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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2022-000434

Daniel W. Spade .....Respondent-Petitioner,

v.

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

REPLY TO STATE'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Daniel Spade replies to the State's return to his petition for a writ of certiorari ("State's Return").

I. Was Daniel Spade denied effective assistance counsel—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—when his trial counsel failed to object to improper bolstering and vouching for the credibility of the child, which violated appellate court decisions existing at the time of his jury trial?

The PCR court expressly found that "trial counsel's failure to object to improper bolstering would meet the *Strickland*[1] standard of prejudice" regarding the testimony of Tabitha Webber and Meredith Thompson-Loftis.[2, 3] A. 3279-80, n. 18. The PCR court specifically "note[d] that no physical evidence was presented to establish guilt." *Id.*; *see Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) ("for the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession,

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] Other experts have questioned Ms. Thompson-Loftis' interviewing techniques. *See, e.g., S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 23, 720 S.E.2d 503, 507 (Ct. App. 2011) ("Ms. Stichnoch was highly critical of Ms. Loftis' interviewing techniques, specifically her continuing to have therapy sessions with Anna G. about the sexual abuse allegations until a full assessment was conducted."). This Court should be mindful of this criticism when considering Question II, *infra*, as *Mary C.* was decided prior to Mr. Spade's jury trial an placed trial counsel on notice about the need to engage an expert witness.

[3] The State argues, "Regarding Roseborough, as Spade has repeatedly conceded, counsel objected to her testimony and the objection was sustained. Accordingly, any claims against Roseborough are waived." State's Return at 11. The State misses the point. Mr. Spade does not contend he is entitled to any relief based on this sustained objection. As the PCR court recognized, there is a link between all the expert testimony relied upon by the State during Mr. Spade's trial. More importantly, as discussed in detail thought this section, the State argues that Mr. Spade's trial counsel was not on notice to make a bolstering or improper vouching objection. That trial counsel made this objection is some evidence that he was on notice about the law in this issue existing at the time of Mr. Spade's jury trial. Mr. Spade's complaint concerns trial counsel's failure to object to improper testimony by Ms. Webber and Ms. Thompson-Loftis—the very witnesses the PCR court found problematic.

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"). In the order denying the State's Rule 59(e), SCRCP Motion, the PCR court reaffirmed footnote 18, reminded the "issue of bolstering [as to Thompson-Loftis and Weber] is a close call," and observed, "For clarity purposes, [the PCR] Court found prejudice existed in the event [the PCR] court was incorrect that Trial Counsel should have objected to the presentation of either or both of these witnesses." A. 3325, n. 5.

The State does not address the prejudice prong of *Strickland*, but rather argues that Ms. Webber merely provided "introductory background information" and Ms. Thompson-Loftis' testimony "was not" improper bolstering. State's Return at 11-14. A careful analysis of the PCR court's order reveals the flaws in the State's arguments. First, the PCR court ruled, "Since Webber was presented as a fact witness, her credentials were not necessary and *counsel should have objected* to them being presented to the jury." This ruling is consistent with *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (holding it is unnecessary to qualify a children's advocacy center interviewer as an expert witness). Second, the PCR court ruled Ms. Thompson-Loftis "bolstered the child generally when she stated, among other things, she had seen a lot of 'transformation' in the child from her therapy" and when "[s]he referred to the child as remarkable." Third, the PCR court discussed the "link between Ms. Webber, who contacted law enforcement and recommended therapy for the child to the testimony of Ms. Thompson-Loftis who accepted the child for therapeutic treatment under 'victim services'" Fourth, the PCR court observed, "Our Supreme Court has made it clear, trial counsel should object to this type of testimony when it is presented before a jury as a means to indirectly bolster testimony." A. 3276-79 (emphasis added) (citing *State v. Anderson,* 413 S.C. 212, 776 S.E.2d 76 (2015) and *State v. Makin*, 433 S.C. 949, 860

S.E.2d 666 (2021). The State, accordingly, is wrong when it argues the testimony of Ms. Webber and Ms. Thompson-Loftis was proper.

The PCR court did not err by finding trial counsel should have objected to the testimony of Ms. Webber and Ms. Thompson-Loftis. Rather, the PCR court erred by concluding trial counsel was not on notice to object to this improper testimony because of the state of South Carolina's law at the time of Mr. Spade's jury trial. *See* A. 2377 ("[T]he testimony of these [two] witnesses could not be considered 'improper' bolstering under South Carolina jurisprudence existing at the time of [Mr. Spade's] trial.") and A. 3279 ("This Court's opinion that trial counsel was not constitutionally deficient based on South Carolina jurisprudence that existed at the time of his trial."). The PCR court based this conclusion on the fact that "*State v. Anderson* was not decided until 2015." A. 3279. In reaching this conclusion, the PCR court ignored this Court's holding in *Briggs v. State*:

> After *Dawkins*[4] in 1989, certainly after *Douglas* in 2009 and *Smith*[5] 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. When the testimony directly conveys the witness's opinion that the victim is telling the truth, it is obviously improper bolstering.

421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017). *See also Thompson v. State*, 423 S.C. 235, 243, 814 S.E.2d 487, 491 (2018) ("We recently concluded in *Briggs* [], that after *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.'").[6]

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[4] *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001).

[5] *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010).

[6] The *Briggs* and *Thompson* analysis has become so commonplace that our appellate courts dispense of this issue in unpublished opinions that are not precedential pursuant to Rule 268, SCACR. *See, e.g.*, *Elders v. State*, No. 2016-000242, 2020 WL 1724876, at *1 (S.C. Ct. App. Apr. 8, 2020).

In addition to *Dawkins, Douglas*, and *Smith*, the PCR Court overlooked numerous other appellate cases that were decided prior to Mr. Spade's jury trial on February 24-26, 2014. *See, e.g*., *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) (testimony by forensic interviewer of victim that victim had given a "compelling finding" of child abuse was inadmissible); *State v. Jennings*, 394 S.C. 473, 482, 716 S.E.2d 91, 95 (2011) ("The trial court erred in allowing the State to introduce the forensic interviewer's written reports because they contained impermissible hearsay, vouched for the children's credibility, and their admission was not harmless."); *State v. Whitner*, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) ("Admittedly, we have confronted instances where the State has abused the statute and sought to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim."); *State v. McKerley*, 397 S.C. 461, 725 S.E.2d 139 (Ct. App. 2012) (forensic interviewer's general testimony indicated belief in complainant's truthfulness and was thus inadmissible); 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 PCR court made all the findings necessary to grant Mr. Spade post-conviction relief: trial counsel should have objected, and Mr. Spade was prejudiced by trial counsel's failure to object. This Court must "defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 (2017). The PCR court, however, erred regarding the state of the law in South Carolina that existed at the time of Mr. Spade's jury trial. This Court should grant the writ and consider the question.

II. Was Daniel Spade denied effective assistance counsel—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—when his trial counsel failed to consult expert witnesses and call those witnesses during pre-trial hearings and to testify before the jurors.

At the PCR evidentiary hearing, Mr. Spade presented the expert witness testimony of Dr. Maggie Bruck (A. 1296-1424, 2462-78) and Dr. Michael Lamb (A. 1497-1616, 2479-2636). The PCR court found these experts "have the highest credentials in their areas of expertise," "both can be considered experts of the highest esteemed," "both appeared credible on the witness stand," "explained what are the 'best practices for obtaining information for a child in a forensic interview," and "explained how the forensic interviews in this case deviated from the 'best practices.'" The PCR court expressly found that Mr. Spade "was successful in discrediting the video interviews" and agreed with these expert witnesses "assessment that the forensic interviews were suggestive." A. 2758. This Court must "defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal*, 421 S.C. at 91, 805 S.E.2d at 571.

The State acknowledges evidence supporting the PCR court's findings of fact regarding Dr. Bruck and Dr. Lamb. *See, e.g.,* State's Return, at 16 ("Both of Spade's experts averred Weber's techniques were suggestive, which they opined could lead to inconsistent and unreliable reports of abuse."). The State even acknowledges Mr. Spade "was eager to present an expert witness." *Id.*, at 17. Rather, the State argues, trial "counsel made a sound, well-reasoned strategic decision not to [consult] expert witnesses." *Id*., at 15. For the reasons discussed below, the record does not support a finding that trial counsel made a valid strategic decision not to consult experts. *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015) ("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."); *Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002) (same).

First, the State argues trial counsel "researched potential expert witnesses to challenge the forensic interviews and considered the benefits and drawbacks of presenting such an expert witness." State's Return, at 17. When asked whether he talked to any experts, trial counsel testified he did "internet research" regarding "the idea of coaching and whether or not there were any good articles to talk about what it would take to convince a child that something happened that didn't happen of a child this age."[7] He admitted not knowing anything about Dr. Lamb or Dr. Bruck; however, he agreed it would have been '[p]otentially" beneficial to consult an expert "about interviewing techniques that could potentially contaminate a child's memory." A. 1656-57, 1674-75. The record supports only one conclusion: trial counsel decided not to call an expert witness without ever having consulted an expert witness. "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

Second, the State argues, "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." State's Return, at 17. The record does not support any reasoned decision. "Counsel has a duty to make reasonable

[7] During the cross-examination of Dr. Lamb during the PCR hearing, counsel for the State represented, "I did some brief fleeting research into the subject and part of my amazement was finding that you seem to be cited for about half of the authorities in the field of forensic interviewing and I would not be surprised if you peer reviewed the other half." A. 1545-46. Public information about Dr. Lamb was just as available to trial counsel as it was to counsel for the State.

investigations or to make a reasonable decision that makes particular investigations unnecessary." *Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006) (cleaned up) (citing *Strickland v. Washington,* 466 U.S. at 691). "A decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* (internal quotations omitted). The State's argument overlooks Mr. Spade's desire for trial counsel to obtain an expert witness and trial counsel's recognition of the need to research experts who could provide the testimony provided by Dr. Bruck and Dr. Lamb. Once again, the State's argument overlooks the fact that trial counsel did not even consult a single expert witness.[8] Because trial counsel's decision not to call an expert witness was made in ignorance, without even consulting an expert, the decision cannot be considered a valid strategic decision. *Weik, Ingle*, and *Freiburger, supra.*

Trial counsel was deficient under the first prong of *Strickland* for not consulting experts like Dr. Bruck and Dr. Lamb and for not calling them to testify during a suppression hearing and, if necessary, at trial. Given the factual findings by the PCR court about the value of these expert witnesses, Mr. Spade established prejudice under the second prong of *Strickland*. The experts would have provided multiple values to Mr. Spade's defense. First, they could have consulted with trial counsel and provided valuable insight in the suggestiveness of the videotaped interviews. Second, they could have testified at a pre-trial taint hearing regarding the reliability of the child's testimony. *State v. Adams*, 430 S.C. 420, 428, 845 S.E.2d 217, 221 (Ct. App. 2020) ("the

[8] In another context, the State argued trial counsel could not be found deficient for not calling an expert witness because trial counsel consulted an expert witness who did not testify at trial. *Hillerby v. State*, 431 S.C. 323, 332, 847 S.E.2d 500, 505 (Ct. App. 2020) ("On deficiency, the State argues there is no disputing counsel consulted with an expert—Dr. Gibbs—and made a strategic decision to challenge the State's medical evidence with cross-examination after Dr. Gibbs indicated her testimony would not be favorable."). Here, trial counsel did not even consult an expert witness.

framework of § 17-23-175, which in essence requires a pre-trial taint hearing"). If Mr. Spade is successful at a pre-trial taint hearing, then the jurors would not see the videotaped interviews because the case would be dismissed. *See Grueninger v. Dir., Virginia Dep't of Corr.*, 813 F.3d 517, 524 (4th Cir. 2016) ("ineffectiveness claim [can be] based on counsel's failure to file a motion to suppress). Third, these experts could have testified before the jurors and provided valuable scientific insight regarding how to evaluate the statements of a child. This Court should grant the writ and consider the question.

III. Was Daniel Spade denied effective assistance counsel—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—when his trial counsel not only failed to object to the trial judge instructing the jurors that their role is to "search for the truth" and make sure "justice is done" and when the prosecutor embraced this language during the opening statement, but also adopting that language in Mr. Spade's opening statement and closing argument, thereby diminishing and shifting the burden of proof?

Mr. Spade alleges his trial counsel were ineffective for "[n]ot only failing to object to the trial judge instructing the jurors that their role is to 'search for the truth' and make sure 'justice is done' and the prosecutor embracing this language in its opening statement, which impermissibly diminishes and shifts the burden of proof, but also adopting that language in Mr. Spade's opening statement and closing argument, thereby diminishing and shifting the burden of proof." A. 1079-89. The PCR court agreed with Mr. Spade "that 'the trial court's statement and his attorney's statement crossed into the [*State v. Beaty,* 423 S.C. 26, 813 S.E.2d 502 (2018)] sphere of improper statements'" because "these statements 'shifted the jury's focus away from the State's obligation of meeting its burden of proof.'" A. 2762. The PCR court, however, denied Mr. Spade relief because *Beaty* was not decided at the time of his jury trial. *Id.* The State argues the PCR court correctly ruled "an objection to such a charge was not 'universally recognized' at the time of [Mr. Spade's] trial." State's Return, at 19. The PCR Court erred as a matter of law because his Court

decided *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2103) prior to Mr. Spades jury trial. *See also Teamer v. State*, 416 S.C. 171, 182-83, 786 S.E.2d 109, 114-15 (2016) (recognizing *Daniels* decided this issue).

The State also argues the PCR "court correctly determined [Mr. Spade] could not establish any resulting prejudice based on the record." State's Return, at 19. The State is wrong. The PCR court actually found and concluded, "[B]ecause trial counsel failed to object to the trial court's use of a 'search for the truth' terminology and because trial counsel erred in using the same terminology when explaining the purpose of a criminal trial, the significance or weight of the Special Prosecutor's improper closing argument when performing a *Smalls* analysis, increased the prejudicial effect of the improper closing argument." *Id*., at 13, n. 14. The PCR court ultimately found and concluded, "[T]he presentation of evidence in the trial was 'bookended' with unconstitutional statements that altered the jury's role from being an impartial factfinder when determining if the State had met its constitutional obligations of proving guilt." *Id*., at 27. These findings of fact are supported by the record and entitled to deference. *Mangal, supra.*

The PCR court made all the findings necessary to grant Mr. Spade post-conviction relief: prejudice resulted from trial counsel's failure to object to these burden shifting statements and from trail counsel embracing the burden shifting language. This Court must "defer to a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal v. State*, 421 S.C. at 91, 805 S.E.2d at 571. The PCR court, however, erred regarding the state of the law in South Carolina that existed at the time of Mr. Spade's jury trial, as *Daniels* decided this issue prior to *Beaty*. This Court should grant the writ and consider the question.

IV. Was Daniel Spade denied effective assistance counsel—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—when his trial counsel failed to call Alexandria Wolf, the Guardian ad Litem, in the Family Court Action?

Alexandria Wolf's PCR testimony is evidence that was not presented to Mr. Spade's jurors, even though it was available at the time of Mr. Spade's trial. The PCR Court found Ms. Wolf credible, and this finding is supported by the record. *Mangel, supra.* In a one paragraph, cursory response, the State argues, the PCR "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." State's Return, at 20. The State's argument is not only not supported by the record, but also is misleading about the record.

The PCR courts' Form 4 order contains multiple findings of fact that support the value of Mr. Wolf as a witness for the defense. The PCR court found, "The history proceeding the forensic interviews strangely link the motivation of the interviews to the domestic dispute." A. 2757. The PCR court discussed the new evidence presented at the evidentiary hearing and found:

> Significant to this new evidence was the testimony of the child's family court guardian ad litem (GAL). Part of the GAL's testimony included that she was closed off from the minor by the mom and soon-to-be adoptive father. This Court easily concluded the GAL felt strong hostility from the mom and soon-to-be adoptive father. Their conduct and attitude towards the GAL materially interfered with her work as the GAL for the minor. This new evidence and the timing/link to the family court issues was further supported by the information revealed post-PCR hearing from the DSS file.

A. 2758. The PCR court "was troubled that the legal history of this case includes private parties being encouraged to be uncooperative and thereby frustrate the work of the DSS and a family court GAL." *Id.*; *see also* A. 2761 ("A private referral was made to the forensic interview service. Information suggested that the parents paid for the forensic interview services. Cooperation with the Family Court GAL ended."). The initial order of dismissal—drafted by the Attorney General's Office—contained these same findings of fact. A. 2777-78, 2783, 2785. This Court must "defer to

a PCR court's findings of fact and will uphold them if there is any evidence in the record to support them." *Mangal v. State*, 421 S.C. at 91, 805 S.E.2d at 571.

Significantly, nowhere in the Form 4 order or the initial order of dismissal does the PCR court make a finding of fact or conclusion of law, regarding Ms. Wolf's testimony, "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." State's Return, at 20. In fact, Mr. Spade's objections to the State's proposed order pointed out the proposed order did not address Ms. Wolf's testimony in the context of failing to call her as a witness. A. 2873-75. The State did not object "to including specific findings of fact and conclusions of law" regarding the failure of trial counsel to call Ms. Wolf as a witness. A. 3135, n. 15. In his reply, Mr. Spade pointed out the State does not object to "amending the final order to add findings of fact and conclusion of law regarding trial counsel's failure to call guardian ad litem Alexandria Wolf." A. 3155; see also A. 3190 (Mr. Spade reminded "[T]he State concedes that the order needs to be amended to add something about the failure to call the guardian ad litem, Ms. Alexandria Wolf."). The final order granting post-conviction relief on another issue never added the findings of fact and conclusions of law regarding the testimony of Ms. Wolf. A. 3263-90.

This, the record is devoid of any finding of fact or conclusion of law regarding, Ms. Wolf's testimony, "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." State's Return, at 20. Trial counsel was deficient for not calling Ms. Wolf to corroborate and bolster Mr. Spade's theory of defense. *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) ("If witnesses

other than petitioner were willing to testify to this fact, certainly that would have added significantly to the credibility of petitioner's case."). Based on the PCR court's findings of fact regarding Ms. Wolf, Mr. Spade established prejudice. *See, e.g., id.,* 380 S.C. 454, 463, 670 S.E.2d 646, 650-51 (prejudice resulted from failure to subpoena and call witnesses who would have supported petitioner's own testimony at trial."). This Court should grant the writ and consider the question.

V. Did the State commit prosecutorial misconduct when it failed to disclose statements by the child that established venue was not proper in Spartanburg County, failed to timely disclose medical records that established venue was not proper in Spartanburg County, failed to correct testimony implying venue was proper in Spartanburg County, failed to disclose the DSS records, and failed to disclose exculpatory emails involving the special prosecutor?

Mr. Spade alleges multiple instances of prosecutorial misconduct. The State responds to these allegations in a cursory manner without ever addressing the specifics of the allegations.[9] The State contends, "In support of this allegation, Spade has cited the transcript of the 2012 termination of parental rights trial wherein Investigator Cantrell mentions she has the DSS records for the victim." State's Return, at 23-25. Investigator Cantrell acknowledges that she represented during the Family Court hearing that the Solicitor's Office would have the DSS file. A. 1940-41. The PCR Court expressed, "This Court was troubled that law enforcement made inconsistent factual statements to different courts." A. 2758, 3041, 3280.

Regarding the contents of DSS records, the State argues Mr. "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 know to counsel." State's Return, at 25. In the cross-petition for a writ of certiorari, Mr. Spade discusses how Dr. Henderson's medical exam—contained in the

[9] Mr. Spade will address the allegations of misconduct regarding venue in Sections VI and VII, *infra*.

DSS file—contradicts the child's testimony at trial. Although Dr. Henderson's report lists the reason for referral as alleged "Sexual Abuse," the only specific allegation Dr. Henderson documented was "Fondling." Dr. Henderson did not document any "Oral-Genital Contact." Suppl. A. 153-68. *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998) (evidence in medical exams can be significate to an accused's defense).

Also, the State never addressed Mr. Brannon's claim of privilege with the Jolleys and the discrepancy between his representation to the Family Court about the number of emails subject to disclosure under Judge Cole's order and the number of emails ultimately disclosed. A.1074-77, 1085-44. Even after the circuit court ruled Mr. Spade is entitled to any *Brady* material, it remains unclear whether the Special Prosecutor complied. Compare Ex. 40 (A. 2674), disclosing one email, with Ex. 39 (A. 2671), Special Prosecutor stating multiple emails were subject to the discovery order.

This Court should grant the writ and consider the multiple *Brady* violations.

VI. Was Daniel Spade denied effective assistance counsel—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—when his trial counsel failed to request a ruling on whether the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470.

The State argues S.C. Code Ann. § 1-7-470 is not applicable Mr. Brannon's appointment as a special prosecutor in this case. State's Return, at 20-21. The plain language of the statute, however, establishes the relevancy to this prosecution.

The State additionally argues that Mr. Spade "utterly failed to show the required prejudice" because Mr. "Brannon made no decisions regarding whether to prosecute Spade, the crime for which Spade was prosecuted, or how the trial would proceed against Spade." State's Return, at 21-22. Although he might not have brought the charge or selected the charge, Mr. Brannon played a

significant role in how the trial proceeded against Mr. Spade. He examined Ms. Thompson-Loftis and asked misleading questions about venue. A. 258-71. He asked to make the closing argument and improperly appealed to the passions of the jurors. A. 305-08. As seen above, the State never addressed Mr. Brannon's claim of privilege with the Jolleys and the discrepancy between his representation to the Family Court about the number of emails subject to disclosure under Judge Cole's order and the number of emails ultimately disclosed. A.1074-77, 1085-44. Even after the circuit court ruled Mr. Spade is entitled to any *Brady* material, it remains unclear whether the Special Prosecutor complied. Compare Ex. 40 (A. 2674), disclosing one email, with Ex. 39 (A. 2671), Special Prosecutor stating multiple emails were subject to the discovery order.

Trial counsel, accordingly, was deficient for not preserving this issue for appellate review. Mr. Spade was prejudiced by the Special Prosecutor's biased advocacy, failure to disclose Brady material, knowledge of the exculpatory medical records contained in the DSS file, and closing argument. This Court should grant the writ and consider the question.

VII. Was Daniel Spade denied effective assistance counsel—in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution—when his trial counsel failed to demonstrate that Spartanburg County was not the venue of the alleged crime.

Trial counsel correctly pointed out the child did not testify that the sexual abuse occurred in Spartanburg County. Trial counsel was also aware that Mr. Spade stayed with the child at hotels other than the one in Duncan, South Carolina. The prosecutors cleverly crafted questions for the child, Tabatha Webber, and Meredith Thompson-Loftis alleging the sexual assault occurred in South Carolina, but they did not ask any of these witnesses whether the abuse occurred in Spartanburg County. A. 135-40, 246-50, 258-71. The State takes issue with the "cleverly crafted questions" characterization. State's Return at 22 ("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."). The record is plain and unambiguous—the prosecution was intentionally avoiding a venue challenge.

The State then argues Mr. Spade "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."[10] State's Return at 23. The trial testimony on this issue is not as clear as State contends. The trial record contains allegations that Mr. Spade committed a sexual assault. The trial record contains evidence that Mr. Spade and the child stayed at a hotel in Spartanburg County. The trial record does not contain any evidence that the child alleged the sexual assault occurred in Spartanburg County. This Court should grant the writ and consider the question.

CONCLUSION

For the reasons set forth in Mr. Spade's petition for a writ of certiorari and this reply, this Court should grant Mr. Spade's cross-petition for a writ of certiorari and consider the questions.

Respectfully Submitted,

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[10] This Court should not overlook the PCR court's finding, "This Court was troubled that law enforcement made inconsistent factual statements to different courts." A. 2758, 3041, 3280. This finding of fact is entitled to deference. *Manguel, supra.*