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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari from Spartanburg County
Honorable J. Mark Hayes, II, Post-Conviction Relief Judge
Honorable R. Keith Kelly, Trial Judge
Appellate Case No. 2022-000434

DANIEL SPADE,

Respondent-Petitioner,

vs.

THE STATE,

Petitioner-Respondent.

**PETITIONER-RESPONDENT'S RETURN TO RESPONDENT-PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

COUNTERSTATEMENT OF ISSUES ON CERTIORARI.....2

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW6

ARGUMENT6

CONCLUSION.....25

COUNTERSTATEMENT OF ISSUES ON CERTIORARI

- I. The PCR court properly found Spade did not meet his high burden of proof in establishing constitutional ineffectiveness of counsel based on the claims raised in his petition.
 - A. The PCR court properly found Spade failed to establish counsel was ineffective for failing to object to purported bolstering and vouching of the minor victim.
 - B. The PCR court properly found Spade failed to establish counsel was ineffective for failing to present expert witnesses.
 - C. The PCR court properly found Spade failed to establish counsel was ineffective for failing to object to “truth-seeking” language in the trial court’s instructions and the State’s opening argument and for using similar language in his own opening argument.
 - D. The PCR court properly found Spade failed to establish counsel was ineffective for electing not to present the minor victim’s guardian ad litem as a fact witness during trial.
 - E. The PCR court properly found Spade failed to establish counsel was ineffective for failing to request a ruling on whether Special Prosecutor Brannon was qualified to serve as a special prosecutor pursuant to S.C. Code Ann. § 1-7-470.
 - F. The PCR court properly found Spade failed to establish counsel was ineffective for failing to argue that venue was not proper.
- II. The PCR court properly found Spade failed to establish any valid claims of prosecutorial misconduct.

STATEMENT OF THE CASE

Procedural History

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

indicted. Judge Kelly sentenced Spade to imprisonment for thirty-five years. Spade's convictions were affirmed on direct appellate review.

On July 13, 2017, Spade filed a *pro se* PCR application. Spade then retained E. Charles Grose, Jr., who filed three subsequent amendments to the application. An evidentiary hearing on this action was convened May 15, 2019, before the Honorable J. Mark Hayes, II. Spade proceeded forward on the claims from his third amended application, absent one that he expressly withdrew.¹

On May 7, 2020, the court issued a detailed Form 4 denying PCR on all grounds and instructing the State to prepare a proposed order in accordance with the Form 4. The State submitted a proposed order pursuant to the court's instructions. Spade submitted detailed objections to this proposed order. On October 8, 2020, the court issued an order of dismissal, denying the PCR action in full. Spade served a timely Rule 59(e), SCRCF motion and the State made its return in opposition to the motion. On March 29, 2021, the court convened a hearing on Spade's motion and took this motion under advisement. On November 12, 2021, the court issued an amended order, reversing its previous denial of PCR and granting Spade a new trial as to a sole issue. The State moved to reconsider this new order pursuant to Rule 59(e), SCRCF. Spade then served his return in opposition. The court summarily dismissed the State's motion to reconsider.

Summary of Facts Presented at Spade's Jury Trial

The victim's mother and Spade met at work and ultimately had a child together, the victim, who was born in September of 2006. (App. 149-51). Spade, who lived in Virginia at the time of

¹ On Spade's motion, the court issued an order requiring DSS to provide the court with a complete copy of any file or records regarding the underlying custody action involving Spade, the minor victim, and her parents (mother and adoptive father). The DSS file was hand-delivered to the court by a DSS attorney. Following in-camera reviews and a status conference with both parties and counsel for DSS, the file was first released to the parties and then ultimately made a part of the record under seal. Thereafter, the court requested the parties submit any additional memorandums on the DSS file and the issues raised at the PCR hearing, and both sides complied.

conception and birth, first saw the victim in January or February of 2007. App. 151). Sometime in the year 2007, Spade filed an action in South Carolina family court seeking visitation with the victim. (App. 151-52). Meanwhile, the victim's mother married her husband David in December 2007. (App. 151). The victim referred to David as "daddy." (App. 151). In 2008, the victim's mother and her husband filed an action in family court seeking to terminate Spade's parental rights. (App. 152-53). The action was not successful, Spade was awarded visitation with the victim, and a visitation schedule was thereafter established. (App. 153). In the summer of 2010, the victim, then almost four years old, went to Virginia for an extended visit with Spade, who lived with his fiancée and their children. (App. 154). The next two visitations took place in South Carolina in September 2010 and October 2010. (App. 155-59).

The September 2010 visit took place at a Holiday Inn Express in Spartanburg County. (App. 126-27; 157). During this visit, Spade took the victim to the hotel's pool. (App. 138-40). At one point, he took the victim into the private bathroom near the pool area and "stuck his private part in [her] mouth." (App. 138). Spade told the victim that if she "didn't do it," he would not take her home to her mother. (App. 140). Following this visit, the victim's mother noticed regressive behavioral changes in the victim. (App. 157). The victim wet herself in her car seat, which was unusual for her as she was potty-trained at that time. (App. 157-58). After having a bath, the victim started crying uncontrollably. (App. 158). She pulled away from her mother, hid herself in the corner, and wet herself again. (App. 158). The victim was unable to control herself and was almost making herself sick. (App. 158). When the victim's mother asked what was wrong, the victim said, "I don't know." (App. 158). The victim developed problems sleeping and was suddenly terrified of the dark. (App. 160). One night the victim's mother found her barricaded under a small play table in her room, asleep. (App. 161). The victim also began to complain of stomach aches and

headaches and would sometimes revert to speaking like a two-year-old. (App. 160). Sometimes she would “break down completely” and there was no consoling her. (App. 160). Sometimes she would hide behind a door and not come out for anywhere from five to thirty minutes. (App. 160). When she finally did come out, she wanted her mother to hold her. (App. 160). After the October 2010 visit with Spade, her mother decided to seek counseling for the victim. (App. 163).

That same month, the victim began counseling with Kimberly Roseborough. (App. 163-64). At the time counseling began, the victim’s mother had no idea that sexual assault was a possible issue. (App. 164). Instead, the goal of the counseling was to figure out the cause of the victim’s anxiety and to try to ease any anxiety she may have had regarding her visits with Spade. (App. 165). Following the commencement of counseling, the victim had no further in-person visits with Spade. (App. 166, lines 14-18). Also following commencement of counseling, the victim’s mother noticed an improvement in the victim’s anxiety symptoms. (App. 166).

The victim disclosed the sexual abuse to her grandmother in late March of 2011. (App. 238-39). The grandmother was in shock regarding the disclosure and waited a day or two to tell her husband about it. (App. 239-40). Her husband, the victim’s grandfather, reported the disclosure immediately to the victim’s family court guardian ad litem Alexandria Wolfe. (App. 242, lines 24-25). He also called Kimberly Roseborough, the victim’s counselor at that time, and reported the disclosure. (App. 203-204). In response, Ms. Roseborough referred the victim for a forensic interview at the Child Advocacy Center. (App. 204). The victim’s mother found out about the allegation from her parents around this time. (App. 166-67).

Tabitha Webber, then a forensic interviewer at the Child Advocacy Center, conducted forensic interviews with the victim on five different dates in April and May of 2011. (App. 247-48). During these interviews, the victim made a disclosure of sexual abuse that occurred “at a hotel

with a pool” in South Carolina.² (App. 248-49). Following the interviews, Webber made a report to law enforcement. (App. 249). The victim thereafter began counseling with Meredith Thompson-Loftis in May of 2011. (App. 259). The victim disclosed sexual abuse during the counseling sessions and provided a specific time and location. (App. 270). Although the victim started out having a variety of symptoms of anxiety, she exhibited a great deal of improvement over the course of the counseling sessions. (App. 268-70).

Spade’s parental rights were terminated in family court in November of 2012. (App. 177).

STANDARD OF REVIEW

The standard of review to be applied on PCR appeal is dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (“Under the proper standard of review, the appellate court’s ‘view’ must be limited to whether there is probative evidence to support the PCR court’s factual findings.”). When reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge’s rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

- I. The PCR court properly found Spade did not meet his high burden of proof in establishing constitutional ineffectiveness of counsel for the claims raised in his petition.**

² The victim also made several other disclosures of sexual abuse during these interviews, but only this one limited instance of sexual abuse was presented to the jury during Spade’s trial. (App. 137-40; PCR Ex. #8: Forensic Interviews).

Following a thorough evidentiary hearing and full briefing on the issues raised, the PCR court denied relief as to all of the numerous claims raised by Spade. The court then reversed its earlier denial and granted relief on a sole issue (subject to the State's current appeal). However, the court reaffirmed its prior denial of relief as to all remaining issues. Spade now challenges the denial of relief on six issues of ineffective assistance of counsel and asserts the PCR court erred. However, the record clearly established that Spade failed to meet his requisite burden of proof as to these issues and the PCR court properly denied relief. This Court should deny Spade's petition.

Standard of Review for Assessing Sixth Amendment Ineffective Assistance of Counsel Claims

The PCR court's determination Spade failed to meet his burden of establishing counsel was constitutionally ineffective for these six matters is in accordance with the recognized standard of review for PCR matters requiring Spade to meet a heavy burden of establishing both that his counsel performed in a manner that no competent attorney would have performed and that there is a reasonable probability that he would not have been convicted but for counsel's error or omission.

In every criminal case, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties

‘mistake-free.’ ” (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel’s assistance is constitutionally ineffective only when “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.” Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) (“Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.” (citation and internal quotations omitted)).

In a PCR action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel’s representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel’s deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing

“the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment” and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); see also Weaver, 137 S. Ct. at 1912 (explaining “the rules governing ineffective-assistance claims must be applied with *scrupulous care*” (emphasis added and citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Richter, 562 U.S. at 110 (instructing the proper analysis “calls for an inquiry into the *objective* reasonableness of counsel’s performance, not counsel’s subjective state of mind” (emphasis added)). When analyzing counsel’s performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (noting counsel’s strategic decisions are to be afforded “ ‘strong presumption’ of reasonableness that the defendant must overcome”). Furthermore, the reviewing court will scrutinize counsel’s performance in a highly deferential manner, will make every effort “to eliminate the distorting effects of hindsight,” and will “evaluate the conduct from counsel’s perspective at the time” in light of the then-existing circumstances. Strickland, 466 U.S. at 689. To establish counsel’s performance was deficient, the applicant must demonstrate “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 687. Thus, counsel’s performance will be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply “deviated from best practices or most common custom.” Richter, 562 U.S. at 105. “In fact, even if there is reason to think that counsel’s conduct was far

from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.” Dunn, 141 S. Ct. at 2410 (citation and internal quotation and brackets omitted).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice to be entitled to relief as “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691. In order for that burden to be met, counsel’s deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel’s unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.” Richter, 562 U.S. at 112 (emphasis added); see Strickland, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

This Court has reaffirmed the necessity of the PCR court to make specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 864 (2018) (“As we have explained, the strength of the evidence must be considered along with the specific impact of counsel’s errors.”). “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” Id. at 188, 810 S.C. at 844 (internal citations omitted).

A. The PCR court properly found Spade failed to establish counsel was ineffective for failing to object to purported bolstering and vouching of the minor victim.

Spade argues the lower court erroneously denied relief as to his claim that counsel was ineffective for failing to object to purported vouching and bolster of the victim by three State's witnesses (Roseborough, Weber, and Thompson-Loftis). The lower court clearly found that Spade did not establish any deficiency of counsel. This finding is correct based on the law and record.

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

Next, Spade asserts Roseborough and Thompson-Loftis improperly vouched for the victim's credibility. Regarding Roseborough, as Spade has repeatedly conceded, counsel objected to her testimony and the objection was *sustained*. Accordingly, any claims against Roseborough are waived. See Sloan v. Friends of Hunley, Inc., 393 S.C. 152, 159 n.3, 711 S.E.2d 895, 898 n.3 (2011) (indicating a concession allows the court to end the matter).

Regarding Thompson-Loftis, Spade asserts counsel should have objected to her testimony on how she came to treat the victim (i.e., after the victim had been seen by Weber at the Children's Advocacy Center and was referred to her for treatment upon the recommendation of Weber) because it impermissibly vouched for the victim's testimony. In support of this position, Spade cites to several cases wherein our appellate courts have found forensic interviewers improperly testified they believed the victim and argues Thompson-Loftis's testimony served no legitimate purpose other than to vouch for the victim's credibility. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) (noting a forensic interviewer should avoid statements: (1) explaining the child was told to be truthful; (2) expressing a direct opinion as to a child's veracity or tendency to tell the truth; (3) indirectly vouching for the child's believability, such as a statement the interviewer has made a "compelling finding" of abuse; (4) indicating to a jury the interviewer believes the child's allegations in the current matter; or (5) providing an opinion that the child's behavior indicated the child was telling the truth; and State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) (finding the trial court erred in allowing a forensic interview's reports into evidence where the reports state the interviewer found the child provided a compelling disclosure of abuse because the indirectly informed the jury that the interviewer believed the child was telling the truth).

Spade's argument is flawed because it wrongly labels Thompson-Loftis's testimony as improper bolstering when it was not. To an extent, all relevant evidence in some way "bolsters" the strength of the offering party's case, and a trial court may not exclude evidence that bolsters other evidence absent a constitutional, statutory or rule-based principle of law providing for exclusion. State v. Perry, 410 S.C. 191, 763 S.E.2d 603, 611 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part). "Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is

an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror.” State v. Taylor, 404 S.C. 506, 745 S.E.2d 124, 128 (Ct. App. 2013) (citations and internal quotations omitted). “Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain ‘the assessment of witness credibility . . . within the exclusive province of the jury.’” Taylor, at 514-515, 745 S.E.2d at 128 (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). Spade’s assertions Thompson-Loftis was bolstering when she testified she treated the victim—especially without actually testifying as to why she was treating victim—extends far beyond our appellate courts’ concerns as set forth in Kromah and its progeny of cases regarding obvious indirect comments on credibility extant in an expert’s opinion finding abuse occurred or finding a disclosure of abuse is “compelling.”

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

Therefore, Thompson-Loftis's testimony complied with Kromah and its progeny of cases at the time of Spade's trial. Accordingly, Thompson-Loftis's testimony was proper and counsel was not deficient for failing to object. The court's denial of this allegation was proper.

B. The PCR court properly found Spade failed to establish counsel was ineffective for failing to present expert witnesses.

Spade argues the lower court erroneously denied relief as to his claim that counsel was ineffective for failing to present expert witnesses on Spade's behalf. The lower court correctly found that counsel was not ineffective based on objectively reasonable trial strategy.

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel.” Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis omitted). “The validity of counsel's strategy is reviewed under ‘an objective standard of reasonableness.’ ” Id. (quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). The decision not to call witnesses, including expert witnesses, can be part of a reasonable trial strategy. Putnam v. State, 417 S.C. 252, 261, 789 S.E.2d 594, 599 (Ct. App. 2016). “In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” Buckson v. State, 423 S.C. 313, 320–21, 815 S.E.2d 436, 440 (citing Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011) (deferring to trial counsel's strategic considerations). “A PCR court's analysis of counsel's strategic decisions must be ‘highly deferential’ to counsel's judgment, and ‘a fair assessment of

attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.’ ” Buckson, 423 S.C. at 321, 815 S.E.2d at 440 (quoting Strickland, 466 U.S. at 689)). “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id.

Here, counsel made a sound, well-reasoned strategic decision not to expert witnesses. Spade argues first that trial counsel should have presented expert witnesses such as Dr. Lamb and Dr. Bruck to challenge the forensic interviews conducted by Weber. As discussed above, Dr. Lamb and Dr. Bruck testified in support of this allegation and the State presented Weber. All three were duly qualified as expert witnesses in various capacities pertaining to interviewing minor children for possible sexual assaults. Dr. Bruck was admitted as an expert in child abuse disclosure, forensic interview techniques, treatment of child sexual abuse victims, and suggestibility. Dr. Lamb was admitted as an expert in psychology with a specialty in child interviews. Weber, the Clinical Director and Forensic Supervisor of the Children’s Advocacy Center of Spartanburg, Cherokee, and Union Counties, was admitted as an expert in the field of child abuse assessment and treatment.

Dr. Bruck and Dr. Lamb, both of whom readily admitted they are researchers who do not routinely conduct forensic interviews with child sexual abuse victims but rather focus their research on laboratory settings, reviewed the victim’s five forensic interviews conducted by Weber in preparation for their testimony. Both of Spade’s for-hire experts were exceptionally critical of the forensic interviews and methods used by Weber to such an extent that a clear bias in favor of Spade and against Weber’s interviews and methods was apparent throughout their testimonies. For example, both of Spade’s experts often faulted Weber for either using or not using a particular method or course of action that was false, such as citing an incorrect length of some of the interviews, incorrect time of day the interviews were conducted, and failure to acknowledge many

of the things Weber did that were in line with their own best practices, such as letting the child end the interview and reinforcing that only the truth should be told during the interviews. Only reluctantly on cross-examination did either of Spade's paid experts acknowledge *any* of the positive things Weber did in her interviews.

Both of Spade's experts averred Weber's techniques were suggestive, which they opined could lead to inconsistent and unreliable reports of abuse. Both of Spade's experts gave the following examples of suggestive techniques used by Weber: the lack of open-ended questions, the use of drawings, the number and time of the interviews, and the interviewer's support of negative connotations about Spade and confirmation bias that the victim had been sexually abused. Both Dr. Lamb and Dr. Bruck testified the five forensic interviews should have been shown to the jury to highlight these inconsistencies and problems with the victim's report of abuse, even though the interviews reveal numerous allegations of sexual abuse that the jury never heard because the videos were not shown to the jury and the victim only testified to one discrete instance of abuse rather than the copious allegations made in the forensic interviews. Both of Spade's experts argued they would have testified to what they considered problematic in Weber's interviews had counsel consulted with them and both firmly believed it was a fatal flaw by counsel not to present experts such as themselves to the jury in conjunction with the interviews. It is important to note neither of these experts are lawyers or have tried a case before a jury.

The State then called Weber, who was also qualified as an expert. Unlike Spade's experts who focus on academia and research, Weber is a clinician who has conducted well over a thousand forensic interviews of children suspected to be victims of sexual assault and holds a supervisory role in the field at the Children's Advocacy Center helping to ensure other forensic interviewers adhere to best practices based on training, research, and experience. Weber testified generally as

to the techniques and methods she uses based on her own training, experience, and education. Weber then testified as to the specific methods she used while interviewing the victim in this case, who was four years old at the time of trial, and why these methods were developmentally appropriate for a child of her age and experience. Such methods include the use of drawings to describe body parts and the use of photographs to assist with location and jurisdiction concerns. During Weber's testimony, significant portions of the five forensic interviews were played, which included numerous other allegations of Spade sexually abusing the victim in various locations.

Counsel was questioned extensively about the decision not to call expert witnesses to challenge the forensic interviews. Counsel admitted he discussed calling an expert witness with Spade several times prior to trial and that Spade was eager to present an expert witness. Spade presented several emails evidencing these discussions and his strong desire that an expert witness be called in his defense. Counsel testified he researched potential expert witnesses to challenge the forensic interviews and considered the benefits and drawbacks of presenting such an expert witness. Counsel testified he ultimately did not believe an expert witness such as Dr. Bruck or Dr. Lamb would have been beneficial at trial because calling such an expert witness would have required showing the five forensic interviews to the jury, something he greatly wanted to avoid because he believed it would be devastating for the jury to see these videos where the victim describes numerous instances of sexual assault perpetrated by Spade. He elaborated he was thrilled the jury only heard one limited allegation of sexual assault at trial based on the victim's testimony rather than the numerous allegations the victim made throughout the course of the five forensic interviews. He testified he made a strategic decision not call an expert witness because he did not want the jury to hear all these allegations and he discussed this decision with Spade prior to trial.

The lower court correctly found Spade failed to meet his requisite burden of establishing counsel was deficient for failing to present an expert witness to challenge the forensic interviews. Counsel properly researched whether to call an expert witness to challenge the victim's five forensic interviews and thereafter made a sound and well-reasoned strategic decision not to present an expert. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (“[W]e find that counsel’s decision not to call an expert witness to rebut the state’s expert witness was a legitimate trial strategy.”); abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018); McLaughlin v. State, 352 S.C. 476, 483–484, 575 S.E.2d 841, 844–845 (2003) (holding that where counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance of counsel). Counsel was reasonable in his decision not to present any expert witnesses to combat the forensic interviews, as doing so would have required the five forensic interviews to be played to the jury, which would have had a devastating effect on Spade’s case due to the number of allegations of sexual abuse the victim made against Spade. By electing not to call an expert witness, counsel was artfully able to limit the allegations to a single instance of abuse and then attack that lone instance through his cross-examination of State’s witnesses in furtherance of the defense strategy that this solo allegation was false and the result of coaching by disgruntled parents who desperately wanted Spade out of their lives.

Spade cannot establish any prejudice for failing to present expert witnesses. Counsel’s assessment is correct—showing the jury the five forensic interviews of the victim would have been fatal to Spade’s case. In these interviews, the victim makes numerous allegations of sexual assault by Spade in a variety of locations. In large part because he did not present an expert witness, these forensic interviews were not played for the jury and they never heard about the myriad of abuse allegations the victim made against Spade. This was very beneficial to Spade and allowed the

defense to focus on defeating one allegation of sexual assault rather than a litany of allegations. Moreover, while Spade's expert witnesses were able to testify to some of the best practices to be used when interviewing children based on their expensive research, Spade failed to establish that he likely would have been acquitted if such expert testimony was presented.

C. The PCR court properly found Spade failed to establish counsel was ineffective for failing to object to "truth-seeking" language in the trial court's instructions and the State's opening argument and for using similar language in his own opening argument.

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

Moreover, the court correctly determined Applicant could not establish any resulting prejudice based on the record, as the jury was properly instructed as to the State's burden of proof and counsel's vigorous argument advising the jury as to the proper burden of proof. Our courts

have consistently held that any error from such type of language does not automatically require reversal and is subject to a harmlessness analysis. See Beaty, 423 S.C. at 34, 813 S.E.2d at 506 (“Although there was error here, our review of the entirety of the judge’s opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal.”). The court correctly determined there was no reasonable probability that counsel’s failure to object or his use of such language in his own argument impacted the result of the trial and denied relief. The court correctly denied relief.

D. The PCR court properly found Spade failed to establish counsel was ineffective for electing not to present the minor victim’s guardian ad litem as a fact witness during trial.

Spade next argues the lower court erred in failing to present the victim’s guardian ad litem, Alexandria Wolf, as a lay witness to provide testimony as to her interactions with the Jolleys (the victim’s parents), the victim, and Spade, as well as her involvement in the family court proceedings. Counsel testified he considered calling Wolf as a witness to discuss how the Jolleys stopped cooperating with her once the allegations were made. The court correctly rejected this claim, finding that information regarding the timing of the disclosure and the narrative that the Jolleys had coached the victim into making a false accusation to rid themselves of Spade (including specifically as related to Wolf) was already presented to the jury and rejected. The court properly found any additional information on this ground would not have resulted in a different outcome. Counsel was not ineffective for failing to present Wolf as a witness at trial.

E. The PCR court properly found Spade failed to establish counsel was ineffective for failing to request a ruling on whether Special Prosecutor Brannon was qualified to serve as a special prosecutor pursuant to S.C. Code Ann. § 1-7-470.

Spade argues trial counsel was constitutionally ineffective for failing to request a ruling whether Special Prosecutor Brannon was unqualified to serve as a special prosecutor because the

Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470. Initially, the lower court correctly found that section 1-7-470 is necessarily applicable to Spade's case, since the Seventh Circuit Solicitor appointed Brannon as a volunteer special prosecutor for the duration of one trial, rather than as a paid "assistant solicitor" as discussed in the statute. This is further illustrated by reference to sections 1-7-405 and 1-7-406 of the South Carolina Code, which appear in the same Article and clearly contemplate a full-time hired assistant solicitor and not a one-time special appointment. The case of State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986) is distinguishable because, in addition to dealing with a different statutory provision (S.C. Code § 1-7-405), the private attorney in Mattoon was appointed as a "special assistant solicitor" and had an agreement (presumably for pay) to prosecute "a series of obscenity cases" in the county.

Even if the statute was applicable, it does not require that the Governor's commission occur prior to the commencement of the service; it merely requires that the commission occur "after appointment." As noted in other contexts, it is the appointment that confers the powers and not the ministerial requirement of the commission. See State v. Griffin, 413 S.C. 258, 776 S.E.2d 87 (2015) (finding failure to comply with ministerial acts does not render deputy sheriff appointment invalid).

However, even assuming the statute did apply and the "commissioned by the Governor" requirement was not complied with prior to Brannon's service as an appointed prosecutor, Spade has utterly failed to show the required prejudice. See, e.g., State v. Huntley, 349 S.C. 1, 6, 562 S.E.2d 472, 474 (2002) (finding the trial court erred in automatically suppressing a breath test's results when no prejudice to the defendant was shown as a result of the implied consent statute's violation); see also State v. Chandler, 267 S.C. 138, 143, 226 S.E.2d 553, 555 (1976) ("[E]xclusion of evidence should be limited to violations of constitutional rights and not to statutory violations .

. . .”). Brannon made no decisions regarding whether to prosecute Spade, the crime for which Spade was prosecuted, or how the trial would proceed against Spade. The entire prosecution of Spade would have occurred in the same manner even if Brannon had never been appointed. Spade cannot demonstrate prejudice based on the appointment. The court properly denied this claim.

F. The PCR court properly found Spade failed to establish counsel was ineffective for failing to argue that venue was not proper.

Spade next asserts counsel was ineffective for failing to challenge venue (either by motion for a directed verdict or by requesting a jury instruction on venue) based on his claim that “the prosecution did not prove venue by even the preponderance of the evidence.” Spade argues there is evidence that Spade’s visitation occurred at hotels in both Greenville and Spartanburg Counties and a counseling note references that abuse occurred at a hotel in Greenville.³ Spade then boldly asserts because the prosecutors “cleverly crafted questions” about abuse in “South Carolina” rather than Spartanburg County during his trial, the State was somehow intentionally avoiding a venue challenge or misleading the jury.

In denying these venue related challenges, the lower court properly found,

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

All the evidence presented at the evidentiary hearing clearly establishes venue was proper in Spartanburg County. As discussed previously, Investigator Cantrell testified she investigated whether the allegations occurred in Greenville County or Spartanburg County and all evidence established the sexual abuse occurred at a Holiday Inn Express in Spartanburg County. Moreover, the counseling records

³ At the evidentiary hearing, of Thompson-Loftis testified she believed the victim’s statements regarding the abuse happening in Greenville referenced the upstate region (encompassing both Spartanburg and Greenville area) rather than a specific geographic location, which is age-appropriate considering the victim’s very young age at the time of her therapy and disclosures.

from Thompson-Loftis that indicate the abuse happened in “Greenville” refer to the Greenville-Spartanburg metropolitan area, as Thompson-Loftis testified, not to a specific jurisdictional area. As Applicant has failed to present any credible evidence to establish venue was not proper in Spartanburg County, this Court finds these allegations must be denied and dismissed.

(App. 3010). This ruling is supported by the record.

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

II. The PCR court properly found Spade failed to establish any valid claims of prosecutorial misconduct.

Spade again raises his venue challenge under the guise of prosecutorial misconduct, claiming the State intentionally elicited “misleading testimony.” This argument is addressed above. Spade is attempting to assign nefarious intent and improper conduct to the State without anything more than mere speculation, which was properly rejected by the lower court. The investigation clearly revealed the sexual assault occurred in Spartanburg County.

Spade further asserts the State committed Brady violations by failing to disclose the DSS file and the family court file of Special Prosecutor Brannon. It is Applicant’s burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989). Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the

requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)). “The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial ‘resulting in a verdict worthy of confidence.’ Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006)

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

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

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

Spade asserts the State committed prosecutorial misconduct by failing to disclose relevant DSS records and the family court file and Special Prosecutor Brannon. In support of this allegation,

Spade has cited to the transcript of the 2012 termination of parental rights trial wherein Investigator Cantrell mentions she had the DSS records for the victim, as well as the disclosure of an email from the family court file. At the evidentiary hearing, Investigator Cantrell testified she did not have a copy of the DSS file in this case and likely misspoke when testifying at the family court proceeding because she was called to the stand from the road and did not have her file in front of her. Spade has failed to establish the State was in the possession of the DSS file or that anything in the DSS file would have had material information not already known to counsel. Spade has failed to meet his requisite burden of proof. The lower court properly denied this allegation.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this deny this petition.

Respectfully submitted,

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September 26, 2022

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