know if that was brought out during the
17 trial, but that was something we had explored.

18 Q. Okay, but if he told you that he believed the child
19 was abused, there's no reason to ---

20 A. Believe that she had not been?

21 Q. Right.

22 A. I follow what you're saying. Right. Yeah, based,
23 based upon his telling me that she had been abused, I, I
24 believe that she had been abused.

25 Q. Okay, and that was consistent with, you know, pretty

1 much what every medical person that was presented at the
2 trial said at least, right?

3 A. I don't remember Dr. Connell making that, that finding
4 but I, I could be wrong.

5 Q. Right, and Dr. -- I don't know if it's Connell or
6 Connell.

7 A. Connell.

8 Q. Dr. Connell, and that's a she?

9 A. It's a he.

10 Q. He, I'm sorry. Dr. Connell's testimony, he was
11 offered as an expert in emergency, emergency and family
12 practice. Is that your recollection?

13 A. I, I don't recall. If you have the transcript page,
14 I, I can ---

15 Q. Okay, let's move to page 198.

16 A. Yes, sir, I'm there.

17 Q. Okay. So, he's testifying as to the sexual assault
18 exam, and I believe on 198 he testifies there was no
19 tearing, bruising, or bleeding.

20 A. Yeah, on line 4, Dr. Connell said:

21 There's no signs of tearing, no signs of
22 bruising, no signs of bleeding, nothing of the
23 sort.

24 Q. Okay. So, his testimony is a bit inconsistent with
25 Dr. Saunders's testimony?

1 A. That's correct.

2 Q. Okay. Then the courtroom strategy is try to exploit
3 those differences?

4 A. Yes. Dr. Connell was the first one to see the child
5 at the emergency room, I believe either the -- you know,
6 within hours of the allegation.

7 Q. Right. I think that was the night of. So, then
8 moving to, let's see, 202 on your cross-examination of Mr.
9 Connell.

10 A. Yes, sir. I'm there.

11 Q. And you were able to point out there was no signs of
12 trauma?

13 A. I'm sorry, are you asking generally or is it on that
14 page 202?

15 Q. I think it's on that page. It may be 203. Well, what
16 was your thinking there? You wanted to kind of latch on to
17 that, right? That's sort of pausing the testimony that if
18 the allegation is that the child was assaulted just hours
19 earlier, there would be at some type of physical injury
20 that night, right?

21 A. That's correct.

22 Q. So, that was before the jury that was -- you know, you
23 got him to say there was no physical injury. Well, maybe
24 not no physical injury but signs of trauma?

25 A. He says: No signs of physical injury today. At line

1 11 ---

2 Q. Okay.

3 A. --- on page 203.

4 Q. So, you were kind of able to combat Dr. Saunders's
5 testimony which comes later in the trial through Dr.
6 Connell. Is that correct?

7 A. They, they at least testify to different things.

8 Q. Moving to 345.

9 A. Yes, sir, I'm there.

10 Q. I believe there you -- this kind of goes to whether
11 there were reports of the siblings being abused. You see
12 that?

13 A. Yeah. This, this transcript is redacted, but I was
14 going to ask Dr. Saunders about -- it looks like three
15 children.

16 Q. And that was -- what was your thinking on that? What,
17 what were you trying to get out by asking those questions?

18 A. From, from reading page 345, I'd explain my
19 questioning that I was trying to get into possible
20 coaching.

21 Q. And then moving to 353, you kind of make your argument
22 to the judge after a couple of in-camera questions, and
23 then he ruled that was not admissible. Is that, is that
24 right?

25 A. 353? Sorry.

1 Q. Right. That's where you make your argument, and I
2 think Judge Newman rules on 357.

3 A. You said 3 -- 353 or 357?

4 Q. Well, I think you make your argument on 353.

5 A. Yes, sir.

6 Q. 357 I think Judge Newman denies that, right? So, you
7 did try to bring that up with Dr. Saunders, right?

8 A. Mr. Mitchell, if you'll give me a just second, I can
9 look at it and I can ---

10 Q. That's fine.

11 A. --- answer your question.

12 Q. Sure.

13 (A PAUSE.)

14 A. Yes, sir. Just quickly reading through this,
15 especially where Judge Newman is, is doing the majority of
16 the talking 354 through 357, he went back through what I
17 was trying to do but still denied it.

18 Q. As part of that jury instruction on the victim's
19 testimony does not need to be corroborated, do you believe
20 that's the correct statement of law, though?

21 A. Yes, but, but I'd like to explain.

22 Q. Sure.

23 A. I think that's the correct statement of law for any
24 case, that the testimony does not need to be corroborated.
25 So, definitely in the -- in this case it seems to place

1 certain emphasis on, on that child's testimony that doesn't
2 need to be there.

3 Q. All right, so let me go back to the forensic
4 interviewing questions. If you were to handle this case
5 today, and with the guidance of *Kromah*, would it have been
6 a little different you think?

7 A. Definitely.

8 Q. Okay, but, you know, in 2011, would you agree with me
9 that these cases and the law in this was a little different
10 and unclear?

11 A. I agree would that it was unclear as far as the
12 qualification of Ms. Elliott, I believe, in this case as an
13 expert. Some of the other things, looking back on them, I
14 should have objected to.

15 Q. Well, it's kind of twofold. Whether she's qualified
16 to be an expert would be one issue, and then whether she,
17 you know, bolstered the victim' testimony, right?

18 A. You're correct. Yes, sir.

19 Q. So in 2011, though -- I'll withdraw that.

20 MR. MITCHELL: Just a second, Your Honor. I'm sorry.

21 (A PAUSE.)

22 BY MR. MITCHELL:

23 Q. Okay. So, I guess part of the main strategy was to
24 discredit Ms. Scott, right, because she was the eyewitness,
25 the one to say that she -- you know, that testimony is not

J. KIRINCICH - CROSS-EXAMINATION BY MR. MITCHELL

75

1 credible and she has motive for inventing this story,
2 right?

3 A. Yes, sir.

4 Q. Okay. Now, her statement was particularly damaging
5 because she alleges that it is an eyewitness account of
6 what happened, right?

7 A. Correct.

8 Q. Okay, and then right after that, she calls the
9 authorities, the authorities come, and a statement made by
10 Mr. Branham was admitted that he was trying to help her
11 wipe and wanted to make sure that she had done it right.
12 And that, the state tried to use that to say he was
13 excusing what was happening, correct?

14 A. The state tried to use it. That's correct.

15 Q. Now, Mr. Branham doesn't agree with that, right? I
16 mean, it...

17 A. That's right.

18 Q. And he was able to testify to that to say I never said
19 that, right?

20 A. Right.

21 MR. MITCHELL: All right, I don't have any further
22 questions. Thank you.

23 MS. GOLDBERG: Briefly, Your Honor.

24 REDIRECT EXAMINATION BY MS. GOLDBERG:

25 Q. Mr. Kirincich, Mr. Mitchell went over with you some of

1 Mr. Connell's testimony about how there was, in his
2 opinion, no evidence of tearing, scarring, things like
3 that. Will you look with me on page 197?

4 A. I'm on 197.

5 Q. 197 lines, 11 through 15, Dr. Connell said that:

6 The examination of the introitus to the vagina
7 where the opening of the vagina appeared to be
8 dilated or widened posteriorly, which is
9 indicative of abuse or trauma or widening like
10 that that's been going on for a long time.

11 So, he did say he thought there was a medical --
12 medically, he observed a physical sign of abuse, correct?

13 A. Yes, ma'am.

14 Q. And then on page 203, lines 11 through 14.

15 A. One second. The pages are stuck together.

16 MR. MITCHELL: What's that page? I'm sorry.

17 MS. GOLDBERG: 203.

18 BY MS. GOLDBERG:

19 A. I'm there now.

20 Q. Okay, at line, starting at line 11 again, that's where
21 he clarified:

22 No physical, no signs of physical injuries today
23 but mild -- mildly widened introitus, probable
24 chronic abuse.

25 That was what his testimony actually was. Is that

1 right?

2 A. Yes, ma'am. That's what 11 and 12 says.

3 Q. So, he didn't testify that there were no physical
4 signs of abuse.

5 A. Just reading back:

6 No signs of physical injury today. Mildly
7 widened introitus. Probable, probable chronic
8 abuse.

9 MS. GOLDBERG: No further questions.

10 THE COURT: Is that it?

11 MR. MITCHELL: That's it, Your Honor.

12 THE COURT: You may step down.

13 (THE WITNESS EXITS THE STAND.)

14 THE COURT: Anything further?

15 MS. GOLDBERG: No further witnesses for applicant.

16 MR. MITCHELL: And I don't have any witnesses, Your
17 Honor.

18 THE COURT: Any statement?

19 MS. GOLDBERG: Yes, Your Honor. I will go through the
20 amended application just to make things easier for
21 everybody. I do have a decent amount of argument here.

22 First allegation in the application cite -- the
23 application -- I put in transcript numbers in the
24 application to ease -- for the court's convenience and the
25 state's convenience, and it cites to pages 135 and 136.

1 Essentially here the mom of the child testified that the
2 child's hair was falling out and a doctor had said it was
3 from stress. Also that the child kept having urinary tract
4 infections as diagnosed by a doctor. The argument -- she
5 actually said, quote: The doctor would just say it's red,
6 irritated, and not to mess with it.

7 The only argument I would make there is that those are
8 hearsay statements; the doctor's diagnosis is hearsay.
9 I'll go into the actual significance of that later.

10 Allegation B, that was to do with the defense's
11 strategy regarding coaching. There were actually two
12 strategies. I'm not sure if it was abundantly clear today,
13 but there were actually two types of coaching strategies
14 that defense counsel had. One was to bring up prior
15 allegations that the victim had made about people, and he
16 was allowed to get into that during the trial.

17 The other strategy was that defense counsel wanted to
18 get into the fact that siblings had made prior allegations
19 against Mr. Branham specifically, and those had been deemed
20 false or unfounded. The allegation here in the PCR mostly
21 stems from transcript pages 157 and 158, and that is where
22 trial counsel said: Ms. Scott, has anybody ever made a
23 false allegation against Mr. Branham in your family? She
24 said: As In? And he says: A false allegation of sexual
25 misconduct. The objection was sustained, was not allowed

1 in.

2 This was briefly mentioned in pretrial. I think it
3 was obvious at that point in time when it was briefly
4 mentioned that the court wasn't going to entertain anything
5 down this path, but it wasn't discussed any further than
6 that. Trial counsel put this out there in front of the
7 jury, so now the jury is aware that there was another
8 allegation by another person. They don't know the result;
9 they don't know it was unfounded.

10 Mr. Kirincich did do a very good job of preserving
11 this issue for appeal. He actually later proffered some
12 testimony about it outside the presence of the jury. He,
13 as Mr. Mitchell pointed out, he tried to get into it
14 several times through several witnesses. So, he did
15 preserve his argument that he wanted to go into this.

16 My problem or my allegation here is that this
17 question should not have been asked in front of the jury.
18 This entire legal question of whether or not -- of the
19 admissibility of allegations against Mr. Branham by other
20 people, that should have been addressed in pretrial outside
21 of the presence of the jury. The jury never should have
22 been aware that there was another allegation made against
23 this defendant by someone else. That is extremely
24 prejudicial. The jury found out. They don't know the
25 result; they weren't allowed to know. That is prejudicial.

1 So, the allegation is specifically to the way it was
2 handled, the fact that that was brought out in front of the
3 jury.

4 Allegation C, ineffective assistance of counsel for
5 failing to object to the qualification of witness Debbie
6 Elliott. Ms. Elliott was qualified as an expert in
7 forensic interviewing and child abuse assessment. There
8 was no objection to that. This is not proper.

9 The standard for qualification for a non-scientific
10 expert was established in 2009, which was before this case.
11 They say that the qualifications:

12 Their qualifications must be sufficient and for a
13 non-scientific expert, there must be a
14 determination that the expert's testimony will be
15 reliable.

16 That's *State vs. White*, 382 SC 265 from 2009. That
17 was the standard at the time. That was no evidence in that
18 transcript whatsoever that Ms. Elliott's testimony would be
19 reliable in any particular way.

20 Now, notably in 2015 there was a case called *State vs.*
21 *Chavis* where this question was brought up regarding a
22 forensic interviewer and the forensic interviewer was
23 Debbie Elliott, the exact same forensic interviewer we have
24 in this case. And in that case, the court held that:

25 There was insufficient evidence presented that

1 her testimony would be reliable because there was
2 no evidence that her conclusions or impressions
3 from prior interviews were accurate and,
4 therefore, the circuit court abused its
5 discretion in allowing to be an expert.

6 And there is none of that. There, there's no
7 testimony in her *voir dire* as to any -- whether her
8 opinions in past interviews that the child was credible or
9 not credible, believable. None of that was offered because
10 there is no such thing as statistics in that regard. So,
11 she should have not been qualified. There was no objection
12 made, so that would be ineffective assistance of counsel.

13 Generally *Kromah* does address why it is so
14 inappropriate for these people to be determined to be
15 experts today because essentially they're, they're
16 testifying, offering an expert opinion on the credibility
17 of others and that, by its very nature, is improper. It
18 invades the province of the jury.

19 Further, just to go into some more detail of how
20 prejudicial it is, she also testified outside the area of
21 expertise she was qualified in, she was deemed in. She
22 talked about child psychology issues, child accommodation
23 syndrome, delayed disclosure, escalation of abuse,
24 coaching, how memory functions. None of that testimony
25 should have been allowed, but she shouldn't have been an

1 expert to begin with; she shouldn't have provided any
2 opinion evidence on anything in this regard.

3 And then further, my next allegation, subsection D, is
4 that it was ineffective assistance of counsel to fail to
5 object when she offered testimony that was not limited to
6 foundational information for introduction of the videotape.
7 She, she offered information about her techniques, her
8 theories, her conclusions, her opinions, victim's
9 credibility, and the difference between a truth and a lie.

10 Now, the state when cross-examining Mr. Kirincich went
11 in a little bit into the fact that a lot of what we know
12 today is clearly inadmissible we get from *Kromah*. *Kromah*
13 was a 2013 case. But I'll keep the court in mind that in
14 the applicant's position, *Kromah* was not new law. *Kromah*
15 clarified what the law always has been.

16 *Kromah* decided several cases that came before it,
17 including *State vs. Smith*, which is from 2009 before this.
18 *State vs. Smith* says that:

19 A counsel is ineffective for failing to object to
20 hearsay testimony that was improperly
21 corroborative of the victim. The forensic
22 interviewer specifically testified the victim's
23 statement was believable and the victim had no
24 reason to not be truthful.

25 That was all clear.

1 I think that was actually 2010. I misspoke.

2 But also all of the issues that come out of *Kromah*,
3 those are all based on court rules we've always had. It's
4 bolstering. It's vouching for another individual, and to
5 go over some of the -- and I can go into detail about what
6 *Kromah* says which is what we know the law today to be. I
7 don't know if that's necessary for the court. This area of
8 law is a very hot topic; I think the court's probably very
9 familiar with it.

10 But I did go over several portions of Ms. Elliott's
11 testimony and several pages. At the beginning, she does
12 stress the type -- how the interview works, the type of
13 things that are done. Page 21 -- 221 is stressed to them
14 that they need to tell the truth and they're told not to
15 make up anything. Page 223 she said:

16 I want as clean and unbiased an interview as
17 possible, setting the stage for them to close and
18 say what happened.

19 Page 224:

20 I check the child's competency about whether or
21 not they know about the truth, difference between
22 a truth and a lie. I'm asking children to tell
23 me the truth, but I also have to elicit from the
24 child whether or not that they understand what
25 that means. If they understand what truth means

1 and the differences between a truth and a lie
2 that has consequences, and we have a truth-lie
3 competency exercise we do.

4 She later says that they -- she did that with the
5 child and she passed it successfully. Basically she's
6 passing herself off as a human lie detector who's able to
7 tell when someone is telling the truth and a lie. All of
8 this is clearly prohibited by *Kromah*, but it is clearly
9 prohibited by the rules of evidence all along.

10 I'll also say that *Kromah*, the appellate court came
11 out in 2013, but the trial occurred way before that back in
12 2011, 2012, along with all the other cases that are coming
13 up right now. All those attorneys knew to object to these
14 things back then. We submit Mr. Kirincich would -- should
15 have, too.

16 Ms. Elliott, 231 Ms. Elliott specifically said she:
17 Determined that the child understands the difference
18 between the truth and a lie. 233 asked, she's asked:

19 Was there anything about the disclosure that
20 would cause you to believe it was the result of
21 third-party influences or suggestibility or
22 coaching in any way?

23 She says: No. That's the jury's decision. 238: Was
24 there anything about the interview that gave you concern?
25 No. 238 through 240 she said verbatim: My conclusion was

1 that the child had been chronically sexually abused by
2 Bubba, George Branham.

3 How her opinion can have anything to do with the
4 actual perpetrator, I don't understand. She goes into her
5 recommendations, which are irrelevant and improper. Even -
6 - Mr. Kirincich, he doesn't object to any of this. He then
7 further cross-examines her on all of this, this testimony
8 she just said which should have been admissible. During
9 that cross-examination by Mr. Kirincich, she said on page
10 245: I felt she was telling me the truth. She said several
11 times that she found her disclosure to be credible.

12 The, the testimony is clear of the forensic
13 interviewer. Should be limited to admissibility for the
14 videotape. Then the child's statement should speak for
15 itself. All of that is inadmissible. We'd argue that was
16 ineffective assistance of counsel.

17 The next issue, issue E, regards failure to retain and
18 consult with a forensic pediatrician for a second opinion.
19 There were two medical professionals that testified at
20 trial. One was Dr. Connell, who is an emergency room
21 doctor. He had -- I think he said maybe he'd done a
22 hundred sexual exams before, had testified once in trial
23 before, very low degree of knowledge in this area. He
24 testified there was no current trauma, but he did find
25 physical evidence of essentially an effective hymen, some

1 sort of evidence of prior penetration. The other witness
2 was a nurse practitioner. She testified very specifically
3 as has already been said today.

4 However, we presented to the court today Dr. Olga
5 Rosa. She is a very experienced medical doctor in child
6 abuse pediatrics. She, in fact, heads up training for this
7 area for the state. She is extremely credible, based on
8 her qualifications. She said there is no physical evidence
9 of scarring.

10 Now, it is true that even with her testimony, a normal
11 sexual exam of a child can, can be -- can occur whether
12 there's abuse or not. So, just because there's a normal
13 exam doesn't mean there was abuse, doesn't mean there
14 wasn't abuse. What is problematic in this case is that the
15 evidence offered to the jury was that there was the
16 presence of scarring and that that showed prior abuse, and
17 that was incorrect medical evidence. And that's important
18 based on what the solicitor says in the closing argument.

19 Page 428 about credibility the solicitor says:

20 Was the victim corroborated? Does she have scar
21 tissues on her vagina? Is she missing part of
22 her hymen? Is that corroboration? We submit it
23 is.

24 On page 430 solicitor says:

25 Then you have multiple evidence for all these

1 yeast infections and urinary tract infections
2 where apparently the tests showed after they came
3 in that this wasn't really an infection.

4 Which I'll go into that more in a minute.

5 Page 431 the solicitor said:

6 The scar tissue, the scar tissue on the vagina of
7 a seven year old, I think the term is attenuated
8 hymen where it's kind of rubbed out.

9 Puts emphasis on that medical evidence that is
10 incorrect, and then page 453 solicitor says:

11 But in addition to what the victim says, her
12 injuries match. You saw the photographs. Dr.
13 Connell didn't take any photographs, yet he sees
14 her the next day and it's a widened introitus, a
15 penetrating injury. Very, very uncommon. He's
16 never seen it in nineteen years. He said this
17 widened introitus heals quickly and can revert
18 back to its same shape. He says it was chronic
19 abuse, and that's exactly what Dr. Saunders says.
20 She's seen over 8,000 children, and she says
21 there's evidence of scar tissue. She didn't
22 believe that night she was used to it. This
23 wasn't the first time. Dr. Saunders also saw an
24 injury of 1 to 2 inches inside the body, an
25 attenuated hymen that's been rubbed away. You'll

1 have the pictures in your jury room to refresh
2 your memory. That she was Tanner Stage 1, her
3 hymen, which means infant like. This is a child.
4 Children should not have these injuries. They,
5 and they say this all tends to prove that George
6 Branham did this, not just one time but multiple
7 times, and it's ongoing.

8 They put extreme evidence on, that medical evidence.
9 I submit that medical evidence was wrong but even if not,
10 it's clear that defense counsel could have consulted with
11 and retained a medical who would have a different opinion
12 that the jury could have considered. The jury not having
13 that information is prejudicial to him.

14 There is a new case, 2015, Bobby Joe Reeves, but in
15 that case it was a PCR. Trial counsel was found
16 ineffective for not having a second opinion medical expert,
17 but all they would have -- in that case both experts agreed
18 that there was physical damage. The expert that the
19 defense attorney would have hired only said that there were
20 other causes that there could have been. In this case,
21 we're showing that there's a medical expert who would say
22 there was not physical damage. It's much more egregious
23 than in Bobby Joe Reeves. That is a Court of Appeals case,
24 so I'm sure it's going to the Supreme Court at some point,
25 but that is, I believe, interesting how this is even worse,

1 and the Court of Appeals did reverse that one or did find
2 that that was ineffective.

3 Issue -- subsection 7, essentially Dr. Saunders
4 testified about hearsay information obtained from prior
5 medical records. That's when she -- on page 323 she said
6 that the father reported that on at least two occasions she
7 had presented to the emergency room with vaginal bleeding,
8 painful urination, which was hearsay, but then the doctor
9 says:

10 But indeed when they cultured the urine, which is
11 the more definitive test for urinary tract
12 infections, indeed there was no infection
13 present.

14 Later the same doctor says on page 323:

15 The significance to me, again, is that there are
16 at least two reports of vaginal bleeding in this
17 child which is presumptive urinary tract
18 infections that were never clinically documented
19 to be urinary tract infections.

20 And on page 324, she clarifies that she did review
21 those medical records herself, and the lab results show: No
22 growth on the urine cultures completed.

23 The doctor is testifying about something she had no
24 involvement with, she wasn't the doctor on. Those medical
25 records from those weren't introduced in trial. That's

1 just blatant hearsay and inappropriate evidence. She had
2 no personal knowledge about that whatsoever.

3 The reason that that's important, in some cases maybe
4 a hearsay like that might not make a difference, but in
5 this, in closing arguments the solicitor again emphasizes
6 it on page 430:

7 Then you have multiple evidence from all these
8 yeast infections and urinary tract infections
9 where apparently the test results showed after
10 they came and visited it wasn't really an
11 infection, that there was not infection.

12 They do that to try and argue that that was abuse
13 going on and not something else, but that's not actually in
14 evidence properly.

15 But also it contradicts the testimony of the victim's
16 mom, which was my first allegation, when the mom said that
17 there were multiple times they went to the doctor and she
18 was diagnosed with yeast infections. It's still hearsay
19 from the mom that it was the medical doctor's diagnosis,
20 but at least the mom was there. Dr. Saunders wasn't there
21 at all. It shouldn't have come in on either circumstance,
22 but then it also contradicted itself. Yet, the solicitor
23 used it to their -- put their own spin on it and used it to
24 try and show abuse.

25 Subsection G, that is the test -- the allegation is

1 that the defense attorney should have objected regarding
2 the testimony -- in the jury instructions, the court said
3 that there's: Testimony of an alleged victim of a criminal
4 sexual conduct case need not be corroborated.

5 There is recent case law regarding that statute that
6 does say a judge may use that. However, we are preserving
7 that here for the record for the appellate court. The only
8 difference I would put on it is that in this case, the
9 solicitor did cite that in their closing, put special
10 emphasis on it. The solicitor said:

11 We have a special statute here in South Carolina,
12 and what it says is in a sexual assault, the
13 testimony of a victim need not be corroborated.
14 Why is that? It's because you don't have a lot
15 of sexual assaults happen with witnesses.
16 Usually it's he said/she said with small
17 children, and they are the most vulnerable
18 population we have.

19 I would just argue that put undue emphasis on that. I
20 think it's an inappropriate jury instruction anyway,
21 although that's been decided, but with, with the
22 solicitor's emphasis, I think it's worth the argument.

23 Subsection H with pitting the witnesses, there are
24 several citations to this. Essentially for a large part of
25 Mr. Branham's cross-examination by the state, she

1 essentially just went over the testimony of other witnesses
2 and asked him whether or not it was true and why or why
3 not. But the most egregious account is her recross where
4 she states verbatim: So, all these people, Jessica, the
5 child, Investigator Lyons, they're all lying? Mr. Branham
6 says: Apparently. She says: Apparently? And he says: Yes,
7 ma'am. Those were the last questions the defendant was
8 allowed to say in the whole trial. Defense counsel did not
9 object at all during any of that pitting.

10 There is a case, *State vs.*, *State vs. Benning* -- *State*
11 *vs. Burgess* -- or *Burgess vs. State*. They say:

12 No matter how a question is worded, any time a
13 solicitor asks a defendant to comment on the
14 truthfulness or explain the testimony of an
15 adverse witness, the defendant is in effect being
16 pitted against the adverse witness, and that
17 argumentative questioning is improper.

18 Even in closing, they brought it out again and said on
19 page 426: When asked, when we asked him why the child would
20 make this up, he says he didn't know. That's just -- that
21 goes to the pitting.

22 Subsection I is all about prior consistent statements.
23 The medical records that were offered into evidence were --
24 are made as exhibits, were handed up to Your Honor. Those
25 medical records contain statements made by the victim.

1 They were not redacted in any form. The way you have them
2 is exactly the way that I got them from the clerk of
3 court's office aside from a new exhibit sticker. They
4 weren't redacted in any form.

5 In *State vs. Jennings*, that's a 2011 case, the court
6 found error when the -- they entered, they introduced the
7 forensic interviewer's reports because it had that prior
8 consistent statement of the child. The court talks about
9 how:

10 Improper corroboration testimony that is merely
11 cumulatively to the victim's testimony cannot be
12 harmless because it is precisely this cumulative
13 effect which enhances the devastating impact of
14 the proper corroboration.

15 Every time somebody gets out another version -- not
16 version. Even if it's the same, another instance repeating
17 what the victim originally said, it's cumulative. And by
18 nature, in this case it goes toward improper corroboration.

19 And then there are the medical records themselves
20 which either could have been objected to completely because
21 they didn't need to be offered into evidence -- the medical
22 professionals testified -- or they could have been
23 redacted.

24 And then there's testimony in the record. The mother
25 testified. The mother, the nurse, the nurse practitioner

1 all testified to what the child told them. There is an
2 exception in the rules in sexual assault cases, but it
3 needs to be limited to the victim when somebody can say
4 what the victim told them, and it's limited to time and
5 location.

6 All of these have details. The mom said the child,
7 page 125: The child said he was trying to stick his private
8 in her hole. The nurse read her report into the record,
9 went into several details on page 266, and the nurse
10 practitioner did the same thing, although that all came
11 from Mark Scott, who wasn't a witness. So, that should not
12 have been admissible under any circumstances. But again,
13 it's just that cumulative effect of all that that goes to
14 corroboration. And then the state further argued in their
15 closing that the witnesses have no reason to lie. So, when
16 everything is, is corroborated by this inadmissible prior
17 consistent statements over and over and over, it's
18 damaging.

19 Finally, I believe finally, subsection J, ineffective
20 assistance for failure to object to replay of the forensic
21 interview in the jury room. South Carolina case law as far
22 as what the jury is allowed to see or witness during
23 deliberations, there's definitely a discretionary standard
24 based on what the judge wants to allow. There's nothing
25 that specific in South Carolina on this issue. There is

1 the *State vs. Winkler* case that talks about a 911 tape.

2 Says:

3 The judge in his discretion may permit the jury
4 at their request to review in the defendant's
5 presence testimony after beginning the
6 deliberations.

7 This wasn't done in the defendant's presence. They
8 didn't watch it. The transcript shows that they were given
9 a laptop. I can't recall if it was the clerk of court's or
10 the solicitor's. They were just given it back in the jury
11 room, so it appears they may have had the ability to pause,
12 rewind, see only portions they wanted to see without seeing
13 the whole thing.

14 But there is a case, a federal case, *United States vs.*
15 *Binder*. It's an appeal from a federal conviction out of
16 Arizona, and in that one the court said: A decision to
17 replay testimony during jury deliberations ---

18 They said that:

19 Binder asserts the replay of the videotape ---

20 And that's a videotape statement ---

21 --- in the jury room during deliberations placed
22 prejudicial emphasis on the complaining witness's
23 testimony.

24 And the federal court agreed. Said:

25 Since there was no physical evidence in that

1 case ---

2 Just as there was in this one or should have been in
3 this one.

4 --- the only evidence of the acts of molestation
5 were presented through the child's videotaped
6 testimony. The defendant denied criminal
7 conduct, asserting that the children were
8 displeased with him and their charges against him
9 were vindictive. Credibility was a crucial
10 issue. Under these circumstances, the videotaped
11 testimony may have taken on great significance.
12 Allowing the jury to see and hear the children's
13 videotaped testimony a second time in the jury
14 room during deliberations unduly emphasized their
15 testimony.

16 I would just argue that there should be a similar rule
17 in South Carolina, that it does put -- they're not allowed
18 to watch anyone else's testimony all over again. It puts
19 undue emphasis on what the victim's statement is and that
20 it should not -- there was no objection made. There should
21 have been an objection made so it could be preserved for
22 appeal and ruled on. But also we would argue here that it
23 was ineffective not to object. It was prejudicial and is
24 another ground.

25 If enough -- this case is interesting because of the

1 numerous levels, the numerous prior consistent statements,
2 in addition to the forensic interviewer repeatedly being
3 able to testify, bolstering the victim, in addition with
4 the medical evidence that we argue that was not accurate
5 that was offered. I think on any one of those alone this
6 case would be sufficient for overturning it and allowing a
7 new trial. However, if any case exists out there where a
8 cumulative effect of the errors might be appropriate, this
9 is on of them. All of those things together combined show
10 that Mr. Branham received a very unfair trial and that
11 there is some question as to the reliability of the jury's
12 decision based on all of that.

13 MR. MITCHELL: Judge, in response to that, I just want
14 to start off by saying that the standard is reasonable
15 professional norms at the time and in the community
16 practice. So, you know, what's reasonable now after some
17 case law and some clarification, you know, may not have
18 been -- but what's unreasonable now, according to case law
19 and clarification, you know, could have been reasonable
20 back in 2011.

21 You know, I think a lot of this all goes to *Kromah* and
22 these recent cases that have come out. They're not that
23 recent, but the 2013 case, *Kromah*, and all of that, you
24 know, and it's -- what's important to note about those
25 opinions is that, you know, this has been litigated a lot.

1 It's been -- before 2011 -- Ms. Goldberg cites a 2009 case
2 saying that this was the case on point. But, you know --
3 and that's what *Kromah* argued as well, but it took *Kromah*
4 to get to this point to where we decide and say okay, this
5 is it. We've had it with this. This is the law. We don't
6 need any more of these inconsistent rulings by judges and
7 by, you know, defense strategy. So, I think, you know, we
8 talk a lot about how there was other case law out there,
9 but there's case law upholding these types of interviews
10 and these types of testimony as well. So, it took *Kromah*
11 to really hammer that in, and there's plenty of recent
12 cases since then reaffirming that.

13 So, you know, anything -- this case especially, I
14 think, when you look at it and it would have been tried
15 differently today. But I think the solicitor would have
16 tried it much differently today with that guidance.
17 Defense counsel also.

18 You know, and just, it's just really, you really got
19 to think about what's the reasonable norms at the time this
20 case was tried and whether there was kind of affirmative
21 authority saying that this was absolutely improper. And
22 Judge Newman, you know, he had been around a bunch of these
23 cases, and I guess I'll move to the expert now.

24 You know, as far as that goes, you know, defense
25 counsel testified that he was unable to get Judge Newman to

1 grant money for an expert as a -- psychosexual evaluation.
2 And he testified he had no reason to really question, or
3 it's our position he had no reason to question whether
4 there was abuse.

5 I mean, and that's the key point in this to me is
6 that, you know, it was a lot of this about, well, whether
7 she was abused, how bad she was abused. Mr. Branham admits
8 it in his testimony. He admits it on direct, on redirect,
9 everywhere, cross-examination of him. It's all over the
10 place. He, you know, he is part of this. He believes that
11 the victim was chronically abused.

12 That's not the defense. The defense is not, oh, she's
13 not abused. The defense is that, oh, she was abused. It
14 just wasn't me and they're making up, they're contriving
15 this story because of various motives that they have to get
16 Mr. Branham. That was the defense and you've got to base
17 your defense strategy on what you're told by your client.

18 If your client agrees that the victim has been abused,
19 I mean, it hard to put up a case saying that that's not
20 right when he's going to testify and cut right down the
21 heart of your case. So, you know, I feel like most of this
22 is really just around the extent to abuse, extent to this.
23 But this is something conceded by him from the beginning,
24 and you have to form your strategy around what he's going
25 to say.

1 You know, if he puts up -- you know, if he challenges
2 all this and then the first thing they ask in
3 cross-examination is well, you know, you think she was
4 abused? He said, well, yes, sir. It's like -- well,
5 that's ineffective. That's bad.

6 You know, crafting your strategy on what your client
7 told you, that's proper and that's what -- and, you know,
8 it's a tough case and I'll give you that. It's a tough
9 case because it's a lot of evidence against Mr. Branham.
10 It's hard to come up with an effective strategy or
11 something that's, you know, a concrete defense to this case
12 when you got an eyewitness saying that she witnessed Mr.
13 Branham sexually assaulting a three-year-old child.

14 I mean, that's powerful stuff. There's not much
15 around that. I mean, he challenged that. He challenged,
16 you know, the ID of that and challenged her on
17 cross-examination, challenged her motives, challenged her
18 credibility. He did everything he could to discredit that,
19 but that's the big piece of evidence. You know, it's the
20 eyewitness. I saw Mr. Branham assaulting my daughter, my
21 three-year-old daughter. She calls the police. The police
22 get there. Law enforcement gets there. First thing Mr.
23 Branham says while he's sitting out on the old porch
24 waiting is that, oh, well. He tries to explain himself and
25 says, oh, well, you know. I was just trying to make sure

1 she wiped correctly and was just making sure all that was
2 okay down there. That's, you know, what he says to -- you
3 know, I don't know if he's mentioning it to law enforcement
4 or to who, but he says that.

5 And that, you know, it's hard to come up with some
6 kind strategy to say, oh, she wasn't sexually assaulted
7 because that's not the point. The point is had -- there's
8 eyewitness testimony. There's a statement made by him that
9 says -- tries to excuse exactly what was happening. He, he
10 knows the allegations being made. He's trying to make an
11 excuse that, you know, oh, I was just checking that. That
12 was presented to the jury. I think that's, you know,
13 strong, strong evidence of his guilt.

14 I think you take in conjunction with the eyewitness
15 testimony the fact that she, the victim, was chronically
16 abused -- I don't think there's any testimony really to the
17 contrary of abuse. I think that's -- you know, there's
18 pretty much, you know, uncontested there. And even with
19 Mr. Branham, he, he knows that, he knows that she was being
20 abused. There's past -- they call it chronic abuse. Some
21 of these call it chronic abuse. It's because the victim
22 had been abused multiple times for an extended amount of,
23 amount of time, and that's what the state alleged. In the
24 indictment it's a year. It's a year, the time period.
25 It's not just the one night where she saw him. It's the

1 full year before that almost.

2 And sticking on that, you know, I think Dr. Rosa's
3 testimony today, I don't think -- I think it -- you would
4 actually be ineffective for calling that testimony in your
5 case in chief. If you present Dr. Rosa as an expert
6 witness in your case, she's going to say okay, well, there
7 may not be scar tissue, but what's your opinion,
8 conclusion? My conclusion is the victim was sexually
9 abused. I don't know how you get around that. I don't
10 know what probative testimony she would have given, would
11 have, would have helped the defense at all with that. You
12 know, for her to get up there and say okay, well, you know,
13 the injuries, specific injuries maybe not, but taking it as
14 a whole, yeah, she was abused and I, you know, I find it
15 was chronic abuse. I mean, I think that's -- and I keep
16 saying chronic. It may not -- she didn't characterize it
17 as that, but she did say that there was abuse. That's very
18 clear. I don't, I don't know why you'd want to present
19 that kind of evidence that would cut right against your
20 client.

21 Let's see, I'll try to just -- I'm not going through
22 these one by one. I'm just -- kind of hit the points as I
23 see them.

24 Yeah, and there was a lot of talk with Dr. Rosa that
25 -- or there was some talk that there could have been other

1 causes, and that would have been the reason to call or say
2 that, you know, this could have been caused not by sexual
3 abuse but by, you know, her doing it to herself or objects
4 or something along those lines, but that's what Dr.
5 Saunders testified to as well. Defense counsel was able to
6 get Dr. Saunders to say that this could have been done with
7 the child's own fingers. It's like is that right? Yes.
8 You know, and that's how the -- Dr. Saunders responded to
9 that question. That it could have been done, you know, as
10 not, not as just sexual abuse. It's just that something
11 had happened up there.

12 And then as far as the jury instruction, I don't think
13 there's any authority saying that's inappropriate to show a
14 piece of evidence. Again, it happens all the time in
15 cases. You show a video, show a picture, show an
16 audiotape, something. That's in Judge Newman's discretion.
17 So, I won't hit on that any more.

18 As far as the cumulative effect of things, South
19 Carolina does not recognize cumulative error analysis. I
20 think what is most binding on the state is the Fourth
21 Circuit Court of Appeals, and they flatly rejected
22 cumulative error analysis. They say that flies in the face
23 of the *Strickland* test that's been around for so long and
24 that adopting that would pretty much overrule *Strickland*,
25 which they decided not to do. So, you know, while it's not

1 been ruled on the state level -- and that's been raised
2 numerous times as a cumulative analysis -- the court's had
3 plenty of opportunity to adopt it. They have not, but the
4 Fourth Circuit has flatly rejected it in their federal
5 analysis.

6 THE COURT: Explain it to me briefly.

7 MR. MITCHELL: Yes, sir.

8 THE COURT: If you will. You're saying that -- I'm
9 not quite familiar. I'm not quite understanding your
10 argument about the cumulative effect. I mean, clearly just
11 the fact that you had numerous errors as opposed to one
12 error does not necessarily result in prejudice. But would
13 you agree or disagree that sometimes the, the, the
14 accumulation of testimony or evidence or whatever is makes
15 it prejudicial? In other words, if you have one person
16 testifying in some respect and it's error to allow it,
17 perhaps that might not be that prejudicial. But if, if
18 twenty people are allowed to testify, let's say just as an
19 example, to bolster the credibility of a trial witness,
20 that, that's, that's a, that's a cumulative effect. In
21 other words, you would agree it would have more impact
22 perhaps to a jury than would one person bolstering the
23 testimony of the witness.

24 MR. MITCHELL: That's kind of an cumulative prejudice
25 analysis.

1 THE COURT: All right.

2 MR. MITCHELL: That's, that's not *Strickland*.

3 *Strickland* is show me the error, show me the prejudice
4 resulting from that error.

5 Now, there's an argument to be made if you had done it
6 once here, that would not have flowed, resulted from that
7 error. But *Strickland* is, you know, it's a A and B. It's
8 you show me the error, show me the prejudice that resulted
9 from that one error. It's not okay, well, you know, here's
10 an error to object to inconsistent statements on four
11 witnesses. It's an error; it has to be a specific error.
12 It has to be specific as to a point in the transcript where
13 you say that's error. And you say that the error that
14 flowed from the prejudice that flowed from there, would it
15 have caused the trial to go a bit different.

16 Now, South Carolina does not recognize the cumulative
17 prejudice analysis. That was briefed probably two years
18 ago, and they dismissed it as properly granted and did not
19 rule upon that issue, but that's, that's not *Strickland*.
20 *Strickland* is very -- you know, it's failure to do one
21 thing and through that one error would have caused the
22 trial to have been different.

23 And, you know, we're not talking about a perfect trial
24 here either. You know, this isn't -- you're not entitled
25 to everything has to be perfect. You know, there's going

1 to be ---

2 THE COURT: Oh, I understand that.

3 MR. MITCHELL: No, I'm just kind of getting on my
4 soapbox about *Strickland* a little bit but, you know,
5 there's -- a lot of things can happen. I mean, you have a
6 leading question. You say, okay, ineffective for letting
7 the solicitor lead on, you know, some kind of background
8 question. I mean, that's deficiency. Then you've got to
9 prove prejudice. How does have any effect on anything?

10 So, you know, you can kind of nitpick a lot of these
11 things, I think, but you got to look at it, you know, the
12 big picture. What, what one error here would have resulted
13 in the trial being different, and I submit nothing because
14 the evidence against him -- the eyewitness testimony. The
15 jury obviously, you know, found his testimony not credible.
16 They found the eyewitness's testimony more credible, and
17 his statement on the, on the trailer, on the porch trailer
18 what they got there. The first thing he says is tries to
19 explain the situation, and I think that's very, very
20 important to this case.

21 THE COURT: Well, that's what I want to ask you about,
22 the cumulative effect. Is it your position, or is what
23 you're say the law is, is that, for instance, if, if, if it
24 were to be found that there were thirty separate individual
25 allegations of deficiency of status, that each individual

1 allegation of deficiency has to result in prejudice? It's
2 not that the thirty together result in an unfair trial.
3 Each individual allegation has to be prejudicial such that
4 the outcome is not -- I'm trying to think of the
5 terminology they use, but nevertheless it shed, it, it,
6 it ---

7 MR. MITCHELL: Reasonable probability.

8 THE COURT: Well, it would have affected the, it would
9 have affected the outcome and the outcome would have been
10 different but for each individual allegation of deficiency.

11 MR. MITCHELL: Well, it's just one allegation. So,
12 it's, it's not -- you don't take it into these twelve
13 deficiencies. You take it as the one. Which one
14 deficiency would have caused the trial to have been
15 different.

16 THE COURT: Well, I probably didn't state that very
17 well. What I said is if you had thirty different ones and,
18 you know, one you might have said, well, you know, as I
19 gave you the example before. If you have one witness that
20 says something and they might be a little bit shaky but,
21 you know, they, they contradicted or they bolstered the
22 testimony of a witness, whichever, and so that might not be
23 sufficient to change the outcome. But if you've got --
24 you've allowed thirty different people to testify to the
25 same thing and bolster the credibility of a witness or to,

1 to testify to the truthfulness or whatever, you're saying
2 that's not the standard? That doesn't -- that's not it?
3 It's got to be one of those individual, any one, but one of
4 those individual errors or, or deficiencies has to result
5 in prejudice?

6 MR. MITCHELL: And that's right.

7 THE COURT: Yeah.

8 MR. MITCHELL: It's one deficiency would have changed
9 the result of the trial. So, you know, you have to point
10 to a spot in the transcript and say, hey, that's it right
11 here. Not these fifteen instances of, you know, say
12 leading questions or something. It has to be the one
13 specific portion of testimony where the objection could
14 have been made and that if it wasn't, the result of the
15 trial would have been different. So, you've got to think
16 about one objection. He would have said I object to this
17 here. Would that have changed the results of the trial?
18 There is no cumulative effect or cumulative -- see, it's
19 kind of, it's kind of getting on both of us. Cumulative
20 error analysis and cumulative prejudice analysis, so you're
21 kind of starting with prejudice.

22 THE COURT: Well, I agree that cumulative -- well, I,
23 I haven't thought about this much, but I would tend to
24 agree with you that cumulative error doesn't really matter.
25 I mean, you can have plenty of errors in a trial. It

1 doesn't affect the fundamental fairness of it, but if the
2 cumulative nature of the errors results in, in prejudice,
3 causes prejudice, then that would -- that does deny a
4 fundamentally fair trial and that, seems to me, would
5 require a retrial, but you're saying that's not so?

6 MR. MITCHELL: Well, I'm saying -- and I'm not quite
7 sure I'm totally following you, but kind of jump back to
8 what you were saying before.

9 There's kind of two sets of analysis. Cumulative
10 prejudice analysis, you say that, you know, oh, this would
11 have -- you know, these specific instances are prejudice
12 because of an error. There's a cumulative error analysis
13 to where, you know, you say these ten errors give you one
14 set of -- you know, these -- combined effect of these
15 errors.

16 THE COURT: Right.

17 MR. MITCHELL: Which I think is what we have here.
18 So, I think we're looking at cumulative error. You're
19 saying cumulative error. You're saying here's an error,
20 here's an error, here's an error, here's an errors. You
21 know, the cumulative effect of these errors are these
22 inconsistent -- incon -- or consistent statements would
23 have changed the result of the trial.

24 You can't point to a place in here where you say one
25 spot right here would change the result and that's, that is

1 the law. It's not ---

2 THE COURT: Well, that's what I mean.

3 MR. MITCHELL: Right. So, and I think, you know, more
4 applicable here is the cumulative error, cumulative
5 prejudice, but it is an open question. You know, they say
6 that in multiple cases. There's been, you know, a lot of
7 ---

8 THE COURT: They say what in multiple cases?

9 MR. MITCHELL: In -- there's cases out there that say
10 it's a -- well, this is -- applicants like to raise, they
11 raise this a lot on appeal to say that, you know -- in
12 South Carolina, there's one case the Supreme Court said
13 it's an open question involved whether we recognize
14 cumulative error analysis.

15 THE COURT: What?

16 MR. MITCHELL: It's -- but ---

17 THE COURT: I may be mistaken, but I, I seem to recall
18 a case where I think Justice Pleicones does recognize
19 cumulative error.

20 MR. MITCHELL: No. I'm ---

21 THE COURT: Or, or his, or has stated it's the very
22 cumulative nature of the errors that causes the prejudice.

23 MR. MITCHELL: Well, I mean, that may be something
24 that ---

25 THE COURT: That may be Hearn's statement.

1 MR. MITCHELL: --- a concurrence. Well, she's maybe
2 kind of famous for it.

3 THE COURT: Do what now?

4 MR. MITCHELL: I said if -- that may be in one of his
5 concurrences that he's kind of famous for, but that's,
6 that's not the ---

7 THE COURT: Concurrences or dissents?

8 MR. MITCHELL: Well, again, I like Justice Pleicones,
9 so concurrences. But it is -- you know, that's not been
10 recognized. The Fourth Circuit's flatly rejected it, so
11 I'll tell you that. I think that's the most applicable
12 law. The Fourth Circuit says no. You got to point to one
13 thing, and that's what *Strickland* is all about. You really
14 get into *Strickland*, it's point to me this one spot where
15 you can say this would have changed the result of trial.
16 And I think here you don't have that.

17 You need a -- I'm basing most of my argument on
18 prejudice, and I really don't think you change the result
19 of the trial because of the evidence. I think that's my
20 most important point is that, you know, you get to this --
21 you get a lot of this stuff. There's a lot in there.
22 There's a lot being alleged, but I don't think any of this
23 really reaches the point where you say, okay, this one
24 statement, you know, this statement here, that would have
25 changed the result of the trial.

1 And I think that's have -- all I have. Let me run
2 through it one more time, if you don't mind.

3 (A PAUSE.)

4 MR. MITCHELL: Yeah, and just to the expert thing, you
5 know, counsel is not required to get an expert any time,
6 you know, there's another expert. It doesn't have to be a
7 battle of the experts. He -- you know, I think defense
8 counsel adequately handled the experts that he had, was
9 able to get favorable testimony from them. Got Dr. Connell
10 to say there was no physical -- he may not have said this
11 the way Ms. Goldberg read it either. There was no physical
12 abuse or something along those lines. So, that's in here.
13 He got the doctor to say that. You know, the state came
14 back on redirect and clarified a little bit, but he was
15 able to get favorable testimony there.

16 My point on that is that you do not have to get an
17 expert because the state has an expert. It doesn't have to
18 be a battle of experts, you know. He had different
19 strategies and the strategy in not calling an expert is --
20 it doesn't matter. We admit that she was abused. Mr.
21 Branham admits that she was abused. That's not the issue.
22 So, I think that's the most important part on the expert is
23 that that's just not an issue. It's just an issue Mr.
24 Branham perceived.

25 And, you know, just I guess back to the prejudice

1 stuff, you know, I, I really just focus on the prejudice
2 analysis that you can't show me -- you can't have -- prove
3 prejudice to show that the result would have been
4 different. I think there's a lot in this transcript.
5 There's a lot of evidence that was presented. Most
6 importantly, like I said, the eyewitness, his statement.

7 And, you know, I'd even ask you to take into
8 consideration Judge Newman's sentence. He goes through a
9 little kind of scolding Mr. Branham at the end, how he's
10 not accepted responsibility, and he has no doubt that he,
11 that he was -- that it was a fair verdict and a fair trial.
12 So, I'd ask you to take that into account as well, and then
13 the fifty years is a substantial sentence. So, I think
14 I'll leave it on that. Thanks.

15 MS. GOLDBERG: Yes, Your Honor.

16 THE COURT: Ms. Goldberg.

17 MS. GOLDBERG: I think I just have about four points,
18 one of which was the attorney general seems to keep
19 bringing up the fact that Mr. Branham said that the victim
20 had been abused before. That's not exactly true. There
21 were specific instances of things that had happened that
22 were fully brought out. The defendant testified that he
23 suspected the victim may have been abused by her father or
24 something, but he never admitted that he knew anything.
25 So, I just don't think that was a fair recitation of the

1 facts.

2 As far as Dr. Rosa, the state alleged that he didn't
3 even think her, her opinion was helpful because her main
4 conclusion was that there was abuse. I asked her to try
5 and make this clear as possible what her conclusion was and
6 what it was based on. And what she said, a medical
7 diagnosis, a medical conclusion by their nature of what
8 they do is always based on two things, a physical exam and
9 the report of the patient.

10 The physical exam in this case was normal, not
11 indicative of anything either way. The only reason for
12 that diagnosis or that conclusion would be based on the
13 opinion of the -- or the statement of the victim in this
14 case. So, I think to that extent Dr., Dr. Rosa's testimony
15 could have been limited in an actual jury trial, criminal
16 jury trial because that's what this whole issue revolves
17 around anyway is the forensic interviewer, the medical
18 experts, they're not allowed to testify as to whether or
19 not they believe the victim. And so I don't know that that
20 would have necessarily been allowed.

21 The important thing is that what her -- her expert
22 opinion medically speaking as far as physical signs,
23 physical demonstration of injury, current or past, is
24 vastly different than was offered in trial. And that is
25 important, and that's prejudicial to the defendant.

1 I also do want to point out I think you finally did
2 get to that point, but the cumulative error analysis, it is
3 an open question in South Carolina. It not is prohibited.
4 It is an open question. And appellate courts have
5 traditionally really preferred to, if a case concerns them,
6 find one of those issues they can latch on and just latch
7 onto it and not worry about the rest because the case is
8 reversed anyway. They have not wanted to address the
9 cumulative issue.

10 I think this is an appropriate case for it, but I also
11 think that some of these issues are significant enough
12 otherwise. For instance, the forensic interviewer's
13 testimony, our argument isn't so much that there were
14 several instances of bolstering and corroboration, that
15 each one of those failed objections was ineffective
16 assistance. Our argument is that her testimony should have
17 been limited as a whole to what is allowed within the law,
18 which is basically setting out the time and place of the
19 interview, who was present so that the video could be
20 introduced. There's nothing else she should have testified
21 to. So, I think that can be taken as one huge deficiency
22 in itself.

23 And the other main point the state made was that he
24 doesn't think that any of these things would have changed
25 the outcome of the trial. Mr. Mitchell specifically said

1 that the jury found, clearly found the defendant to be not
2 credible and the witness to be credible. I don't know that
3 that's true. There's a lot of evidence in the record about
4 the vic -- the mother, the witness, her drug use, the
5 interactions between her and the defendant, the prior
6 allegations by the child. It is entirely possible that at
7 the end of the day when the jury looked at this case, they
8 said I don't know what happened here. I don't know who's
9 telling the truth, but I know this seven year old has
10 scarring on her vagina, so I'm going to find him guilty.
11 That is possible.

12 So, the verdict alone does not mean that the jury
13 found the witness to be necessarily credible. They also
14 could have based that opinion alone on the doctor's
15 testimony or in conjunction with the forensic interviewer's
16 belief that she was a believable, credible child who knew
17 how to tell the truth, or on both of those things. So, I
18 do think there is a possibility that all these changes
19 would have had a much different outcome at trial.

20 THE COURT: Anything else?

21 MR. MITCHELL: Judge, if I could make one point?
22 Judge, I take issue with saying I mischaracterized the
23 facts. The question was asked did the victim disclose
24 abuse to you and Jessica. Said yes, she has. So, you
25 know, that's all I was getting at. He readily admitted

1 that he believed she had been abused and that that was
2 disclosed to him through the victim.

3 (A PAUSE.)

4 MS. GOLDBERG: And, Your Honor, the only, the only
5 response is I think that is -- what was -- to referring to
6 what was already brought out in the jury trial, that she
7 had been molested by another child at her school at one
8 time. I think that's what he was talking about there,
9 whether the record is clear in that regard.

10 THE COURT: All right, I'll review the record in the
11 case issue and issue an order.

12 (OFF THE RECORD.)

13 MR. MITCHELL: Judge, we're back on the record in
14 George Branham.

15 MS. GOLDBERG: All right, Your Honor, the attorneys in
16 this case did go back and look at this *Fareed Manigault vs.*
17 *State of South Carolina* case which was filed December 30,
18 2015. Just two very minor points that I just wanted to put
19 on the record just for -- just to make sure the record is
20 complete.

21 First of all, in Mr. Manigault's case, the underlying
22 trial that resulted in convictions was in 2007. This case
23 is basically the issue of bolstering in his case, and that
24 is essentially the issues involved in *Kromah*, as we know.
25 But again *Kromah* is not new law. It's a clarification of

1 what the law always should have been understood to be.

2 I just want to be clear that in this *Manigault* case,
3 they did -- the Court of Appeals did find that the -- it
4 was improper bolstering. They cited to *State vs. Dawkins*,
5 *State vs. Dempsey*. That's a 1989 case and 2000 case.
6 Those are well in advance of the case we have here, Mr.
7 Branham. So, those would be a basis where Mr. Kirincich
8 should have been aware that that bolstering is improper,
9 should have know the basis of an objection. He didn't need
10 to wait on *Kromah* to be established to know that. He
11 should known, and even though -- well, I'll leave that at
12 that.

13 The only other minor point I wanted to bring out, they
14 do -- the Court of Appeals did find that it was a
15 deficiency, and then they go into whether or not prejudice,
16 it's enough for prejudice. And that's why where we have
17 kind of a weird situation in this case where the cumulative
18 errors become an interesting question because in cases like
19 -- well, generally speaking when the courts look at
20 cumulative errors and whether or not that's sufficient for
21 a PCR, they're looking at cases where defendants or
22 applicants cite to several various errors in the record --
23 a missed objection here, missed objection there -- that all
24 are related and the fact that they contributed to the
25 conviction but maybe not directly related.

1 In Mr. Manigault's case, they say that the defendant's
2 theory of the case was the abuse allegations were
3 fabricated by the victim, very much similar to here. And
4 they find that the improper bolstering was prejudicial
5 because it went -- it counteracts the defendant's defense,
6 because also they say:

7 Given the lack of physical evidence, we believe
8 the testimony bolstering was critical and made a
9 difference.

10 So, for instance, in Mr. Branham's case, a court like,
11 like this one, Your Honor could say generally speaking
12 there's, there is a high degree of impermissible bolstering
13 that is clear. However, based on the trial transcript
14 alone, given the fact that there was visible injury, it's
15 not enough for prejudice. But here in this particular PCR,
16 we have evidence that physical manifestation of injury
17 should have been attacked and could have been attacked, at
18 least enough to put some -- for there to be a probable
19 doubt in the jury's mind about the existence of any
20 physical injury or not. And that's why I think Mr.
21 Branham's case is a little bit of a different case
22 regarding cumulative evidence than what courts typically
23 see in the past. It's attacking different areas, and so
24 it's hard to say now, well, the bolstering is improper, but
25 there's all this other evidence when the other evidence

1 could have been attacked also. It could have been separate
2 issues.

3 So, I just want to point that out, kind of as a
4 hypothetical, the cases that we've dealt -- the cases that
5 exist regarding cumulative errors haven't been on point,
6 haven't made a decision for a reason. Maybe it wasn't
7 improper in those, wasn't improper in those cases, but in
8 this one it kind of goes to the existence of prejudice.

9 THE COURT: Okay. Mr. Mitchell.

10 MR. MITCHELL: Well, Judge, you know, I think sticking
11 with *Manville*, *Manville*, I know that is on appeal from our
12 office. It's a Court of Appeals case; we're appealing
13 that. You know, and I think just the difference, you know,
14 said there's no physical evidence. it's kind of he
15 said/she said. That's kind of what's here, too, but you
16 add in an eyewitness. The eyewitness in this case, nothing
17 that serious in the *Manigault* case, and I'll just point
18 that part out. I don't really have anything to add on the
19 cumulative analysis. I think we got all that out earlier.

20 THE COURT: Do you know what the timeline is for the
21 handling of that appeal?

22 MR. MITCHELL: The timeline? They put them on -- for
23 petitioning from the Court of Appeals, they get on kind of
24 an expedited briefing schedule. So, probably thirty days,
25 thirty days, and then they would decide whether they'd take

1 up cert which could be, you know, a week or a year. So, I
2 think the briefs, the petitions, return petition should be
3 in by March, end of this month possibly.

4 THE COURT: All right. Thank you.

5 MS. GOLDBERG: Thank you, Your Honor.

6 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
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 THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR KERSHAW COUNTY, SOUTH CAROLINA, ON
THE 4TH DAY OF FEBRUARY, 2016.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/ELIZABETH B. HARRIS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

JUNE 25TH, 2017