

**RECEIVED**

**Feb 14 2023**

**S.C. SUPREME COURT**

**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

---

**Certiorari to the Berkeley County Court of Common Pleas**

**Jennifer B. McCoy  
Circuit Court Judge**

---

**Berkeley County Case No. 2018-CP-08-02576**

---

**Gary Fraley #364802..... Applicant/Petitioner,**

**v.**

**The State of South Carolina.....Respondent.**

---

**NOTICE OF APPEAL**

---

Petitioner Gary Fraley (SCDC #364802) appeals the January 12, 2023 and October 14, 2022 orders of the Circuit Court (attached). Appellant received written notice of the former order on January 23, 2023.

Dated: 02/14/2023

/s/ Jason Scott Luck  
Jason Scott Luck  
P.O. Box 47  
Bennettsville, SC 29512  
843.479.6863 (o)  
843.479.7222 (f)  
jason@luck.law  
Attorney for Petitioner

Other counsel of record:  
Megan Jameson  
Sr. Ass't Deputy Atty. General  
P.O. Box 11549  
Columbia, SC 29211  
MJJameson@scag.gov  
Attorney for Respondent

STATE OF SOUTH CAROLINA  
COUNTY OF BERKELEY

FILED

2023 JAN 17 AM 11:44

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CIVIL ACTION NO.: 2018-CP-08-02576

Gary Fraley #364802,

Applicant,

v.

State of South Carolina,

Respondent.

LEAH GUEERY  
CLERK OF COURT  
BERKELEY COUNTY, SC

ORDER DENYING APPLICANTS  
MOTION TO ALTER OR AMEND


Applicant Gary Fraley filed a Motion to Alter or Amend on October 24,  
2022. Upon careful consideration, this Court hereby DENIES Applicant's Motion.

IT IS SO ORDERED!

  
The Honorable Jennifer B. McCoy

January 12, 2023  
Charleston, South Carolina

CERTIFIED TRUE COPIES OF RECORD IN THIS COUNTY

  
DATE 17 JAN 2023  
CLERK OF COURT  
C.P. & G.S.  
BERKELEY COUNTY, SC

J. LUCK, L. MIMS


STATE OF SOUTH CAROLINA )  
 COUNTY OF BERKELEY )  
 Gary Fraley, SCDC #364802, )  
 Applicant, )  
 v. )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-08-02576

**ORDER OF DISMISSAL**

FILED  
 2022 OCT 19 PM 2:51  
 LEANNE H. HARRIS  
 CLERK OF COURT  
 BERKELEY COUNTY, SC



This matter comes before this Court by way of post-conviction relief action commenced by Applicant Gary Fraley on December 28, 2018. An evidentiary hearing into the matter convened before the undersigned on December 6, 2021, at the Berkeley County Courthouse. Applicant was present and represented by Jason S. Luck and James K. Falk, Esquires. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing, as did Applicant’s ex-wife, Julie Fraley and Applicant’s daughter, Alta Fraley. Applicant’s trial counsel, Melisa W. Gay, and Assistant Solicitor Anne M. Williams also testified.

This Court had before it a copy of the Berkeley County Clerk of Court records regarding the subject convictions; Applicant’s records from the South Carolina Department of Corrections; the records from Applicant’s direct appeal, including the trial transcript; and the pleadings and records in this post-conviction relief action. After hearing the testimony and evidence presented at the post-conviction relief hearing and upon full review of the record, this Court finds Applicant’s allegations regarding ineffective assistance of trial counsel are without merit. Therefore, for the reasons discussed below, this Court denies relief and dismisses this action with prejudice.

JBM/1

CC: JASON LUCK; AG

## **I. Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court. On August 5, 2014, law enforcement officers with the Goose Creek Police Department arrested Applicant following a criminal rampage that included the oral, vaginal, and anal rape of an eleven-year-old girl and an armed standoff with law enforcement at Royal Lanes bowling alley. During its October, November, and December 2014 terms, the Berkeley County Grand Jury indicted Applicant for attempted murder; two counts of possession of a weapon during the commission of a violent crime; unlawful conduct toward a child; third-degree criminal sexual conduct with a minor; three counts of second-degree criminal sexual conduct with a minor; and two counts of kidnapping. On July 13, 2015, Applicant proceeded to a jury trial before the Honorable Kristi Lea Harrington. On July 17, 2015, the jury convicted Applicant as indicted. The trial court sentenced Applicant to: thirty years' imprisonment for attempted murder; five years' imprisonment for each count of possession of a weapon during the commission of a violent crime; ten years' imprisonment for unlawful conduct toward a child; fifteen years' imprisonment for third-degree criminal sexual conduct with a minor; twenty years' imprisonment for one count of second-degree criminal sexual conduct with a minor; thirty years' imprisonment for two counts of second-degree criminal sexual conduct with a minor; and thirty years' imprisonment for the kidnapping charge related to victim Tsafos with a finding that the offense was not sexual in nature, to be served consecutive to all other sentences; and thirty years' imprisonment for the kidnapping of Victim to run consecutively to all other sentences.

On July 23, 2015, the trial court reconvened to clarify its sentences and amend various scrivener's errors on the sentencing sheets. The trial court clarified its aggregate sentence was

JBM/2

ninety years' imprisonment, with the controlling sentence being thirty years' imprisonment for the kidnapping of Victim, followed by a consecutive sentence of thirty years' imprisonment for the attempted murder of Tsafos, followed by a consecutive sentence of thirty years' imprisonment for the kidnapping of Tsafos. The trial court further clarified all other sentences were to be served concurrently to the sentence of thirty years' imprisonment for the kidnapping of Tsafos.

Subsequently, Applicant filed a timely notice of appeal. John Harrison Strom, Esquire, of the Office of Appellate Defense perfected the appeal. In Applicant's appeal, he raised the following issues:

- I. The trial court reversibly erred by refusing to instruct the jury on the verdict form of not guilty by reason of insanity where (A) the court erroneously believed that the defense must prove to the court by a preponderance of the evidence that [Applicant] was legally insane before the defense was entitled to a jury instruction on the affirmative defense and (B) where there was evidence that [Applicant] was legally insane at the time of the offenses were committed, entitling him to the not guilty by reason of insanity verdict form and
- II. The trial court reversibly erred by refusing to instruct the jury on the three lesser-included offenses of attempted murder, where the court wrongly concluded that there was no evidence that [Applicant] had committed any of the lesser included offenses where [Applicant] had testified that he had intended to commit suicide and where the victim had testified that the gun appeared to have simply "went off" while [Applicant] was pointing it at the floor.

The South Carolina Court of Appeals affirmed Applicant's convictions by unpublished opinion on July 26, 2017. State v. Fraley, Op. No. 2017-UP-305 (S.C. Ct. App. filed July 26, 2017). The remittitur was returned to the circuit court on August 11, 2017.

On December 28, 2018, Applicant, through counsel, filed an application for post-conviction relief. Through its return, filed on April 23, 2019, the State moved to summarily dismiss the application as it was filed after the statute of limitations had expired. A hearing on the State's motion to dismiss was convened before the Honorable Judge Perry H. Gravely on December 11,

JBM/3

2020, via Webex. Judge Gravely denied the State's motion to dismiss and ordered an evidentiary hearing be set in this matter. This hearing followed.

## **II. Facts Adduced at Trial**

On the afternoon of August 5, 2014, Applicant went to his neighbor's house to see if the neighbor's fourteen-year-old daughter could come to a surprise party for his daughter at the local bowling alley. (R. 188). The neighbor's fourteen-year-old daughter Applicant desired was not home, but her brother told Applicant his eleven-year-old sister ("Victim") was home and could possibly attend the party. (R. 189). Victim's brother went to ask his mother's permission for Victim to attend the party and she came to talk with Applicant. (R. 189, 193). Victim's mother had known Applicant for over three years and interacted with him frequently around the neighborhood and at the bus stop, as both had daughters around the same age. (R. 192). Applicant and Victim's mother discussed the party and Applicant showed Victim's mother fossil modeling kits he had for the children to play with at the party. (R. 193-94). Victim's mother called her ex-husband, who was scheduled for visitation with Victim and her siblings that evening, to see if he would permit Victim to attend the birthday party. (R. 193-94). Victim's father gave his permission for Victim to attend the party and agreed to pick up Victim from Applicant's home after the party at 5:30 p.m. (R. 194). Victim left with Applicant in Applicant's vehicle. (R. 194, R. 206).

After leaving Victim's house, Applicant drove to a nearby Publix grocery store. (R. 206). Applicant left Victim waiting in his parked car and went inside the store. (R. 206). Once inside, Applicant quickly went through the store, picking up a bottle of cherry flavored NyQuil cold medicine, a bottle of Johnson & Johnson baby oil, and a six-pack of Natural Light Beer. (R. 469-72, 477-80). Applicant purchased these items and return to the car. (R. 206, 471-72).

Applicant then drove Victim to the EconoLodge motel on North Goose Creek Boulevard. (R. 206, 473). Applicant, who had been checked into Room 125 of the motel since August 3, 2014, told Victim he was staying at the motel rather than his house because his house was without power. (R. 206, 474). Applicant used his key to access his room and went inside with Victim. (R. 206-07). Once inside, Applicant threatened Victim with a handgun and told her not to “test” him. (R. 213-14). Applicant demanded Victim’s iPod and attempted to remove the battery with a pocketknife. (R. 207). Applicant then commanded Victim take a shower, claiming she needed to remove all bacteria before she touched any fossils at the party. (R. 207-08). While Victim showered, Applicant brought Victim a white plastic cup filled with NyQuil and instructed her to drink it so she would not catch a cold from the other children at the party. (R. 208). Victim drank the NyQuil as instructed. (R. 208). Applicant then brought Victim an alcoholic beverage and demanded she drink it. (R. 208). Victim took a sip of the beverage but poured the remaining beverage down the shower drain once Applicant left the bathroom. (R. 208). Victim finished showering and, per Applicant’s instructions, did not put her clothing back on but instead came into the room wearing only her towel and underwear. (R. 209).

Applicant was waiting for Victim on the bed and directed her to sit on his lap. (R. 209). Applicant told Victim his wife was cheating on him and he was going to rape Victim to get back at his wife. (R. 209-10). Applicant then removed Victim’s underwear and rubbed something on her vagina. (R. 210). He thrust his penis into Victim’s mouth and forced her to perform fellatio on him. (R. 211). During the fellatio, Applicant instructed Victim to “go deeper” and pushed her head and mouth farther down on his penis. (R. 210-11).

Next, Applicant mounted Victim while she was on her back and forced her legs apart. (R. 211). Applicant penetrated Victim’s vagina with his penis, causing her to scream and cry. (R. 211-

12). In response, Applicant removed his penis from her vagina. (R. 211-12). He let Victim use the bathroom before forcing her back onto the bed. (R. 212). Once she returned to the bed, Applicant anally penetrated Victim. (R. 212). Victim again screamed and cried. (R. 214). As a result of Applicant's sodomy, Victim defecated on the bed. (R. 212). Following his oral, vaginal, and anal assault of Victim, Applicant turned on the television and put on the animated cartoon SpongeBob SquarePants. (R. 214). Applicant told Victim he would most likely go to jail for raping her. (R. 468).

Applicant confided in Victim that he was going to kill "Steve," the man with whom his wife was having an affair. (R. 214-15). Applicant and Victim then left the motel and Applicant drove to the Royal Lanes bowling alley in Goose Creek, striking a car in the motel parking lot on the way. (R. 215, 344-50). Once they arrived at Royal Lanes, Applicant left Victim in the car and instructed her to wait in the car for ten minutes before getting out. (R. 215).

Applicant entered Royal Lanes through the alley's front doors and went directly to the pro-shop. (R. 276-68). Applicant was well-known at Royal Lanes because his wife, Deonna, was the alley manager. (R. 237-39, 262, 267-68, 275). Applicant had recently been placed on trespass notice and was prohibited from entering the alley based on his disruptive and aggressive behavior towards Deonna and others, including alley owner Steve Tsafos. (R. 267-69, 277). Applicant had been accusing Deonna and Tsafos of having an extramarital affair and sending threatening text messages and Facebook postings about the alleged affair.<sup>1</sup> (R. 244, 251-52, 260, 293, 303).

---

<sup>1</sup> In response to Applicant's increasingly threatening behavior, which included sending intimidating text messages and Facebook postings, peering into Tsafos's windows at night, keying Tsafos's car, slashing Tsafos's tires, and making a purchase at a gun retailer, Deonna filed a police report with the Goose Creek Police department earlier that day. (R. 248-52, 279-81).

Applicant left the alley briefly, then reentered and looked around before eventually barricading himself in Tsafos's office along with Tsafos. (R. 268-70).

Once inside Tsafos's office, Applicant pointed his gun at Tsafos, who was seated at his desk, called Tsafos a dead man, and prevented Tsafos from leaving the office. (R. 281, 283-84). Applicant demanded answers from Tsafos and referenced the purported affair with Deonna and his inability to pay his bills. (R. 283-87). Tsafos feared for his life and thought Applicant was going to kill him. (R. 284-87, 288). Tsafos attempted to leave the office, but was blocked by Applicant, who still had the gun pointed directly at him. (R. 285-88). Applicant told Tsafos he should be afraid and shot the gun at Tsafos. (R. 286). Tsafos thought the bullet hit him, and then realized the projectile struck the floor. (R. 286). In the fracas that followed, Tsafos fled the office. (R. 287-88, 320).

While Applicant held Tsafos against his will, the Goose Creek Police Department SWAT team had surrounded the bowling alley with a concentration of officers around Tsafos's office. (R. 315-17). Goose Creek Police Department Captain David Aarons, commander of the SWAT Team, negotiated with Applicant for nearly an hour and a half before Applicant was apprehended. (R. 314, 319-32). Throughout negotiations, Applicant lay on the floor of Tsafos's office and conversed with Captain Aarons. (R. 321-28). Applicant repeatedly pled with Captain Aarons not to be shot. (R. 321-30). Applicant asked for and received a cup of red wine and was permitted to smoke a cigarette. (R. 326-31). Applicant called Captain Aarons by his first name, told Aarons that he was doing a good job, but that it would not end well because Applicant had no reason to live. (R. 329). As Applicant neared the end of his cigarette and wine, Captain Aarons made the decision to disarm and apprehend Applicant. (R. 330). After Captain Aarons secured the weapon, other officers with

JBM/7

the SWAT team rushed the office and subdued Applicant with the use of tasers. (R. 331-32, 339-40). Officers placed Applicant under arrest and secured him with handcuffs. (R. 340).

Law enforcement escorted Applicant to a police cruiser and called for medical treatment. (R. 351-52, 356). EMT John Lee and Paramedic Paul Clendenning from the Goose Creek Fire Department responded to the bowling alley based on a dispatch call of a possible shooting and use of a taser on a suspect. (R. 351-52). When they arrived, Lee and Clendenning inspected Applicant for possible taser probes and did not find any. (R. 352, 356). Additionally, Lee and Clendenning examined Applicant and reported he was devoid of any injuries or health problems. (R. 352, 356). Lee noted Applicant was "kind of playful, jovial," but otherwise lucid, rational, reasonable, and aware of what was happening. (R.352). Clendenning similarly reported Applicant was lucid, aware, and reasonable. (R. 356).

While the standoff ensued inside the bowling alley, Victim left Applicant's vehicle and sought assistance from a woman nearby, Vanessa Gilchrist. (R. 215, 264-65). Gilchrist, who worked as a cook at Royal Lanes, was sitting outside the bowling alley following her shift when Victim approached her. (R. 262-65). Victim was very jittery and was physically shaking, and Gilchrist sensed something had happened to her. (R. 265). Victim asked to use Gilchrist's phone and used a piece of paper with phone numbers to try to call her parents. (R. 215-16, 265). Victim's dad answered, spoke with Victim, and told her to wait inside the alley and he would be there soon. (R. 216, 224, 265). Concerned for Victim, Gilchrist told Victim to wait with her until her father arrived. (R. 265). Shortly thereafter, a crowd of people came running out of the bowling alley and into the parking lot. (R. 266). In the chaos, Gilchrist lost sight of Victim. (R. 266).

When Victim's father arrived at the bowling alley minutes later, the parking lot was swarming with law enforcement. (R. 216, 224-25). He found Victim and decided to take her and

the rest of the children with him to Dairy Queen at the nearby mall. (R. 225-26). When Victim got into the car, she appeared upset, exclaimed she never wanted to attend another birthday party, and stated she needed to talk to her father alone. (R. 226). Once they arrived at the mall, Victim and her father talked privately and she disclosed Applicant raped her. (R. 226). Victim's father noted she was extremely hot, her face was flushed, and she was in shock. (R. 227). He called Victim's mother, informed her of the rape, and asked her to meet them as soon as possible. (R. 195, 227). He next called law enforcement and reported the rape. (R. 227-28). Victim's mother and the police arrived on the scene and all agreed Victim needed to be taken to a hospital with specialized sexual assault care immediately. (R. 195-96, 227).

Victim's mother and father took her to the emergency room at the Medical University of South Carolina. (R. 196-97, 227). Upon arriving, Victim was examined and treated by Karen Drozd, a specially trained sexual assault nurse examiner. (R. 381-83). Drozd completed a full body examination of Victim, including the use of a Wood's light to illuminate fluids on the body. (R. 383-84). Drozd also collected swabs for later analysis, drew blood for toxicology and disease screening, and took photographs to evidence Victim's injuries. (R. 383-84). Drozd further documented Victim's injuries in a report, which included oozing blood, deep lacerations, and two fissures on her anus. (R. 389-91). Medical care providers also tested for Human Immunodeficiency Virus (HIV) and gave her powerful HIV medication that potentially had long-lasting implications should she be infected with the virus later. (R. 391-92). Drozd also completed a sexual assault kit on Victim. (R. 391-36).

Victim's medical records and injury documentation was also reviewed by Dr. Kendra Ham, a pediatrician and child abuse expert from MUSC. (R. 404-11). Dr. Ham noted Victim has a deep laceration to her posterior fourchette at the six o'clock position, and lacerations or fissures to her

JBM/9

anus at the eleven o'clock position and the six o'clock position. (R. 409-10). She also found oozing blood emanating from the posterior fourchette laceration. (R. 410).

Prior to trial, the various specimens collected from Victim were analyzed and examined. Tracy McKinnon, a forensic toxicologist with the South Carolina Law Enforcement Division (SLED) tested Victim's blood samples. (R. 398-403). McKinnon identified Doxylamine, Methorphan, Methorphanam, and Acetaminophen in Victim's blood, all which were either ingredients or byproducts of NyQuil. (R. 402-03). Dr. Daniel Demers, who was admitted as an expert in DNA analysis, tested various swabs and other items collected in the case. (R. 411-36). Dr. Demers detected blood on Victim's underwear, vaginal swabs taken from Victim, rectal swabs taken from Victim, and Applicant's underwear. (R. 414). He also detected semen on one of the pillowcases removed from Applicant's room at the EconoLodge, Victim's underwear, Applicant's underwear, and various swabs taken from Victim. (R. 414). Dr. Demers detected Victim's DNA on the NyQuil dosage cup and could not exclude Applicant as a contributor to DNA found on the NyQuil bottle. (R. 419-20). Dr. Demers detected Applicant's DNA on the handgun taken from Applicant at the bowling alley and could not exclude Victim as a contributor to a DNA mixture also found on the weapon. (R. 422). Dr. Demers detected a mixture of DNA from both Applicant and Victim on one of the pillowcases. (R. 423-28). He also detected Applicant's DNA on semen found on Victim's underwear, as well as swabs collected from Victim's vagina and anus during the sexual assault examination. (R. 431-33).

Law enforcement took Applicant's cellular phone into custody following his arrest. (R. 441-42). A search of the phone revealed Applicant had been sending threatening messages to Tsafos and the bowling alley's Facebook page. (R. 441-42). Additionally, a review of Applicant's

internet history on the phone showed he searched for Tsafos, private investigators, and GPS tracking devices prior to his criminal rampage. (R. 477).

Applicant was indicted for attempted murder, two counts of possession of a weapon during the commission of a violent crime, unlawful conduct toward a child, third-degree criminal sexual conduct with a minor, three counts of second-degree criminal sexual conduct with a minor, and two counts of kidnapping. Prior to trial and in anticipation of an insanity defense, the court ordered Applicant to undergo evaluations by the South Carolina Department of Mental Health (SCDMH) to determine his competency to stand trial pursuant to S.C. Code Ann. § 44-23-410 and his criminal responsibility and capacity to conform pursuant to S.C. Code Ann. § 17-24-10. (R. 22-33, 129-176, R. 837, 847). Both evaluations were completed by Dr. Anna Gomez, a forensic psychiatrist at the Medical University of South Carolina. (R. 22-33, 129-76, R. 837, 847). Dr. Gomez met with Applicant three times for his criminal responsibility and capacity to conform evaluation: February 9, 2015, February 17, 2015, and May 13, 2015. (R. 133, R. 847).<sup>2</sup> Dr. Gomez concluded to a reasonable degree of medical certainty that Applicant was criminally responsible and had the capacity to conform his conduct to the requirements of the law. (R. 129-76, R. 847).

Applicant proceeded to a jury trial on July 13, 2015. At the outset of trial, the court held a competency hearing, at which Dr. Gomez testified to a reasonable degree of medical certainty that Applicant was competent to stand trial. (R. 22-33, R. 847). The court then held hearings on Applicant's statements to law enforcement, including the voluntariness of the statement and the State's motion in limine to prevent the defense from using the statements in its case in chief. (R.

---

<sup>2</sup> Dr. Gomez met with Applicant on January 9, 2015, to conduct his competency to stand trial evaluation and determined Applicant was competent to stand trial, evidenced in her written report and testimony at trial. (R. 22-33, R. 837).

JBm/11

34-89). The trial court ruled the statements were voluntarily given but granted the State's motion in limine. (R. 34-142). Next, defense counsel moved in limine to prevent the State from delving into Applicant's prior bad acts, including his hit and run car accident while leaving the EconoLodge to go to the bowling alley, his comments to others about his wife having an affair, Applicant's various Facebook postings, his purchase of ammunition, and his repeated attempts to obtain access to other young girls who lived nearby. (R. 90-101). The State filed a pre-trial brief addressing this anticipated motion and also placed arguments on the record opposing defense counsel's motion, including that all acts were relevant to the case and necessary to counter Applicant's anticipated insanity defense. (R. 90-101, 815-36). The trial court denied Applicant's motion in limine. (R. 90-101).

At trial, defense counsel focused on Applicant's mental state leading up to and on August 5, 2014, in furtherance of his claims of insanity. During the State's case, Dr. Gomez testified as to her evaluations of Applicant and her conclusion to a reasonable degree of medical certainty that Applicant was criminally responsible and had the capacity to conform his conduct to the requirement of the law. (R. 129-76, R. 847). Dr. Gomez testified she consulted with a pharmacist on the possible psychiatric side effects of Vivitrol, an injectable medication prescribed to addicts to curb the euphoric effects of alcohol and opiates, as Applicant complained his behavior was a result of receiving a Vivitrol injection in June. (R. 135-38, 148-51). Dr. Gomez testified there are no known psychiatric side effects to Vivitrol and it is highly unlikely his behavior was a result of the injection. (R. 135-38, 148-51). Dr. Gomez further testified Vivitrol is typically out of the bloodstream or only remains in a very low level after twenty-eight days, making it very unlikely any of the medication was still in his system six weeks later on August 5, 2014. (R. 135-38). Dr. Gomez testified in her expert opinion Applicant was not insane at the time of his crime spree. (R.

JBm/12

138-40). She testified Applicant is alcohol dependent and has been diagnosed as depressive disorder recurrent. (R. 138-40). She testified Applicant told her he had been diagnosed with Post-Traumatic Stress Disorder (PTSD), but she found no evidence of this in any of his military or medical records. (R. 138-40). She also noted numerous witnesses described Applicant's behavior during this time period as normal. (R. 129-76).

The State also presented various neighbors of Applicant, who testified regarding his efforts to gain access to other young girls in the neighborhood in the days leading up to violent sexual assault of Victim. (R. 177-90). Kimberly Tompkins, a neighbor of Applicant and Victim, testified Applicant repeatedly tried to persuade her fourteen-year-old daughter to help with his daughter's schoolwork or come to a surprise birthday party in early August 2014, both in person and by voice message, and offered her money. (R. 177-83). She testified Applicant's demeanor was normal, other than his repetitive insistence he take her daughter to the party. (R. 182). Victim's brother and mother also testified Applicant's behavior was normal on August 5, 2014, when he inquired about Victim's older sister coming to the party and eventually took Victim instead. (R. 187-94).

Applicant's estranged wife, Deonna, also testified during trial. (R. 237-261). She testified Applicant repeatedly accused her of having affairs throughout their marriage, including with her boss Tsafos. (R. 237-244, 259-61). She testified her marriage with Applicant was volatile and Applicant often came to the bowling alley to confront her or her co-workers. (R. 238-40). Tsafos wrote her a letter, stressing the bowling alley needed to remain professional and banning Applicant from entering the premises. (R. 239-40). She testified she moved out of the marital home in June of 2014 while Applicant was at a rehabilitation facility in North Carolina receiving treatment for his alcoholism. (R. 240-41, 245). She testified Applicant had been in treatment for his drinking several times and described his heavy drinking throughout their marriage. (R. 244-47). She

testified Applicant buried empty alcohol bottles in the backyard and hid them under his daughter's mattress. (R. 244-47). She testified Applicant had numerous health problems and she began to accompany him to his medical appointments because the things he was telling her did not make sense, including that fuel exposure to his skin caused his ailments. (R. 245-46). Deonna testified every single doctor told her Applicant's health issues were solely related to his alcohol abuse, not military service as Applicant claimed. (R. 245-46). Deonna testified despite Applicant's heavy drinking, he was able to function and would help his daughter with her homework and behave "like a normal person." (R. 247).

Deonna testified she went to the police station around noon on the day of the incident after becoming alarmed upon noticing Applicant made a purchase at a gun store nearby and was heading back to the area. (R. 247-49). She also received a call from Applicant's mother that he had stolen her gun and she intended to file a police report. (R. 248-49). Deonna also recalled various alarming Facebook messages from Applicant. (R. 250-52). She testified she had filed police reports before concerning Applicant. (R. 251). Deonna testified after she filed her police report, she went to work at the bowling alley. (R. 253-54). She testified she had no interaction with Applicant until he showed up at the bowling alley after five p.m. (R. 253-54).

Applicant testified in his own defense and presented a nonsensical, disjointed and self-serving account of the weeks leading up to his August 5, 2014, crime spree. Applicant testified in the summer of 2014, he had a substance abuse problem and was drinking to help him sleep at night. (R. 766). He testified he also had a myriad of other health issues, including gastrointestinal problems prevalent since childhood, liver issues that caused his "brain to malfunction," and a "heart virus." (R. 492-96). Applicant testified he had been diagnosed with PTSD by the VA and a

private psychiatrist had challenged Dr. Gomez's prior testimony that she found no record of Applicant having PTSD. (R. 495).

Applicant testified he tried to quit drinking in March of 2014 and eventually entered an inpatient treatment program in Wilmington, North Carolina. (R. 495-98). Applicant testified he stayed at this rehabilitation center for twenty-five days and was discharged on June 23, 2014. (R. 498-99). Applicant testified prior to his discharge, he received an injection of Vivitrol and was told it would last a month. (R. 499-502). Applicant claimed the injection gave him horrid side effects. (R. 501). After leaving Wilmington, Applicant testified he drove back to the Goose Creek area before eventually returning to Wilmington and begging the rehabilitation center to re-admit him. (R. 501-08). Applicant testified he was experiencing stomach pain so severe that he could not eat and eventually had to be hospitalized in Wilmington. (R. 507-13).

After being discharged, Applicant stayed at a friend's home in the Wilmington area for a few days. (R. 513-14). While at the friend's house, Applicant testified he received a call from his wife's friend informing him Deonna was having an affair with Tsafos. (R. 514). Applicant then left his friend's house and drove to his mother's house in Pennsylvania. (R. 514-15). Applicant claimed he forgot how to read a map or drive a car, making his drive to Pennsylvania all the more arduous. (R. 515-18). Applicant also claimed he was still unable to eat. (R. 517).

Once he arrived at his mother's house, Applicant testified he was so severely ill that he laid on the floor for days. (R. 518-19). Applicant testified he began drinking wine to help him sleep at his mother's insistence. (R. 520). He testified he was throwing up blood and still unable to eat, so his mother took him to the emergency room. (R. 521). Applicant testified he was "emaciated." (R. 521, 525). Applicant claimed to have no clear memory and that he was only able to remember things as "a picture here or there." (R. 522). Applicant testified he refused psychiatric treatment at

JBM/15

the hospital and was discharged into his mother's care. (R. 525-26, 528-29). Applicant testified he stayed at his mother's house for a few days before eventually leaving to drive back to Goose Creek. (R. 530-32). Applicant claimed his mother packed the gun into his bag unbeknownst to him, but later recanted this assertion and said he did not want to blame his mother for his procurement of the firearm. (R. 532-33, 573-74).

Applicant testified it took him four or five days to drive back to South Carolina and he could not eat during the trip. (R. 533-34). He testified when he arrived in Goose Creek, Deonna had moved out of their marital home and was living with Tsafos. (R. 537). He claimed the electricity had been turned off, so he checked into the EconoLodge motel. (R. 537, 540). Applicant testified he waited around at the motel for his electricity to be turned back on. (R. 541-42). Applicant testified he does not recall what happened after that and most of his memory is based on his reading of discovery materials for the case. (R. 542-46). He testified he did not recall sexually assaulting Victim and only recalled telling Tsafos he wanted to kill himself. (R. 545-63). Applicant never denied threatening Tsafos, pointing a loaded firearm at him, or shooting Tsafos. Applicant testified the Vivitrol shot caused him to commit his crimes. (R. 586-87).

Applicant also called Robert Bennett to testify on his behalf. Bennett, who received a pharmacy degree in 1980 and a Ph.D. in pharmaceutical sciences in 1990, was allowed to testify as an expert in pharmacology and toxicology over the State's objections.<sup>3</sup> (R. 623-41). Bennett testified he reviewed Applicant's case and medical records to determine if his body was experiencing any toxic effects at the time of his crime spree. (R. 642-44). Bennett discussed the

---

<sup>3</sup> During *voir dire* on his qualifications, Bennett admitted he has not kept his licensures up to date, had not taken any required continuing educational requirement since 1999, and had been served a cease-and-desist letter from the State Board of Pharmacy requesting he stop referring to himself as a pharmacist. (R. 628-34, R. 866).

possible effects on the brain and other organs from gastrointestinal issues and the various other ailments Applicant asserted he suffered. (R. 643-59). Despite testifying Applicant appeared to be malnourished based on his review, he conceded Applicant's medical records repeatedly referenced that he was well-nourished. (R. 664-67). Bennett reiterated he was basing his opinion on Applicant's self-assessment that he had not eaten in weeks and was malnourished, which Bennett opined would significantly affect internal organs and cognitive functioning. (R. 678-79).

In rebuttal, the State called Dr. Todd Magro, a medical doctor who specializes in adult psychiatry and addiction psychiatry. (R. 685-87). Dr. Magro routinely prescribes Vivitrol and was qualified as an expert in psychiatry, medicine, addiction psychiatry, and addiction medicine. (R. 686-88). Dr. Magro reviewed Applicant's medical records, including laboratory results, and concluded Applicant was "[a]t most . . . mildly dehydrated . . . one time[,] [b]ut certainly not starving." (R. 688). Dr. Magro testified there was absolutely nothing in Applicant's medical records to suggest that he was malnourished. (R. 688). Dr. Magro testified that based on his professional experience, there is no connection between gastrointestinal issues and psychosis. (R. 689-90). He further testified there is nothing in Applicant's records that led him to believe Applicant was psychotic at any period of time. (R. 684, 698). Dr. Magro testified Vivitrol does not cause psychosis, memory loss, or any psychiatric or cognitive problems based on his vast experience with the medicine. (R. 691-94). Dr. Magro testified that based on his review of Applicant's medical records, Applicant's primary medical problem was alcohol dependency. (R. 694-95).

Following the close of all testimony, the court asked both parties for any requests to charge. (R. 700). Defense counsel requested an instruction on involuntary intoxication based on Applicant's Vivitrol injection approximately six weeks prior to the crime spree. (R. 700-01).

Defense counsel also requested jury instructions on not guilty by reason of insanity and guilty but mentally ill. (R. 701-13). Defense counsel theorized that the Vivitrol injection caused Applicant's psychosis and instead argued Applicant's "physical state at the time of the incident caused the psychoses," including malnourishment, gastrointestinal, blood, and liver problems. (R. 703-06). The State argued against an instruction of not guilty by reason of insanity, citing a dearth of testimony that Applicant did not know the difference between moral or legal right from wrong. (R. 708-11). Following argument from both parties, the court ruled it would not charge the jury on not guilty by reason of insanity, stating:

There has been no evidence in the record that at the time the crime was allegedly committed that because of that mental disease or defect that you are alleging there -- the testimony has always been that the defendant did know the alleged crime in each of the indictments was morally or legally wrong. So I will not be charging insanity, the insanity defense. Note your exception to my ruling.

(R. 712). However, the court ruled it would instruct the jury on guilty but mentally ill as requested by defense counsel. (R. 712-13).

Defense counsel then requested jury instructions on the lesser included offenses of attempted murder, including assault and battery of a high and aggravated nature, assault and battery in the first degree, and assault and battery in the third degree. (R. 713-14). In support of this request, defense counsel argued Applicant did not have the requisite intent for attempted murder. (R. 714). The State objected, arguing a lack of evidence in the record to show any lesser included offense of attempted murder occurred. (R. 714). The court ruled it would not charge any lesser included offenses of attempted murder, stating:

I must charge the law applicable as to the facts as presented. I will not be charging any lesser included's. We discussed this last evening. I do not -- there has been nothing -- the testimony has not changed since last evening, and there is nothing that would indicate

that factually the lesser included's is appropriate. The testimony has been and even your own client's testimony was that when he came out of his fog, the white light, that he had the gun in his hand. So based upon that I will be charging -- I will not be charging any lesser included's.

(R. 714-15).

Following closing argument from both parties, the trial court charged the jury on the law and instructed the jury to begin deliberations. (R. 763-83). The jury deliberated for forty-seven minutes before convicting Applicant on all counts as indicted. (R. 783-85).

### **III. Issues Before This Court**

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on:

1. Ineffective Assistance of Counsel;
2. "I was not competent at the time of my trial";
3. "Please see my August 7 2018 deposition transcript, attached as exhibit A"; and
4. "Please see Exhibit A and Exhibit B which is a true and correct copy of a letter from Rebecca A Plummer McCardle, LMSW".

Pursuant to Rule 71.1, SCRCPC, on February 4, 2019, Applicant, through PCR counsel, filed a Supplement/ Amendment to Application for Post-Conviction Relief to include the following allegations:

1. I received ineffective assistance of counsel that prejudiced my defense, in violation of the Sixth Amendment of the United States Constitution. See S.C. Code § 17-27-20(A)(1). In addition to the ineffective assistance identified in Exhibit A to my Application and at hearing, I specifically believe that my trial attorney, Melisa Gay, was ineffective for failing to pursue a defense of (and a jury instruction for) involuntary intoxication based on the side effects of Vivitrol. See State v. Shands, Op. No. 5569 (S.C Ct. App. dated June 13, 2018) (Shearouse Adv.Sh. No. 24 at 69) (example of involuntary intoxication jury instruction). One of the side effects of Vivitrol is inability to sleep, and I suffered from this side effect after the Wilmington Treatment Center administered the Vivitrol shot in June of 2014. The sleep deprivation caused by this shot, possibly combined with interactions with my other medications, led to my unusual, bizarre, and psychotic behavior leading up to August 5, 2014. During this period of time, and particularly during the times of my alleged crimes, I

did not understand what I was doing (to the extent I can even remember), and even if I did understand what I was doing I did not understand it was legally or morally wrong.

- a. Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed Aug. 26, 2016) available at <https://ctrack.sccourts.org/public/document/view.do?documentID=480792> (last visited January 3, 2019) and <https://ctrack.sccourts.org/public/document/view.do?documentID=480795> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- b. Supplemental Record on Appeal, State v. Fraley, No. 2015-001737 (S.C. Ct. App. filed August 31, 2016) available at <https://ctrack.sccourts.org/public/document/view.do?documentID=480799> (last visited January 3, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- c. Vivitrol Medication Guide, FDA (Rev. July 2013) available at <https://www.fda.gov/downloads/Drugs/DrugSafety/UCM206669.pdf> (last visited January 4, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- d. Flavie Waters, et al., Severe Sleep Deprivation Causes Hallucinations and a Gradual Progression Toward Psychosis With Increasing Time Awake, 9 Frontiers in Psychiatry 303 (July 10, 2018) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6048360/pdf/fpsy-09-00303.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- e. Nadine Petrovsky, et al., Sleep Deprivation Disrupts Prepulse Inhibition and Induces Psychosis-Like Symptoms in Healthy Humans, 34 The Journal of Neuroscience 9134 (July 2, 2014) available at <http://www.jneurosci.org/content/jneuro/34/27/9134.full.pdf> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- f. Stanley Coren, Sleep Deprivation, Psychosis and Mental Efficiency, 15 Psychiatric Times (March 1, 1998) available at [http://www.mpsaz.org/rmhs/staff/rjrrios/psychii/psychcal/files/sleep\\_deprivation\\_article\\_questions.pdf](http://www.mpsaz.org/rmhs/staff/rjrrios/psychii/psychcal/files/sleep_deprivation_article_questions.pdf) (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- g. Louis Jolyon West, et al., The Psychosis of Sleep Deprivation, 96 Proceedings of the New York Academy of Sciences 66 (Jan. 1962) available at <https://nyaspubs.onlinelibrary.wiley.com/doi/pdf/10.1111/j.1749-6632.1962.tb50101.x> (last visited January 8, 2019). Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of this document.
- h. Pursuant to Rule 201, SCRE, Petitioner requests this Court take judicial notice of the attached documents from State v. Gay, 2018A1010200733, which are attached as Exhibit A. See also In re Gay, 375 S.C. 418, 653 S.E.2d 272 (2007); In re Gay, No. 2018-000237 (S.C. Sup. Ct. Order dated March 21, 2018).

On August 23, 2020, Applicant, through PCR counsel, filed a Second Supplement to Application for Post-Conviction Relief to his application to include the following allegation:

1. "Petitioner hereby files the attached excerpts of the May 25, 2018, deposition of Len Allen (pages 1-3, 30, 50-53, Ex. 1) as a supplement to his Application for Post-Conviction Relief.

Pursuant to Rule 71.1, SCRPC, on March 12, 2021, Applicant, through PCR counsel, filed another amendment to his post-conviction relief application to include the following allegations:

1. Trial counsel failed to call Rebecca A. Plummer to testify on my behalf;
2. Trial counsel failed to call Alta Fraley to testify on my behalf;
3. Trial counsel failed to object to hearsay testimony uttered at p. 191 lines 14 through p. 192 l. 11. This testimony went beyond the scope of expert testimony permitted under SCRE 703;
4. Trial counsel failed to make a contemporaneous objection to Kimberly Tompkins' testimony (pp. 232-238) regarding an incident occurring on the Saturday before the events for which Applicant was charged. Trial counsel argued in limine that the conduct was impermissible 404B evidence. However, by failing to make a contemporaneous objection, trial counsel did not preserve the issue for appellate review;
5. Trial counsel failed to object to hearsay testimony from witness Ruth at p. 250 lines 10-13; p. 251 lines 7-8;
6. Trial counsel failed to object to hearsay testimony from witness Chad at p. 281 lines 12-14; and lines 19-22;
7. Trial counsel failed to object to hearsay testimony of the victim that went beyond "time and place" exceptions set forth in SCRE 801(d)(D) p. 468 lines 11-13; 21-24; and p. 470 lines 8-16;
8. Trial counsel failed to object under SCRE 404(B) to unrelated "bad acts" testimony uttered at p. 569 lines 11-12. 404B testimony should have objected; and
9. Trial counsel failed to object to the State's vouching for its witnesses at p. 837 lines 12-15; 842 and lines 8-9.

At Applicant's evidentiary hearing, he proceeded forward on allegations 2-9 of the amended application filed on March 12, 2021. To the extent the allegations set forth in Applicant's original application and amended applications can be construed as separate grounds for relief from the grounds stated at the PCR hearing, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

#### **IV. Relevant Testimony From Evidentiary Hearing**

##### ***Applicant's Ex-Wife Julie Fraley's Testimony***

Applicant's ex-wife, Julie Fraley (Julie), testified on Applicant's behalf at the evidentiary hearing. Julie testified she and Applicant were married in 1999 and divorced in 2006. Julie testified she had one child with Applicant – Alta Fraley. Julie testified she had sole custody of Alta after the divorce; Applicant had visitation. Julie testified that from 2014-2016, Alta, age 12-14, lived with her in West Ashley. Julie testified her relationship with Applicant remained polite following their divorce, specifically stating her and Applicant remained on speaking terms and communicated regarding Alta's welfare.

When questioned regarding Applicant's trial counsel (Melisa Gay), Julie stated she was unfamiliar with Applicant's trial counsel. Julie opined that following Applicant's arrest, no one, including Applicant's trial counsel, reached out to her to inform her about or discuss Applicant's case with her. Julie stated she had to look up information regarding Applicant's trial and arrest on her own. Julie additionally testified Applicant's wife at the time of his arrest, Deonna, would inform her what was going on with Applicant's case. Julie testified she gave a statement to the Berkeley County Sherriff's department at some point in time; Julie testified the statement contained her contact information. Julie testified that if someone had contacted her and requested to speak with Alta, she would have allowed them to do so.

On cross-examination, Julie testified she only became aware that Melisa Gay was Applicant's trial counsel following Applicant's trial. When asked what benefit she believed Applicant would have received should Applicant's counsel have reached out to her, Julie testified she did not know. Julie further testified she could not determine whether it would have been good or bad for Alta to be involved in her father's trial – noting, Alta was twelve years old at the time.

***Applicant's Daughter Alta Fraley's Testimony***

Applicant's daughter, Alta Fraley, also testified at Applicant's evidentiary hearing. Alta testified she lived with her mother, Julie Fraley, from 2014 to 2016. Alta testified she had a cell phone during that time and in August 2019, delivered photographs of text messages from that phone to PCR Counsel Jason Luck's office. (*see* Applicant's Exhibit #1). Alta testified the text messages as seen in Exhibit #1 were communications between her and Applicant prior to Applicant's arrest. Regarding Alta's communications with Applicant, she stated she attempted to keep in contact with Applicant through both phone calls and texts.

Alta testified that during conversations with her father throughout 2013 and 2014, Applicant spoke to her about strange matters. Specifically, Alta testified Applicant had told her on different occasions he had been struck by lightning; text her to tell her he had seen bigfoot; and told her he had throat cancer and would only live a week. Prior to 2014, Alta testified she and Applicant had discussed hunting for bigfoot. However, Alta stated Applicant had not previously indicated seeing bigfoot. When questioned whether this conversation or joke about bigfoot was ongoing between herself and Applicant, Alta testified they watched bigfoot shows together and talked about camping and finding bigfoot.

Alta testified Applicant's texting style had changed during this period as well. Alta stated Applicant had begun adding spaces and punctuation in odd places. Alta further testified she believed Applicant errantly text her believing her to be Deonna (Applicant's ex-wife) at some point. Alta testified she told her mother about Applicant's strange behavior and the strange texts she was receiving; however, her mother, Applicant's ex-wife, did not do anything.

When asked if she knew where Applicant was prior to when he began sending these texts to her, Alta testified he was probably in Pennsylvania. Alta elaborated, testifying Applicant had

gone to his mother's house in Pennsylvania prior to the strange texts. Alta testified that based on her experience and knowledge of her father she did not believe he was in his right mind. However, Alta further testified that following the trial, she was not able to speak with Applicant again until she was eighteen years old.

Alta testified she did not know or speak with Applicant's trial counsel Melisa Gay and testified she remembers asking her mother whether she needed to testify at Applicant's trial. Alta stated that if trial counsel would have requested to speak to her, she would have. Alta additionally testified she believed she had the wherewithal at the age of thirteen to effectively testify on Applicant's behalf. Specifically, Alta testified she knew there was something wrong with Applicant at the time of the incident and opined again Applicant did not have the presence of mind to have committed these crimes. Alta further tried to analyze and explain why Applicant's texts and the way he responded showed he did not know what he was doing.

#### ***Trial Counsel Melisa Gay's Testimony***

Applicant next called trial counsel, Melisa Gay (Counsel), as a witness. Counsel testified she has been practicing criminal law for thirty-one years and was retained to represent Applicant in this matter. Counsel testified Applicant was an alcoholic who had received out-of-state treatment for his alcoholism prior to the incident. Regarding the incident, Counsel testified Applicant created a ruse – a child's birthday party – to lure one of his neighbor's daughters out of her house. Counsel testified Applicant took Victim to an EconoLodge; Counsel further testified there is video evidence of Victim leaving the EconoLodge with wet hair, supporting Victim's contention Applicant made her shower after he raped her. Counsel testified evidence supported the State's case Applicant then took Victim to the bowling alley where his ex-wife worked and where he was eventually apprehended. Counsel testified there was plenty of evidence to support the

State's case and she believed the State had enough evidence to convict Applicant. Due to the strength of the State's evidence, Counsel testified Applicant's theory of defense heavily relied on Applicant's mental state.

Regarding Applicant's mental state, Counsel stated Applicant believed a medicine he had taken to treat his alcoholism, Vivitrol, "sent him off the deep end". Counsel testified Applicant insisted he had not been given the accurate side effects of his alcoholism treatment and had experienced psychosis because of the treatment. Because of Applicant's assertions regarding his mental health, Counsel stated she had a mental health evaluation performed pursuant to *Blair*<sup>4</sup> and *M'Naghten*<sup>5</sup>. Counsel testified Applicant was sent to the state hospital for mental health evaluations.

Counsel testified she spoke with Applicant's mother about his mental health as well as spoke with Applicant about pleading not guilty by reason of insanity. Counsel testified Applicant met with mental health professionals on three separate occasions and was found competent to stand trial. Additionally, Counsel testified she discussed Applicant's case with Dr. Robert Bennett. Dr. Bennett testified on Applicant's behalf at trial regarding the possible effects Applicant's gastrointestinal issues and other self-assessed ailments could have on Applicant's brain. Counsel stated Dr. Bennett testified that because Applicant had stopped eating, the malnutrition deteriorated his mental abilities. Counsel stated she argued during closing arguments Applicant had lost his ability to normally function when he could not eat.

Regarding Applicant's allegation trial counsel was ineffective for failing to call Alta Fraley to testify, Counsel testified she did not believe Alta, nor Applicant's ex-wife, Julie Fraley's,

---

<sup>4</sup> *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).

<sup>5</sup> *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

testimony would have been helpful to Applicant's defense. Counsel testified she spoke mostly with Applicant's mother prior to trial. Counsel testified it was her belief that Applicant and his ex-wife Julie were not on speaking terms. Counsel testified she believed Applicant did not want to burden his at-the-time thirteen-year-old daughter with his case. Additionally, Counsel testified Alta's age deterred her from discussing the case with her. Counsel stated that discussing the matter with Alta at the age she is today would have been more beneficial; however, Counsel re-iterated Alta's age at the time of the trial was a large factor in her decision not to call on Alta to testify. Counsel further testified she was unaware of the text messages between Applicant and Alta prior to this evidentiary hearing.

Regarding Applicant's allegation Counsel failed to object to hearsay testimony from Dr. Anna Gomez that Applicant asserts went beyond the scope of expert testimony permitted under SCRE 703, Counsel testified she did not see a need to object because Dr. Gomez was describing what she did in order to prepare for the evaluation of Applicant. Counsel stated Dr. Gomez, an expert in the field of forensic psychiatry, performed the evaluation of Applicant for his assertion of an insanity defense. Counsel further testified she made a hearsay objection prior to Dr. Gomez's testimony on Vivitrol that was overruled by the trial court. Counsel testified she did not object to the testimony Dr. Gomez gave regarding the Vivitrol drug as Counsel believed Dr. Gomez was giving her opinion on the pharmacists about Vivitrol.

When asked whether Applicant wished to proceed to trial, Counsel testified he did. Counsel testified it would have been beneficial to Applicant's case if she could have found a witness to testify the Vivitrol drug affected Applicant negatively or led to psychosis. However, it was fully Applicant's decision to proceed to trial.

Regarding Applicant's allegation she did not object to testimony from multiple witnesses including Kimberly Tompkins, Ruth Vick, and Chad Vick, Counsel testified she did not believe there was a reason to contemporaneously object to testimony as she had renewed all motions at the close of testimony. Regarding Counsel's failure to object to testimony from Victim's mother, Counsel testified Victim's mother, Ruth Vick, was a first reporter and believed Ms. Vick was therefore able to testify to what she had reported regarding Victim's statements about the rape under 801(d), SCRE. Counsel further testified Victim's father, Chad Vick, also testified, positing she felt she should have objected to his testimony as it bolstered the testimony of Victim. Regarding Applicant's allegation Counsel failed to object to testimony from Karen Drozd that went beyond "time and place", Counsel testified she did not object. Counsel reasoned Ms. Drozd's testimony was admissible because Ms. Drozd was describing her examination of the patient (Victim) and was therefore admissible pursuant to the medical diagnosis exception to hearsay.

Finally, regarding Applicant's allegation Counsel was ineffective for failing to object to statements made during closing which Applicant alleged improperly vouched for the State's witnesses, Counsel testified she did not object to the closing argument as a trial strategy. Counsel further testified it is not her practice to object during closing; Counsel further testified she believes the trial judge corrects any overstepping by the State when the court instructs the jury that closings are not to be viewed as testimony and rather as argument.

#### ***Applicant Gary Fraley's Testimony***

Applicant briefly testified on his own behalf at the evidentiary hearing. When questioned whether he requested Counsel contact his daughter, Alta Fraley, Applicant testified he had. Specifically, Applicant testified he asked Counsel to reach out to Alta around the same time his house was being sold. Applicant did not remember if this request to Counsel was made prior to or

following his competency evaluation.

***Solicitor Anne Williams' Testimony***

The State called Solicitor Anne Williams (Williams) as a witness. Williams testified she has been practicing law since 1998 and was first chair for the State in this matter. Upon request, Williams gave a brief recitation of the State's evidence in this case, averring Victim in this matter was the eleven-year-old daughter of Applicant's neighbor who Applicant lured out of her home under false pretenses. Williams testified State's evidence showed Applicant drugged Victim and anally, orally, and vaginally raped Victim. Williams further stated Applicant made Victim shower to destroy evidence of the rape following the assault. After Applicant raped Victim, Williams stated evidence showed Applicant took Victim to the bowling alley where his ex-wife worked and left her in his car while he went inside. Williams further testified that after entering the bowling alley, Applicant took a person hostage and was eventually arrested by police. Regarding Victim, Williams testified Victim found a phone and called her parents to pick her up from the bowling alley. Williams testified she could not recall any specific plea negotiations but would have expected a similarly situated Applicant to have pled to the charges as there was a large amount of evidence against him.

Williams testified there were medical records in discovery regarding both Applicant and Victim. When questioned whether evidence existed to support Applicant had been acting abnormally prior to the incident, Williams testified that despite Applicant having a history of medical problems, there was nothing substantial to support an insanity defense. Williams additionally testified that due to Applicant's voluminous medical records, Applicant could not show his medical issues legally excused his behavior.

Williams was also questioned regarding Applicant's allegation trial counsel failed to object to hearsay testimony from Dr. Anna Gomez that allegedly went beyond the scope of allowed expert testimony. Williams testified that due to the amount of information asked during trial and in the record regarding the drug Vivitrol, she believed Dr. Gomez's testimony was Gomez's attempt to fully respond and her professional due diligence.

Williams was further questioned regarding Applicant's allegation trial counsel failed to object to hearsay testimony that went beyond time and place exceptions as set forth in SCRE 801(d)(D). Williams testified that time and place is not the only hearsay exception, further stating she did not believe the testimony referenced in Applicant's application and testified to by Karen Drozd objectionable. Specifically, when asked why she pursued the line of questioning she had regarding ejaculation and penetration, Williams testified she did so to lay a foundation as the Ms. Drozd's testimony was admissible under the medical diagnosis exception.

#### **V. Standard of Review**

An applicant may seek PCR upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to

collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRPC. The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant

JBM/30

making a claim of ineffective assistance “must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment.” *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then “determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance” demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a “strong presumption that counsel’s conduct falls within the wide range of reasonably professional assistance.” *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. “The burden of rebutting this presumption ‘rests squarely on the defendant,’ and ‘[i]t should go without saying that the absence of evidence cannot overcome [i]t.’” *Dunn v. Reeves*, 594 U.S. \_\_\_, \_\_\_, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, “even if there is reason to think that counsel’s conduct ‘was far from exemplary,’ a court still may not grant relief if ‘[t]he record does not reveal’ that counsel took an approach that *no competent lawyer would have chosen.*” *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

“When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578,

592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Review of counsel’s actions is hallmarked by deference, as “it is all too tempting for a defendant to second-guess counsel’s assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 (“Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.”). “Defense lawyers have ‘limited’ time and resources, and so must choose from among ‘countless’ strategic options.” *Dunn*, 594 U.S. \_\_\_, 141 S. Ct. at 2410 (quoting *Harrington*, 562 U.S. at 106–107). “Such decisions are particularly difficult because certain tactics carry the risk of ‘harm[ing] the defense’ by undermining credibility with the jury or distracting from more important issues.” *Id.* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel’s actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*’s deferential standard.

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel’s deficient performance prejudiced the applicant such that “there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective

JT3m/33

assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; see *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

#### **VI. Findings of Fact & Conclusions of Law**

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments made by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised and finds each to be without merit. Therefore, pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

#### ***Allegation Counsel was Ineffective for Failing to Call Alta Fraley to Testify***

Applicant claims Counsel was ineffective for failing to call his daughter Alta Fraley to testify on his behalf at trial. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the

witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

“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, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See e.g. *Smith v. State*, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State*, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. See e.g. *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may

corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State*, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial). Further, to demonstrate prejudice, Applicant was required to present the evidence or witnesses he alleges Counsel did not properly investigate. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

This Court finds Counsel was not deficient in her decision not to call Applicant's daughter, Alta Fraley, to testify at Applicant's trial. Specifically, this Court finds Counsel credibly testified she did not believe Alta's, nor Julie's, Applicant's ex-wife, testimony would have been helpful to Applicant's defense. Counsel testified it was her understanding and belief at the time of trial that Applicant and Applicant's ex-wife, who had custody of Applicant's minor daughter Alta, were not on speaking terms. Counsel further testified Alta's age at the time of trial deterred her from discussing the matter with Alta and was a large factor in her decision not to call on Alta to testify. Additionally, Counsel testified she was unaware of the text messages sent between Applicant and Alta. This Court finds Applicant has failed to establish deficiency in Counsel's failure to call Applicant's minor daughter to testify. This Court finds Counsel's decision not to call Alta based on her age was not unreasonable based on the facts of this case. Furthermore, this Court finds Counsel's failure to call Applicant's daughter as a witness was not prejudicial. As such, Applicant has failed to show any deficiency in Counsel's performance and any resulting prejudice. Accordingly, this allegation is **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to Hearsay Testimony  
that Went Beyond the Scope of Expert Testimony***

Applicant alleges Counsel was ineffective in failing to object to alleged hearsay testimony by Dr. Anna Gomez which Applicant contends went beyond the scope of expert testimony as permitted under SCRE 703. “The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.” Rule 703, SCRE. “If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.” *Id.* Additionally, “[t]o the extent . . . relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.” Rule 803(18), SCRE. As noted previously, “when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Smith*, 386 S.C. at 567, 689 S.E.2d at 632 (citing *Caprood*, 338 S.C. at 110, 525 S.E.2d at 517).

Applicant alleges Counsel was ineffective for failing to object to the following testimony:

A: And so what the pharmacist explained to me was that when somebody received a Vivitrol injection the blood levels really reach their maximum in about two or three days and then they kind of reach this plateau of sorts, and then 14 days after the initial injection they continue to come down, come down, and come done; such that by the end of the day you have very low levels in your blood. That is why is it dosed about every 28 days.

She also explained that the Vivitrol itself doesn't change the effects of alcohol. Like if you drink you can still be drunk and have blackouts. So you may not feel that euphoria, that feel good from the alcohol; but everything else is still going to be a possibility.

And then lastly I asked her about, you know, side effects that affect the mind due to this medication, and she said that she was not aware of any psychiatric side effects to include memory loss, loss of awareness of one's actions or confusion as a result of using Vivitrol.

JBM/37

In addition, just the timeline, i.e. having received the medicine six weeks earlier being in fact overdue for the next dose if you are going to receive that treatment it just really didn't make any sense to her.

(R. 136-137).

Solicitor Williams thereafter asked:

Q. And made this inquiry because Mr. Fraley was telling you that the Vivitrol was making him behave that way during the time of the crimes; is that correct?

A. Yes, that was the strong insinuation.

Q. Okay. Now in order to do your report you have to figure out whether whatever you evaluate for Mr. Fraley meets the legal standard of insanity; is that correct?

A: Yes.

(R. 137).

Prior to the above-referenced testimony, Dr. Gomez explained she met with Applicant three different times – February 9<sup>th</sup>, February 17<sup>th</sup>, and May 13<sup>th</sup>, 2015 – in response to the court ordering an evaluation of Applicant for his assertion of an insanity defense. (R. 133). Dr. Gomez testified that prior to her examination of Applicant and to form her opinion, she reviewed a variety of legal records, medical records, and police interviews. (R. 133-134). In addition to the records and interviews reviewed, Dr. Gomez testified she received additional information from Applicant. (R. 134). Dr. Gomez testified that based on the information received from Applicant, she spoke with a pharmacist. (R. 135). Dr. Gomez testified she spoke with the pharmacist because:

[M]r. Fraley was making the contention that he had received a medication while being in Wilmington Treatment Center at the end of June that had a variety of effect on his mental abilities, and that was really not consistent with my knowledge of that medicine and what I found myself looking at the information available from the manufacturers of that medicine.

And so in order to be as thorough as I could be with that, you know, piece of information, I went ahead and contacted a pharmacist who specializes in medications related to mental health and has – she has certification in that – to get

her opinion on the medicine and its effects given the issues that were arises in this situation.

(R. 135).

At the evidentiary hearing, Counsel testified she made a hearsay objection prior to Dr. Gomez's testimony on Vivitrol. Counsel's objection was overruled by the trial court. Counsel further testified that she did believe an objection was necessary as Dr. Gomez was describing her preparation in her evaluation of Applicant and Applicant's contention the Vivitrol drug was cause for an insanity defense.

The Court finds no ineffectiveness on the part of Counsel. The record provides that Dr. Gomez's testimony was not based upon speculation, but rather was based upon a combination of data from her vast experience and prior knowledge, upon which she was entitled to rely as an expert witness. Additionally, this Court finds the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

This Court finds the record reflect that when Dr. Gomez was questioned on cross-examination regarding whether she contacted the pharmacist because she "didn't feel as if [she] had enough information in [her] own repertoire, Dr. Gomez stated:

I did not contact her because I didn't have enough information in my repertoire. I contacted her because this is her specific area of expertise and I thought it would be doing a good job if I did that. I did not have to contact her. (R. 147).

Therefore, this Court finds Applicant's contention that Dr. Gomez's testimony was objectionable as hearsay is baseless, and Counsel was not deficient for failing to advance that argument. Second, Counsel explored the same subject matter on cross-examination and did so in an evident effort to discredit Dr. Gomez. Applicant offers no compelling argument as to precisely how the inclusion harmed him, or how but for their exclusion the outcome at trial would have been

different. Therefore, the Court finds Applicant cannot show prejudice. Accordingly, the Court finds no ineffectiveness on the part of Counsel, and Applicant's request for relief by way of this allegation is DENIED.

***Allegation Counsel was Ineffective for Failing to Object and  
Preserve an Issue for Appellate Review***

Applicant asserts Counsel was ineffective for failing to make a contemporaneous objection to witness Kimberly Tompkins' testimony regarding an incident occurring on the Saturday before the incident occurring on Tuesday for which Applicant was charged. The Court finds these allegations are without merit.

Leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. See *Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); see also *id.* at 380, 811 S.E.2d at 804 (“[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court’s finding . . . . If so, an appellate court would necessarily have affirmed the trial court’s [ruling] . . . .”).

Similarly, “[a]n ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence.” *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). “If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally ‘unreasonable’ action, nor can it prejudice the defendant against whom the evidence was admitted.” *Id.*; see *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d

1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

Trial counsel testified she did not object to the introduction of Ms. Tompkins testimony as she had already moved in limine to limit any testimony discussing Applicant's prior bad acts. Specifically, during pretrial motions, Counsel argued to exclude testimony on Applicant's prior attempts to coerce another neighbor's child out of her home three days prior to the incident. (R. 91-92). Counsel further argued Applicant was not charged with the event in question and therefore any testimony elicited regarding Applicant's prior attempt was extremely prejudicial to Applicant's case. (R. 92). In response to Applicant's motion, the State argued *res gestae*, argued that Applicant had asserted an insanity defense and therefore the testimony was relevant, and argued Counsel planned to present evidence dating back to the June prior to the incident in support of his insanity defense. (R. 92-94). Thereafter, the trial court denied Applicant's motion in limine and found the testimony relevant and admissible. (R. 101).

This Court finds Applicant failed to meet his burden of proving that Counsel's failure to object to Ms. Tompkins' testimony was deficient. Though counsel did not contemporaneously object to the testimony of Ms. Tompkins, Counsel argued in limine to limit the testimony and the trial court denied Applicant's motion. Additionally, barring any alleged deficiency, this Court finds Applicant has failed to show prejudice. Specifically, this Court finds any objection Counsel would have made to Ms. Tompkins testimony would not have changed the outcome of his trial. This Court further finds evidence exists in the record to support the trial court's finding denying Applicant's motion in limine and finds an appellate court would have necessarily affirmed the trial court's ruling should Counsel have objected. As Applicant has produced no probative evidence

towards meeting his burden as to either prong of *Strickland*, accordingly his demand for relief by way of this allegation is **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to Hearsay Testimony from Witness Ruth Vick***

Applicant alleges Counsel was ineffective for failing to object to the following testimony from Victim's mother, Ruth Vick, at trial: "He said he was at the Northwoods and that he had taken [victim] outside and talked to her while the other children were inside of the food court, and then he said [victim] had been raped and get there as soon as we could". (R. 195). Applicant additionally alleges Counsel was ineffective for failing to object when Victim's mother testified: "[Victim] told me that there was no birthday party, that she had been taken to the EconoLodge and raped". (R. 196).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Trial counsel may be deficient for failing to object to hearsay testimony without a valid trial strategy. *Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018). However, trial counsel's deficient failure to object to such testimony does not remove an applicant's burden to prove prejudice. *Id.* 423 S.C. at 246, 814 S.E.2d at 493.

Additionally, a statement 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 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[.]" Rule 801(d)(1)(D), SCRE. Under the rule, "corroborative testimony cannot include 'details or particulars' regarding the assault." *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629,

632 (2010); *see also, e.g. State v. Simmons*, 423 S.C. 552, 816 S.E.2d 566 (2018) (holding a pediatrician's testimony of a minor victim's disclosure that his father watched pornography with them and made the victims fellate him was impermissible hearsay which did not fall under the medical diagnosis exception); *Huggler v. State*, 360 S.C. 627, 602 S.E.2d 753 (2004) (holding written statements provided by children victims to police which detailed sexual acts that they engaged in with the defendant constituted impermissible hearsay, and that trial counsel's failure to object constituted deficient performance, but that the defendant was not prejudiced because the evidence was overwhelming); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001) (holding testimony by four witnesses recounting a minor victim's disclosure of the identity of her abuser constituted impermissible hearsay, and that trial counsel's failure to object constituted ineffective assistance); *State v. Whisonant*, 335 S.C. 148, 154-55, 515 S.E.2d 768, 771 (Ct. App. 1999) (holding stepmother's testimony to be hearsay where she recounted in graphic detail the nature of the abuse disclosed to her by the victim).

"Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless." *State v. Jennings*, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) (citing *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)); *see also Thompson v. State*, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018) (recognizing the concurrence and dissent in *Jennings* collectively overruled *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994) "and its progeny to the extent those cases impose a categorical or per se rule precluding a finding of harmless error"). In considering whether improperly admitted testimony was harmless and whether an Applicant was prejudiced under *Strickland*, the Court must "consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object." *Thompson*, 423 S.C. at 246, 814 S.E.2d at 492-93.

This Court finds Counsel testified she did not believe this testimony was objectionable and believed Victim's mother, as a first reporter, was permitted to testify to the above-referenced statements. This Court finds Ms. Vick testified to out-of-court statements made by Mr. Vick which were hearsay and inadmissible. Hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. *See State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001). While Counsel may have been deficient for failing to object to the hearsay testimony, Applicant has failed to meet his burden of proving how this failure to object prejudiced him. Whether the objection to this instance of hearsay testimony would have changed the outcome of the trial is mere speculation. *See Clark*, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice). Moreover, this Court in considering the strength of the State's case apart from the inadmissible statements finds this admitted testimony was harmless and Applicant was not prejudiced by Counsel's failure to object. Accordingly, this allegation must be **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to  
Hearsay Testimony from Witness Chad Vick***

Additionally, Applicant alleges Counsel was ineffective for failing to object to Victim's father, Chad Vick's, testimony. Chad testified to the following at trial: "And she told me she hope she's not pregnant. And I said what do you mean. And she was like I was raped." (R. 226). Mr. Vick additionally testified, "And I asked her I was like what do you mean you were raped, you know. And she is like Dad I was raped. She is like there was no birthday, I was taken to the hotel EconoLodge. She said, "And Gary raped me"." (R. 226).

As defined above, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule

Bm/44

801(c), SCRE. This Court finds Counsel testified she believes she should have objected to the above-referenced testimony from Chad Vick. Based on the case law *supra*, Mr. Vick testified to out-of-court statements made by Victim which were hearsay and inadmissible. Additionally, as mentioned above, hearsay is inadmissible except as provided by statute, the Rules of Evidence, or other court rules. *See State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (S.C. App. 2001). While Counsel may have been deficient for failing to object to the hearsay testimony, Applicant has failed to meet his burden of proving how this failure to object prejudiced him. Therefore, whether the objection to this instance of hearsay testimony would have changed the outcome of the trial is mere speculation. *See Clark*, 315 S.C. at 388, 434 S.E.2d at 267 (concluding pure conjecture fails to establish prejudice). Therefore, this Court, in considering the strength of the State's case apart from the inadmissible statements finds this admitted testimony was harmless and Applicant was not prejudiced by Counsel's failure to object. Accordingly, this allegation must be **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to Hearsay Testimony that Went Beyond "Time and Place" Exceptions in SCRE 801(d)(D)***

Applicant alleges Counsel failed to object to hearsay testimony of Victim that went beyond the "time and place" exception set forth in 801(d)(D). Specifically, Applicant alleges Counsel failed to object to the three separate instances of testimony from Karen Drozd including the following exchange between the solicitor and Ms. Drozd:

Q: Okay. And was she able to tell you if ejaculation had occurred?

A: She was not aware of that. (R. 385).

Prior to the above question and response, the solicitor inquired whether it would be important for medical treatment and diagnosis of the patient to know when a sexual assault occurred and whether ejaculation and/or penetration. (R. 384). Ms. Drozd responded affirmatively to all inquiries from the State.

Applicant further alleges Counsel was ineffective for failing to object to the following questioning during direct examination between the solicitor and Ms. Drozd:

Q: And did she tell you if penetration occurred?

A: Yes.

Q: And where did she say that penetration occurred?

A: Mouth, vagina, and anus. (R. 468).

Ms. Drozd testified following this colloquy that determining whether penetration occurred and determining where penetration occurred were both necessary in her decision regarding the type of exam to be performed on Victim. Applicant further alleges Counsel was ineffective for failing to object to the following:

A: She told me she had NyQuil and alcohol.

Q: Okay. And did she say she took those voluntarily or they were given to her?

A: They were given to her. Forced.

Q: Okay.

A: She told me forced. (R. 470).

Hearsay is not admissible unless it is pursuant to an exception provided by the South Carolina Rules of Evidence or other means. Rule 802, SCRE. For example, “[s]tatements 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” are admissible pursuant to the trial court’s discretion. Rule 803(4), SCRE. As explained by the Supreme Court of South Carolina, “[A]fter recent trauma, these types of statements can provide the doctor with specific areas to focus on or specific conditions to search for when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment.” *State v. Simmons*, 423 S.C. 552, 564, 816 S.E.2d 566, 572 (2018); also *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997)

JBM/46

("[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.")

The challenged statements qualify as and fall under the exception for statements made for the purpose of a medical diagnosis. This Court finds Victim's statements to Drozd about the rape were essential to her medical evaluation, diagnosis, and treatment. Therefore, Counsel was not deficient for failing to object to any of the above testimony of Ms. Drozd. Furthermore, this Court finds Victim testified to same. Specifically, this Court finds Applicant was not prejudiced by the testimony as it was duplicative and would not have changed the result of the trial should Counsel have objected. Accordingly, this allegation must be **DENIED**.

***Allegation Counsel was Ineffective for Failing to Object to State's Vouching of Its Witnesses***

Lastly, Applicant alleges Counsel was ineffective for failing to object to the following statements made by the solicitor: "When you think about Ruth Vick and Chad Vick what kind of people are these? These are people who are respectful, they have good jobs, they take care of their family." and "He said I know I am going to jail because this is rape. He knew what the law was. He chose to not conform his behavior (R. 745, 750)". Applicant argues these remarks by the State vouched for the State's witnesses and prejudiced him in that he was denied a fair trial.

This Court finds Counsel was not ineffective for failing to object to the State's remarks during closing arguments. "Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions." *State v. Mouzon*, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995), *aff'd*, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing *Herring v. New York*, 422 U.S. 853

(1975)). “A solicitor’s closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). “The argument must not be calculated to arouse the jurors’ passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” *Id.* at 609–10, 602 S.E.2d at 744. “Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). “The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Id.* This Court finds Applicant cannot demonstrate he did not receive a fair trial because of these remarks. Furthermore, Counsel testified she did not object to the Solicitor’s comments during closing arguments because it is not her practice. Counsel further testified she believed that any overstepping by the solicitor was cured by the trial court’s instruction to the jury regarding closing arguments – they are not to be considered evidence. Therefore, this Court finds Counsel was not ineffective in not objecting to the State’s remarks during closing argument and Applicant has failed to meet the burden imposed upon him. Accordingly, Applicant’s claims pertaining to Counsel’s failure to object during closing arguments are **DENIED**.

## **VII. Conclusion**

Based on the evidence presented at the PCR hearing and a thorough review of the record before this Court, this Court finds Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

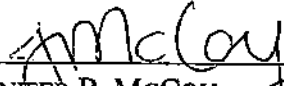
This Court notifies Applicant that he must file and serve a notice of appeal within thirty

days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. See Rule 203 SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

**IT IS THEREFORE ORDERED:**

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 14<sup>th</sup> day of October, 2022.

  
\_\_\_\_\_  
JENNIFER B. MCCOY  
Presiding Circuit Court Judge  
Ninth Judicial Circuit

Charleston, South Carolina