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

S.C. 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
Supreme Court Case No. 2023-000213**

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Was trial counsel's performance deficient for failing to call Petitioner's daughter Alta Fraley as a witness at trial to testify as to Petitioner's deranged and erratic behavior in the days prior to the alleged crime?
- II. Was trial counsel's performance deficient for abandoning an involuntary intoxication and/or insanity defense based on Petitioner's reaction to the drug Vivitrol, which was administered shortly before the alleged crimes?
- III. Was trial counsel's performance deficient for failing to object to the hearsay testimony of the State's expert, particularly when it was used to bootstrap prejudicial expert opinions of a non-testifying pharmacist?
- IV. Was trial counsel's performance deficient for failing to object to "prior bad acts" testimony so prejudicial the State mentioned it in its closing?
- V. Was trial counsel's performance deficient for failing to object to the hearsay testimony of Ruth Vick and Chad Vick which exceeded the bounds of "time and place" and also constituted improper corroboration testimony?
- VI. Was trial counsel's performance deficient for failing to object to the State's vouching for its witnesses in closing?
- VII. Was trial counsel's performance deficient for failing to call Petitioner's daughter Alta Fraley as a mitigation witness at sentencing?
- VIII. Was trial counsel's performance deficient for failing to present mitigation evidence involving Vivitrol at sentencing?
- IX. Did the Circuit Court violate Petitioner's state and federal rights by delegating its responsibility to draft an order in this action to the South Carolina Attorney General's Office?
- X. Did the State's tardy and misleading proposed order violate Petitioner's right to Due Process?
- XI. Did the substantial delays in this matter violate Petitioner's federal right to due process and state right to a speedy civil trial?
- XII. Do the errors set forth above collectively justify a new trial under the cumulative error doctrine?

STATEMENT OF THE CASE

From October 7, 2014, through December 16, 2014, the Berkeley County Grand Jury indicted Petitioner Gary Fraley for: attempted murder, unlawful conduct toward a child, unlawful neglect of a child, criminal sexual conduct with a child in the third degree, two counts of possession of a weapon during the commission of a violent crime, two counts of kidnapping, and three counts of criminal sexual conduct with a minor in the second degree. (App 868-900). Petitioner was tried for these crimes on July 13-17, 2015, before Circuit Court Judge Kristi Lee Harrington. (App 1). Petitioner was represented by Melisa Gay, and the solicitors representing the State were Anne Williams and Daniel Poulos. (App 1). The jury found Petitioner guilty as charged. (App 784, 786). The trial court sentenced Petitioner to a total of seventy six years of imprisonment. (App 812-813). Petitioner served his notice of appeal on or about July 23, 2015, and by opinion dated July 26, 2017, the South Carolina Court of Appeals affirmed Petitioner's sentence. (App 985-987).

On July 24, 2018, Petitioner filed an application for PCR with the Berkeley County Court of Common Pleas. (App 1158). For reasons that remain unclear, the Berkeley County Clerk of Court returned this application. (App 1158, 1293). Petitioner re-filed his application on December 28, 2018. (App 1158, 1177-1293). Petitioner supplemented this application by pleading filed February 4, 2019. (App 1167-1176). The State filed a return and motion to dismiss on April 23, 2019, which

was heard and denied on December 11, 2020.¹ (App 1049, 1167-1166). Petitioner supplemented his application a second time by pleading filed April 23, 2020. (App 1142-1151). Attorney James Falk² appeared as additional counsel for Petitioner and asserted additional grounds for relief by pleading filed March 12, 2021. (App 1140-1141). A final PCR hearing was held on March 25, 2021, but was continued due to Petitioner's trial counsel's failure to appear. (App 1049). Before this hearing was adjourned, the parties stipulated to the admission of the August 28, 2019, affidavit of Alta Fraley (and its associated images of her phone) into evidence. (App 1129-1139). Petitioner filed the affidavit of Julie Fraley on November 18, 2021. (App 1128).

The final PCR hearing was held on December 6, 2021, before Circuit Judge Jennifer McCoy. (App 1294). Representing Petitioner at this hearing were Jason Scott Luck and James Falk; the State was represented by Sammie Weidauer of the Office of the South Carolina Attorney General. (App 1051, 1294). Judge McCoy requested the State prepare an order denying relief on March 11, 2022. (App 1118). On July 11, 2022, Petitioner filed a motion to strike the State's answer for failure to prosecute (*i.e.*, failure to prepare an order); Petitioner supplemented this motion on August 8, 2022, and August 31, 2022. (App 1112-1127). The PCR court issued its order denying relief on October 19, 2022. (App 990-1038). Petitioner filed a motion to alter or amend this order on October 25, 2022, which was denied. (App 989, 1039-1111).

¹ No record exists of this hearing, but no party disputes that the State's motion to dismiss was denied.

² Mr. Falk's representation was limited to the December 6, 2021, PCR hearing.

STATEMENT OF THE FACTS

Introduction

On August 5, 2014, Petitioner Gary Fraley, disheveled and wearing a heavy coat in August, entered the Goose Creek Royal Lanes bowling alley where his then-estranged wife, Deonna Fraley, was the manager. (App 272-274). Petitioner had come to believe that Deonna and the bowling alley's owner, Steven Tsafos, were having an affair. (App 302). Fraley walked into Tsafos's office, produced a revolver and held Tsafos at gunpoint. (App 279-286).

Petitioner then began acting erratically. He demanded that Tsafos write him a check so that he could pay some bills. (App 287). Petitioner accused Tsafos of having a year and half-long affair with Petitioner's wife, when Deonna had only worked at Royal Lanes for a year. (App 302).

Despite allegedly fearing for his life, Tsafos berated Petitioner for his unkempt appearance, stating in a later police report that he told Petitioner: "Look at you man, look at how you are undressed, you're not even taking care of yourself, you're messed up in the mind, you're not even rational." (App 303).

Following another argument between Tsafos and Petitioner, Petitioner mentioned his daughter Alta Fraley and laid on Tsafos's office floor. Shortly after the police announced their presence, Tsafos testified that the gun simply "went off," firing into the ground. (App 286-287). Tsafos used the ensuing confusion to escape. (App 286-287).

Petitioner then remained in the office while Officer David Adams of the North Charleston Police Department attempted to negotiate his surrender. (App 323-332).

Adams eventually decided to tackle and tase Petitioner after he threatened to commit suicide. (App 323-332). Oddly, police described Petitioner as “kind of playful, jovial” about being placed under arrest. (App 352).

Near simultaneous to the standoff at the bowling alley, the police received a call from a hysterical Chad Vick explaining that his eleven year old daughter, Minor 1, had just told him that she had been raped by Petitioner. (App 196-197). Law enforcement then met with Minor 1 and her parents at MUSC. (App 196-197).

At trial, Minor 1 and her family would testify that on August 5, 2014, Petitioner, who was their neighbor, showed them what appeared to be a set of rocks while inviting Minor 1’s older sister to a surprise “fossil themed” birthday party for Petitioner’s daughter Alta Fraley. (App 188-189). Alta’s birthday is actually July 16. (App 242). Petitioner claimed the party was going to be held at the Royal Lanes. (App 188-189). Minor 1’s older sister was not home, so Petitioner invited Minor 1 instead. (App 188-189).

Instead of taking Minor 1 to the Royal Lanes, Petitioner drove her to the EconoLodge after a brief stop at an area Publix. (App 206-215). Minor 1 would testify that Petitioner had her take a shower. (App 206-215). He then force fed her a mixture of wine and cough syrup before raping and sodomizing her. (App 206-215).

Minor 1 further testified that Petitioner explained that he was “getting back” at his unfaithful wife by cheating on her with Minor 1. (App 209). Petitioner then drove to Royal Lanes and left Minor 1 in the car. (App 215). While pulling out of the Econolodge parking lot, Petitioner backed into an on-coming car. (App 344-345). The

officer investigating the accident stated at trial that, “the person pulling out of the parking lot completely disregarded” the oncoming traffic and did not stop or slow down before impact. (App 349).

Relevant Facts Prior to August 5, 2014

In the months leading up to August 5, 2014, Petitioner came to suspect that Deonna was having an affair with Tsafos. (App 237-245). Acting on his suspicions, Petitioner routinely visited Royal Lanes to spy on her and to publicly accuse his wife of cheating on him. (App 237-245). Petitioner’s marital problems coincided with a rapid deterioration in his physical and mental health. Petitioner, who was medically discharged from the Air Force and on disability, suffers from numerous gastrointestinal problems: Barrett's esophagus, ulcerative colitis, acid reflux, a damaged liver, and high ammonia levels. Petitioner is also an alcoholic and had been diagnosed as suffering from acute depression. (App 491-498).

At the end of May, 2014, Petitioner entered into an in-patient alcohol rehabilitation program in Wilmington, North Carolina. (App 491-498). Shortly thereafter, Deonna Fraley left the marital residence. She initially stayed at a friend's apartment, but soon moved in with Tsafos after her friend came to believe the two were having an affair and confronted Deonna. (App 278). Petitioner left the Wilmington facility on June 23, 2014. (App 499-502). At the end of his treatment, he was administered a Vivitrol shot, designed to lessen the euphoric sensation associated with drinking.

Between June 23, 2014 and August 5, 2014, Petitioner’s whereabouts and activities are uncertain. At trial, Petitioner testified that he experienced significant

health problems after receiving the Vivitrol shot. His memory became “foggy” and he could not remember large segments of time. (App 574-581). Petitioner vaguely recalled that he visited his mother in southeastern Pennsylvania and that he went to emergency rooms on two different occasions because of intestinal pains and memory problems. (App 583-586).

Petitioner had no clear recollection of his return to Goose Creek and could not explain how he came to stay the Econolodge. (App 598). At trial, Petitioner bizarrely alleged that his clearest memory of the Econolodge was an occasion when he believed his wife and Tsafos had spent the night there together after working an event at the bowling alley. (App 538-540). Petitioner further claimed that a senior North Charleston police officer had facilitated their rendezvous by driving Deonna to the hotel. (App 538-540). Illogically, Petitioner stated that he discovered their liaison when he went to the hotel to retrieve Deonna's car, supposedly at her request, while she and Tsafos were still there. (App 538-540). On August 1, 2014, Petitioner posted a menacing, but incoherent Facebook status:

If my wife, a hole to go, or Kevin tells me they have a gun at the bowling alley at 3:00 a.m. in the morning I am going to use my fucking Leatherman to where I am going to be in the news again. Shut up. I can kick your ass with my toenail. Can't wait to prove that. Phone off. Notes guys. Third time in a least eight months, folks. I don't know who Steve is. Once my wife Deonna when she started to amp up her game.

(App 594-595) (verbatim).

In the time between August 5, 2014 and Petitioner's departure from Wilmington, Deonna had been tracking Petitioner's spending and was particularly worried that he had purchased an unknown item from a gun shop. (App 248-249).

She alerted Goose Creek police, but they were unable to locate Petitioner before receiving calls about the incident at Royal Lanes. (App 250-252).

Trial in Underlying Action

Petitioner proceeded to trial on August 13 - 17, 2015. The primary issue at trial was whether or not Petitioner was legally insane on August 5, 2014.

Testimony of Dr. Ana Gomez

Dr. Ana Gomez, a forensic psychiatrist, testified for the State that she believed Petitioner was sane when the crimes were committed: “My opinion is that Mr. Fraley did not have a mental illness that would have impaired his ability to conform his behavior to the requirements of the law.” (App 140). Gomez also testified an unidentified pharmacist she spoke with was unaware of any reported cases where Vivitrol had cause psychiatric side effects. (App 135-137). Trial counsel did not object to this testimony. Dr. Gomez stressed that when evaluating whether an individual has lost touch with reality, corroboration by others that the person was acting strangely is important. (App 170). She noted the lack of corroboration by highlighting that the police reports she reviewed indicated that others believed Petitioner was acting normally prior to the incidents. (App 170). However, this claim contradicted the later trial testimony of many of the State's witnesses, including some statements to police she claimed to review. (*See* App 156, 159-161, 273, 523, 525, 542, 551, 557, 861).

Testimony of Kimberly Tompkins

Kimberly Tompkins testified that, two days before the incident resulting in Petitioner’s arrest, Petitioner asked Tompkins’s daughter to help his daughter with

a school project, then the next day invited her to a surprise birthday party for his daughter. (App 177-183). Trial counsel did not object to this testimony.

Testimony of Ruth and Chad Vick

Ruth and Chad Vick testified Petitioner requested their daughter (Minor 1) attend a surprise fossil-themed birthday party for his daughter Alta Fraley. (App 193-194, 223). After he supposedly showed her some of the fossils that would at the party, Ruth Vick, after consultation with Chad Vick, allowed Minor 1 to leave with Petitioner. (App 194, 223). The majority of the Vicks' testimony consisted of corroboration of the details of the alleged sexual assault of Minor 1. (App 195-196, 226-227). Though the Vicks' testimony went far afield of issues of time and place, Petitioner's trial counsel did not object to it.

Testimony of Deonna Fraley

Deonna denied having an affair with Tsafos. (App 237-244). Deonna testified about the marital difficulties that she and Petitioner were having. Petitioner regularly appeared at Royal Lanes and accused her of having affairs with numerous people, including Tsafos, other employees and some bowling alley regulars. (App 237-244).

Deonna also testified about Petitioner's deteriorating health. (App 245-247). In the year leading up to August 5, 2014, Petitioner had mentally and physically declined to the point where he could no longer accurately recount to her the medical advice he received from his doctors. (App 245-247).

Deonna recalled at trial, "[i]t was probably towards the end of the last year. Because things didn't make sense so I started going to doctor's appointments... I

learned that his illnesses were related to his drinking. Every single doctor kept saying you need to stop drinking.” (App 247). When asked by the solicitor, Deonna recollected that, right before she moved out in June 2014, she believed Petitioner exhibited “evidence of brain damage, psychosis, not knowing where he was, not knowing who he was...” (App 247).

Testimony of Victoria Booth

Victoria Booth was working at the front desk of the Royal Lanes on August 5, 2014. (App 267). Booth testified that when Petitioner first approached the entrance, she did not recognize him because he was so disheveled and unkempt. (App 268). Petitioner “seemed like he wasn't fully there and he wasn't thinking clearly.” (App 273-274). She recalled that Petitioner looked confused as he walked back and forth between the alley’s pro shop, the bathrooms, the lockers, and the adjoining offices. (App 273-274).

Testimony of Steven Tsafos

Tsafos initially testified that Petitioner barged into his office and immediately said “you are a dead man.” (App 281). He later contradicted himself and claimed that Petitioner barged into his office by telling him that “I need your help or something” and then sat down. (App 287).

At trial, the sequence of the conversation between Petitioner and Tsafos was unclear. However, Tsafos was adamant that Petitioner asked him for money so that he could pay outstanding bills. (App 285, 292). Tsafos was also adamant that Petitioner accused him of having a year and half-long affair Deonna, despite Deonna having only worked at the bowling alley for approximately one year. (App 302).

On cross-examination Tsafos reluctantly admitted that he harangued Petitioner, who was pointing a gun at him, for his slovenly appearance. (App 303-304). During his testimony, Tsafos alternated between claiming that Petitioner intended to kill him and describing the gun as having simply “went off” and fired into the floor. (App 286). Tsafos’s testimony also vacillated between claims that he was terrified of Petitioner and boasts of how he insulted and mocked Petitioner. (App 284).

Testimony of Petitioner Gary Fraley

Petitioner testified that he was medically discharged from the Air Force due to mental health problems, particularly depression. (App 490-492, 1199). Petitioner received VA disability payments and admitted to being an alcoholic. (App 491). Petitioner further stated that he had pre-cancerous Barrett’s esophagus and had suffered from severe, painful gastrointestinal problems most of his life. (App 493-494). Petitioner recalled that in the months leading up to the incident, he had been undergoing treatment at MUSC and that he was beginning to experience adverse effects from the myriad of drugs he was prescribed. (App 497-498). Petitioner’s primary care manager recommended that he enroll in an in-patient substance abuse program. (App 497-498).

Petitioner enrolled at the Wilmington, North Carolina Treatment Center May 29, 2014 and left on June 23, 2014. (App 498). Prior to leaving, Petitioner received an injection of a drug called Vivitrol. (App 499). Petitioner was then driven back to Goose Creek by an unknown person. (App 503). Petitioner stated that he began to experience memory loss once he returned to Goose Creek. (App 504). He vaguely recalled celebrating a belated Father's day with his daughter and Deonna. (App 503).

He also seemed to remember confronting Deonna about her suspected drug use and a trip to a bowling industry conference in Orlando that she took with Tsafos and others, including Petitioner's daughter Alta Fraley. (App 503-504). Petitioner could not recall how he came to be in a New Hanover, North Carolina emergency room. (App 503-504). Petitioner attempted to summarize what he was experiencing after receiving the Vivitrol shot: "there was so much -- there was so much going on with my -- I didn't understand. I was sick. My stomach was hurting. I didn't know if I was depressed. I wasn't drinking. So but, I didn't understand what was happening." (App 505) (verbatim).

Petitioner had no memory of driving to his mother's house in Pennsylvania. (App 515-516). Petitioner stated that he was not eating during this time and was throwing up blood. (App 520). His mental and physical deterioration continued at his mother's house where he continued throwing up blood and was eventually taken to a local emergency room. (App 519-523). Petitioner could not remember how long he stayed at the hospital. (App 519-523).

Petitioner testified that his mother had told him that the doctors were "cauterizing all the wounds in my stomach and cleaning out my system" during his visit. (App 523). Petitioner recollected that at the hospital after he began to feel better. (App 524). He also remembered that the hospital staff had asked to him stay in the psychiatric ward for longer observation. (App 525).

Petitioner struggled to explain why he felt compelled to leave the hospital as quickly as possible. He testified that, at the time, he believed that his daughter Alta

Fraley had a birthday coming up soon and that he wanted to take her away from Deonna because he believed she was having an affair with Tsafos. (App 530). Petitioner said that he was unaware that his mother had packed a revolver in his bags when he left her house. (App 532-535).

Petitioner had very little memory of the three days that he spent at the Econolodge in Goose Creek. (App 541-543). When asked about Minor 1's testimony earlier in the trial, Petitioner responded: "I saw what y'all saw. And it was all -- this was all brand new to me. Everything was new. I was in awe. I had no clue that any of this was like this." (App 543). He did not recall telling the Vick family that he was having a fossil themed birthday party for his daughter. (App 544-545). He had no memory of raping Minor 1. (App 552-553). In contrast to Tsafos's testimony, Petitioner stated that "the only thing I remember about that day is when I told Steve that I was trying to kill myself, I was trying to hurt myself and not him." (App 546).

Petitioner clarified that his first memory from August 5, 2014, was sitting in Tsafos's office. Petitioner remembered coming out of a "fog" when the gun went off and shot into the ground. (App 547-548). When asked if he intended to kill Tsafos, Petitioner reflected, "I don't think so... I know I was there to kill myself. I just wanted to lay down and [have Tsafos and Deonna] come to work every day knowing I killed myself right there." (App 550).

Testimony of Dr. Robert Bennett

Dr. Robert Bennett testified as an expert in the fields of pharmacology and toxicology. (App 642). Dr. Bennett explained that a large portion of his practice is devoted to forensic toxicology, "my job is to determine if the person that I'm involved

with is experiencing a toxic effect,” as a result of medication they are ingesting. (App 643). Dr. Bennett then explained the “gut-brain connection” whereby problems in the gastrointestinal system - related either to diseases, malnutrition, or both - can directly impact a person's mental functions. (App 645-652). He emphasized that malnutrition and major gastrointestinal problems, such as ulcers and Barrett's Esophagus, will have a deleterious effect on a person's frontal lobe. (App 653-654). Under these circumstances, Dr. Bennett stated that, an individual's “rational thinking, impulse control, ability to function in a complex society” would all be negatively impacted. (App 653-654). Dr. Bennett also opined that a severe vitamin B-12 deficiency may cause psychosis. (App 651).

On cross-examination, Dr. Bennett conceded that Petitioner was not currently psychotic. (App 660). When pressed further, Dr. Bennett reiterated that the “gut-brain connection” is well established and widely accepted in the medical community. (App 661-662). In response to the State's questioning, Dr. Bennett testified on re-direct examination that Petitioner's failure to eat for several days could, given his intestinal problems, have made him psychotic. (App 679).

Testimony of Dr. Todd Magro

The State then called Dr. Todd Magro as a rebuttal witness. (App 685-686). Dr. Magro testified that he regularly prescribed Vivitrol to patients dealing with substance abuse problems and that his patients have never reported having a reaction similar to Petitioner. (App 692). Dr. Magro also examined Petitioner's medical records and concluded that, while Petitioner was malnourished, there was no evidence that Petitioner was psychotic. (App 689-690).

Charges and Closing

Petitioner's trial counsel requested jury instructions on the law of not guilty by reason of insanity (NGRI) and guilty but mentally ill. (App 701-713, 715-716). However, at this time trial counsel also explicitly abandoned any charges based on Vivitrol. (App 703-705). The trial court rejected an NGRI charge.

During closing, Petitioner's trial counsel focused on how Petitioner's health affected his mind, though Vivitrol played no part in this argument. (App 721-740). The State's rebuttal focused on how Petitioner's medical issues could not excuse his behavior. (App 740-763). The State also made a point of mentioning Petitioner's alleged invitation of Kimberly Tompkins's daughter to his daughter's birthday party. (App 748). The State also noted the victim's parents were "respectful", "[had] good jobs", and "[took] care of their family." (App 745). Petitioner's trial counsel did not object to these statements.

Sentencing

Sentencing took place immediately after the jury's verdict, but was reconvened on July 23, 2015, to correct errors. (App 811-813, 902-914). Petitioner's trial counsel offered virtually no argument in mitigation at the first hearing, and none at the second; she presented no evidence, other than some comments from Petitioner, at either hearing. (App 808-809, 902-914).

PCR Hearing

Petitioner's PCR hearing was held on December 6, 2021.

Testimony of Julie Fraley

Julie Fraley's testimony was consistent with her November 8, 2021, affidavit, which was filed of record on November 18, 2021. (App 1128). This affidavit, and her testimony, established she was Gary Fraley's ex-wife (prior to Deonna Fraley). (App 1128, 1300). Julie Fraley had sole custody of their daughter Alta Fraley, though Petitioner had visitation rights. (App 1123, 1301). Julie Fraley gave her contact information to the Berkeley County Sheriff's Department, and this information was included in her statement to that agency. (App 1303).

Testimony of Alta Fraley

Alta Fraley's August 28, 2019, affidavit was admitted to evidence by stipulation of the parties on March 25, 2021. (App 1129). Most significantly, this affidavit provides:

...

3. I am Gary Fraley's daughter, and I lived with him until he left in the spring/summer of 2014 for rehab in Wilmington, North Carolina.

4. I have known my father my entire life and I have always had a close relationship with him. Prior to his incarceration, he and I would regularly exchange calls and voicemails.

5. I specifically remember the spring/summer of 2014, when my father left the house to attend rehab in North Carolina.

6. After my father's visit to rehab, his calls and texts to me became strange and incoherent. I specifically remember calls where my father claimed: (a) he was dying of throat cancer and only had months to live, (b) he had been struck by lightning, and (c) he had seen "Bigfoot." Many of these calls were made at hours of the day and night unusual for him.

...

9. Based on my father's conduct and communications with me during the summer of 2014, I believe my father lost touch with reality after his visit to rehab. I also believe that he did not know what he allegedly did on August 5, 2014, was legally or morally wrong, or that he even knew what he was doing that day.

10. My father's criminal defense attorney (Melisa Gay) never contacted me to discuss my potential testimony, which would have been consistent with the statements I have set forth in this affidavit.

(App 1130).

Alta Fraley also testified at Petitioner's December 6, 2021, PCR hearing. (App 1307-1327). Her testimony duplicated that of her affidavit, including authenticating the images of text messages from her mobile phone, which were also moved into evidence. (App 1131-1139, 1309). She also testified she was 13 at the time of Petitioner's arrest. (App 1310). In addition to the contents of Petitioner's texts, Alta Fraley pointed out Petitioner's grammar, or lack thereof, alerted her of something wrong with Petitioner's mental state. (App 1313). She also testified Petitioner had never shown any inappropriate sexual behavior to her or any other young girl. (App 1318). Alta Fraley closed her direct testimony by stating she would have spoken with Petitioner's trial counsel, had counsel contacted her. (App 1319). During the State's cross-examination, Alta Fraley was firm her interpretation of Petitioner's texts was not made with the benefit of hindsight, and that Petitioner's texts were certainly not a joke. (App 1322-1326).

Testimony of Melisa Gay

In her direct examination, Petitioner's trial counsel agreed she should have objected to the hearsay testimony of Dr. Gomez's pharmacist. (App 1329-1331). She also admitted she did not object to the "prior bad acts" testimony of Kimberly Thompkins. (App 1331-1333). She also noted her failure to object to the hearsay testimony of Minor 1 during the Vicks' testimony was not a trial strategy. (App 1333-1338). She testified she did not object to the State's vouching in closing because, in

her opinion, the trial court's instructions addressed it. (App 1338-1339). Regarding Alta Fraley, she testified it was "likely" she did not speak to her due to Alta's age, though she also admitted she did not speak to Julie Fraley or Alta Fraley. (App 1340, 1354). She presented no mitigation evidence during sentencing because "it was a horrible day." (App 1346). She also admitted "I might have done wrong" by not exploring further a defense based on Vivitrol. (App 1341-1344).

Testimony of Petitioner Gary Fraley

Petitioner's testimony at his PCR hearing was brief; he testified that he requested his trial counsel contact Alta Fraley, but she did not. (App 1361). In deposition testimony from a prior civil lawsuit attached to his PCR application,³ Petitioner also testified that his trial counsel did not give him enough attention to prepare his defense, particularly a Vivitrol-based defense. (App 1238-1239, 1287).

Preparation of Order

The PCR court emailed counsel on March 10, 2022, with its decision and request for the State to prepare an order "within 30 days". (App 1127). The State did not prepare an order in 30 days and did not request an extension, and on June 2, 2022, PCR counsel for the Petitioner reminded the State of its responsibility. (App

³ Petitioner's PCR counsel requested this transcript (and all other documents attached to and referenced by the pleadings) be considered at the PCR hearing, and reiterated this request in his motion to alter or amend. (App 1049-1050, 1361-1362). In considering a PCR application, a court may consider "affidavits, depositions, oral testimony or other evidence" in deciding the application. S.C. Code § 17-27-80; *see also Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) ("A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting.").

1126). Though claiming an order would be prepared “as soon as possible”, the State did not prepare an order after this reminder, and on July 7, 2022, the PCR court requested an update. (App 1125). On July 12, 2022, the State’s attorney claimed she had been sick and promised to have a proposed order in a week. (App 1116). On July 20, 2022, the State’s attorney requested an extension to July 25, 2022, due to her “heavy workload”. (App 1116).

On July 28, 2022, the State supposedly submitted a proposed order via email, but the file was corrupted and unreadable. (App 1120-1121). On the same day, the PCR court requested an uncorrupted file, but the State did not respond until the next day because the judge’s email was “flagged as possible spam”. (App 1120). On August 30, 2022, the State promised to submit it “tonight”, after blaming delays on court obligations and COVID-19. (App 1113). The next morning, the State promised a proposed order “around lunch”. (App 1113). Later that day (August 31, 2022), the State finally produced a proposed order. (App 1060-1109).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The appellate court must reverse where there is no probative evidence to support the findings. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). However, when the PCR court does not make specific findings, the appellate court is free to make its own.⁴ See *Smalls v. State*, 422 S.C. 174, 194-96, 810 S.E.2d 836, 847 (2018).

When reviewing questions of law, the court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014), *reh’g denied* (Dec. 3, 2014), *cert. denied*, 135 S.Ct. 2387 (U.S.S.C. 2015) (quoting *Jordan v. State*, 406 S.C. 443, 752 S.E.2d 538 (2013)).

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel’s representation fell below an objective standard of reasonableness and (2) but for counsel’s errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the trial. *Strickland*, 466 U.S. at 694.

⁴ Issues II, VII, VIII, IX, X, XI, and XII were raised to the PCR court, but not ruled upon, even after a Rule 59(e), SCRPC, motion. (App 989, 1039-1059).

ARGUMENT

Petitioner's trial counsel, by her failure to even attempt to contact and interview Petitioner's daughter, denied Petitioner critically important evidence supporting his defense. What defense trial counsel did present was crippled by her inexplicable abandonment of a meritorious involuntary intoxication / NGRI defense at the 11th hour. The remainder of trial counsel's performance was so riddled with errors as to call into question the fairness of Petitioner's trial.

This petition also provides this Court with a unique vehicle to provide guidance on: (1) preparation of PCR final orders; (2) compliance with the specificity requirements of S.C. Code § 17-27-80; (3) the contours of the speedy civil trial right under Article I, Section 9, of the South Carolina Constitution; and (4) the application of the cumulative error doctrine in PCR matters.

I. Trial counsel's performance was prejudicially deficient for failing to call Petitioner's daughter Alta Fraley as a witness at trial to testify as to Petitioner's deranged and erratic behavior in the days prior to the alleged crime.

PRESENTED IN: March 10, 2021 Amended PCR (App 1140 ¶ 2).

STANDARD OF REVIEW: any evidence (facts) / *de novo* (law)

Alta Fraley is the Petitioner's daughter from his first marriage (with Julie Fraley). (App 1128, 1130). In contrast to the fraught relationship Petitioner had with his second wife Deonna, Alta and her father were close, and remained in close contact via mobile phone. (App 1310-1311). Alta's text messages with Petitioner, preserved in her mobile phone, provide a remarkable window into the workings, or lack thereof, of Petitioner's mind during the period before and during his alleged crimes. Alta

Fraley, and her phone, provide evidence Petitioner labored under a number of delusions in the weeks prior to the alleged crimes, such as: he was dying of throat cancer, he had been struck by lightning, and that he had seen “Bigfoot”. (App 253, 1130, 1139, 1307-1320). Alta Fraley’s testimony would have established Petitioner believed he was texting his wife Deonna Fraley at times. (App 1132, 1313). On July 28, 2015, he texted “happy birthday” to Alta, even though her birthday was twelve days earlier. (App 242, 1137). Alta Fraley’s testimony would have also showed the last unhinged texts from Petitioner (claiming he saw “Bigfoot”) were sent a mere five days before the alleged crimes. (App 1139).

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). Trial counsel’s failure to interview these witnesses would not render her performance ineffective if she could articulate a valid strategic reason for this inaction. *See Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996). Determining whether a stated reason for counsel’s conduct is a valid strategic reason depends on the circumstances of each case, and so courts take a case-by-case approach to decide what is or is not valid trial strategy. *E.g., Solomon v. State*, 347 S.C. 635, 557 S.E.2d 666 (2001).

Petitioner’s trial counsel testified she “likely” chose not to call Alta Fraley as a witness because of her age (thirteen; fourteen during trial). (App 1, 242, 1035). Petitioner’s trial counsel based her decision solely on Alta Fraley’s age – trial counsel did not contact, or even attempt to contact, Alta Fraley or her adult mother, Julie

Fraley. (App 1128, 1130, 1302-1304). Petitioner requested trial counsel to contact his daughter while preparing for trial. (App 1361). Trial counsel had the contact information for these witnesses from the Berkeley County Sheriff's Department. (App 1303). The PCR court found that failing to call Alta Fraley on the basis of her age was a valid trial strategy. (App 1025). However, basing the decision on whether to call a witness solely on his or her age is an error of law. It is well-settled in South Carolina: "There is no fixed age which an individual must attain in order to be competent to testify as a witness." *State v. Green*, 267 S.C. 599, 603, 230 S.E.2d 618 (1976) (citing *Wheeler v. United States*, 159 U.S. 523 (1895)). With age not being a determinative factor,⁵ trial counsel must interview and investigate child witnesses, as mandated by *Ard*, in order to ascertain if they are competent to testify.

Had Petitioner's trial counsel interviewed Alta Fraley to determine her suitability as a witness, she would have discovered, at a bare minimum, Alta Fraley was imminently capable of operating her mobile phone without adult supervision, and consequently she would also be able to authenticate the contents of her mobile phone. Part of Alta Fraley's testimony was precisely this – authentication of the images of and messages on her phone. (App 1307-1326). As set forth in Argument I, these messages contain significant amounts of relevant information; the remainder of Alta Fraley's testimony would further establish Petitioner's disordered state of mind.

⁵ Minor 1 was twelve years old, and she was permitted to testify, without objection, at trial. (App 203).

The prejudice of trial counsel's mistake manifested in multiple ways.⁶ The trial court refused to charge the jury on a not guilty by reason of insanity (NGRI) verdict, holding "there has been absolutely no testimony that indicates the defendant did not know the alleged crime was morally or legally wrong." (App 702; *see also* App 972-974 [the State noting the same on appeal]). *See State v. Lewis*, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997) (At trial, "[t]he law to be charged is determined from the facts presented."). Petitioner's trial counsel would also be unable to present a defense for involuntary intoxication, allowing a jury to find a defendant not guilty if he "lost his ability to exercise independent judgement and volition" due to "unanticipated side effects of a prescription drug taken on orders of a physician". *State v. Shands*, 424 S.C. 106, 125, 817 S.E.2d 524 (Ct. App. 2018) (quoting Ralph King Anderson, Jr., *South Carolina Requests to Charge – Criminal* § 6-4 (2012)). The lack of evidence also foreclosed any charges for lesser-included offenses, such as attempted murder; in the charging conference, the trial court effectively ruled there was no evidence present from which the jury could conclude Petitioner had intended to do anything other than murder his wife's paramour. (App 714-715).

The testimony of Alta Fraley would have provided the testimony necessary to support insanity charge(s), involuntary intoxication charge(s), and lesser included

⁶ The Court's findings as to Alta Fraley (App 1023-1025) also lack specific findings supporting its conclusions, in violation of *Smalls*, 422 S.C. at 195 (PCR court must make specific findings as to prejudice, citing multiple cases), and S.C. Code § 17-27-80 (specific findings necessary). In particular, the PCR court held the failure to call Alta Fraley was not prejudicial without making specific findings as to Alta Fraley's testimony and the specific contents of her mobile phone.

charges to attempted murder; trial counsel recognized as much at the PCR hearing:

MS. GAY: And just to flip ahead. The text messages and things that Alta [Fraley] had testified to [at the PCR hearing], I wasn't aware of any of that. That's [sic] arguably could've, should've been part of something that was given to this expert [State's expert Dr. Ana Gomez] to talk about in her opinion. To create an opinion about whether it was reason of [sic] insanity or guilty but mentally ill and I – I didn't know any of that.

(App 1330-1331; *see also* App 1341 [...is this where I get to just tell you what I think I might have done wrong?]). Dr. Gomez also noted the lack of corroborative evidence in her testimony (App 170), something Alta Fraley would alleviate. Alta Fraley's testimony and the text messages on her phone were also the type of "collateral information" the State's expert witness Dr. Ana Gomez claims was "important" to determine if someone is "actively psychotic". (App 162, 170-171). Alta Fraley's testimony and the text messages on her phone were also critically relevant rebuttal evidence; the State argued Petitioner's sanity based on voice messages Petitioner had left Kimberly Tompkins. (App 181-183, 748).

II. Trial counsel's performance was prejudicially deficient for abandoning involuntary intoxication and/or insanity defenses based on a reaction to the drug Vivitrol, which was administered shortly before the alleged crimes.

PRESENTED IN: Jan. 31, 2019 Supplement/Amendment; never ruled upon, even after Rule 59(e) motion. (App 989, 1042-1045, 1167-1169, 1361-1362, 1384-1419).

STANDARD OF REVIEW: *de novo*

Petitioner was administered a Vivitrol shot on or about June 23, 2014, in Wilmington, North Carolina, for the purpose of treating his alcoholism. (App 135-138, 148-151, 498-500; *see also* App 1385 ["used to...treat alcohol dependence"]). Shortly

after this shot until August 5, 2014 (the date of the alleged crimes), Petitioner experienced what can only be described as a prolonged psychotic break. While Petitioner does not remember this period of time, records show he visited emergency rooms in Pennsylvania for intestinal pains and memory problems (App 583-586); visited an emergency room in New Hanover County, North Carolina (App 503-504); visited a gun shop (App 248-249); sent the unhinged texts described by Alta Fraley (Argument I, *supra*); and other bizarre acts. (*e.g.*, App 60-61, 137, 148-151, 579-580, 583-586, 1008-1009, 1265-1266, 1328-1329). This break culminated with the inexplicable behavior described in the Statement of Facts.

Petitioner's psychosis was the result of sleep deprivation resulting from Vivitrol. Subsequent to Petitioner's Vivitrol shot, he developed an inability to sleep.⁷ (App 144, 159, 162, 473, 492, 520, 522, 854, 858, 862). "Trouble sleeping" is a "common" side effect of Vivitrol, according to the FDA. (App 1388-1389). Petitioner usually drank wine to put himself to sleep and was generally functional while drinking, but Vivitrol prevented the soporific effect of wine and left him unable to sleep. (App 247, 520, 573, 619-621, 842). It is an uncontroversial proposition that extended periods of sleep deprivation cause psychosis; multiple authorities presented to the PCR court agree.⁸ (App 989, 1042-1043, 1168-1169, 1361-1362, 1390-1419).

⁷ Petitioner suffered from several other well-documented side effects of Vivitrol recognized by the FDA: nausea (App 148, 519, 522, 564), headache (App 510, 564), dizziness (App 148), vomiting (App 519, 617, 680), and decreased appetite (App 519).

⁸ One of these authorities describes a sleep-deprivation-induced psychosis similar to Petitioner's (delusions, hallucinations, fragmented thinking, memory loss, &c.). (App 1413-1414).

In spite of the overwhelming evidence of the merit of Vivitrol-based intoxication / insanity defenses, Petitioner’s trial counsel withdrew them. (App 703, 706). At the PCR hearing, Petitioner’s trial counsel acknowledged this error:

[MS. GAY:] As I said, those text messages [of Alta Fraley], I didn’t know about them. And so, I didn’t know to give them to the psychologist - to the psychiatrist. Um - - but **is this where I get to just tell you what I think I might have done wrong?**

MR. [FALK]: Absolutely.

MS. GAY: Haha. Okay. So, Mr. Fraley presented as a person who said that he had taken some medicine and it had caused him to go off the deep end. So, I did research and I tried to see if I could find anywhere, anybody in the country that would substantiate that. I do believe now there’s maybe more research associated with what he’s talking about.

MS. WEIDAUER: Objection. This is not relevant to any of applicant’s allegations.

THE COURT: It’s not relevant to - - to counsel?

MS. WEIDAUER: In general. But none of this is the allegations that he has laid out. - -

THE COURT: I’ll overrule. Go ahead with your answer.

MS. GAY: So, I tried to find somebody to say what it was that Mr. Fraley was talking about to substantiate it. And I was able to get -- I contacted somebody who I believe had his - uh - knowledge and was qualified in toxicology. And, Dr. Bennett. And so, Mr. Fraley had been admitted to the Emergency Room at the time of his arrest. And based on some things that were difficult, the records, the medical records from the Emergency Room visit didn't come in until right before the trial started.

(App 1341-1342 [emphasis added]; *see also* App 1342-1344 [more commentary on this defense]). The State, in its September 8, 2016, brief in Petitioner’s direct appeal of his conviction, recognized the error of Petitioner’s trial counsel, noting the abandonment of this defense occurred “[p]erplexingly” and “[s]urprisingly”. (App 967, 971).⁹

⁹ Perplexingly and surprisingly, the State argued the exact opposite in its August 31, 2022, proposed order to the PCR court. (App 1111; Argument X, *infra*).

The prejudice of being denied an involuntary intoxication defense (or an NGRI defense [see Arguments I & II]) should be apparent, but testimony of Len Allen shows how a third party's perspective of the abandonment of a Vivitrol insanity/intoxication defense. Allen, in his May 25, 2018, deposition transcript (App 1143-1151), testified:

Mary [a mutual friend] was at your trial, reported to me daily what was said. I was in rehab at the time. She said that they didn't go into great detail about medications, which unfortunately sucks for you. I guess you can appeal it if you need to.

(App 1148; *see also* App 989, 1043-1044 [presentation of transcript to PCR court]).

Unfortunately, trial counsel's abandonment of Vivitrol-based defenses prevented any appeal.

III. Trial Counsel's performance was prejudicially deficient for failing to object to the hearsay testimony of the State's expert, which the State used to bootstrap opinions of a non-testifying pharmacist.

PRESENTED IN: March 10, 2021 Amended PCR (App 1140 ¶ 3).

STANDARD OF REVIEW: any evidence (facts) / *de novo* (law)

The State's first witness at trial was Dr. Ana Gomez, who at the time was a forensic psychiatrist at the Medical University of South Carolina. (App 129-176). Gomez opined as to Petitioner's mental state at the time of the alleged crimes, and she also provided testimony on the pharmacology of Vivitrol.¹⁰ (App 135-137). This pharmacology testimony, however, consisted of hearsay opinion testimony from an unidentified pharmacist.¹¹ Hearsay can be admitted under Rule 703, SCRE, when it

¹⁰ Gomez testified before Petitioner's trial counsel abandoned a Vivitrol intoxication/insanity defense.

¹¹ The PCR court's holding that Gomez's testimony was "based upon a combination of

is used to formulate expert opinion, the mere fact that an expert relies on inadmissible evidence does not make the evidence admissible. *See, e.g., State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (Rule 703, SCRE, “does not...make hearsay automatically admissible simply because it was relied upon by the expert.”); *see also Jones v. Doe*, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006) (stating Rule 703 “does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion”). Gomez’s testimony did not establish the mystery pharmacist’s testimony was used to formulate her opinions – it was pure, unadorned hearsay. While Petitioner’s trial counsel objected once on hearsay grounds (App 135), she failed to continue her objections, and she acknowledged she should have objected to Gomez’s hearsay. (App 1330-1331).

The prejudice of this inadmissible hearsay cannot be overstated.¹² As set forth in earlier arguments, psychosis arising from Vivitrol was Petitioner’s primary defense to the charges against him. Further, the State’s trial counsel knew Petitioner’s vivitrol argument “was going to be an issue.” (App 1368; *see also* App 94 [State acknowledging Vivitrol defense pretrial]). Gomez’s hearsay testimony was necessary to neutralize this argument:

data from her vast experience and prior knowledge” is wholly unsupported by the evidence. (App 1028).

¹² The PCR court does not adequately support its finding of no prejudice (App 1099), in violation of *Smalls, et al.*

MS. WEIDAUER: And [Gomez] had to go into that vivitrol analysis because that was Mr. Fraley's allegation, was that what made?

MS. WILLIAMS: Right. Correct. Exactly.

(Ex. A 76:11-14).

IV. Trial Counsel's performance was prejudicially deficient for failing to object to "prior bad acts" testimony so prejudicial the State mentioned it in closing.

PRESENTED IN: March 10, 2021 Amended PCR (App 1140 ¶ 4).

STANDARD OF REVIEW: any evidence (facts) / *de novo* (law)

At trial, State's witness Kimberly Tompkins offered testimony that, two days before the incident resulting in Petitioner's arrest, Petitioner asked Tompkins' daughter to help his daughter with a school project, then the next day invited her to a surprise birthday party for his daughter. (App 177-183). The clear implication of Tompkins' testimony was that these invites were a ruse to obtain access to her daughter. The PCR court acknowledged this testimony was the subject of a motion *in limine* and further acknowledges Petitioner's trial counsel did not renew her objection contemporaneously with the trial testimony. (App 93, 177-183, 1030). Nonetheless, the PCR court, without any evidentiary basis, refused to find Petitioner's performance deficient, even though Petitioner's trial counsel acknowledged her mistake at the PCR hearing. (App 1030-1031, 1332-1333). The PCR court likewise held Petitioner had not proven prejudice. (App 1030-1031). Not only do these findings fail to meet the specificity requirements of *Smalls, et al.*, they represent an error of law.

The inherent prejudice of propensity evidence in sex crime prosecutions is evident in the scrutiny Rule 404(b), SCRE, is given by this Court. *See, e.g., State v. Perry*, 430 S.C. 24, 35-36, 842 S.E.2d 654 (2020). “The State may not show defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.” *Id.* (quoting *Michelson v. United States*, 335 U.S. 469, 475 (1948)).

The admission of this testimony prejudices Petitioner by undermining confidence in the outcome of his trial. The State made a point of mentioning Petitioner’s alleged invite to his daughter’s birthday party in closing (App 748), highlighting its importance to the State’s argument.

V. Trial Counsel’s performance was prejudicially deficient for failing to object to the hearsay testimony of Ruth Vick and Chad Vick which exceeded the bounds of “time and place” and also constituted improper corroboration testimony.

PRESENTED IN: March 10, 2021 Amended PCR (App 1140 ¶¶ 5 & 6).

STANDARD OF REVIEW: any evidence (facts) / *de novo* (law)

At trial, State’s witnesses Ruth Vick and Chad Vick presented corroborative testimony regarding the alleged sexual assault of Minor 1 that included “details and particulars” prohibited by Rule 801(d)(1)(D), SCRE. (App 195-196, 226-227). *See Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010). The PCR court acknowledged trial counsel’s failure to object constituted deficient performance (even

admitting the statements were inadmissible),¹³ but refused to find prejudice, citing the “strength of the State’s case” and that it was “speculation” that objection would have changed the outcome of the trial. (App 1033-1034). This finding of lack of prejudice does not meet the requirements of *Smalls, et al.*

The PCR court also committed an error of law. The wrongfully admitted hearsay testimony was that the alleged victim was raped, and that she was raped at an EconoLodge. The alleged victim provided testimony as to these facts at trial, and there was no need for her parents to provide the same testimony. (App 203-221). “[I]mproper corroboration testimony that is merely cumulative to the victim’s testimony **cannot be harmless.**” *Vail v. State*, 402 S.C. 77, 90, 738 S.E.2d 503 (Ct. App. 2013) (emphasis added) (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)). The “strength of the State’s case” which constitutes only a “factor” under *Smalls*, is not sufficient to overcome *Vail*’s finding of prejudice as a matter of law.

VI. Trial counsel’s performance was prejudicially deficient for failing to object to the State’s vouching for its witnesses in its closing.

PRESENTED IN: March 10, 2021 Amended PCR (App 1140 ¶ 7).

STANDARD OF REVIEW: any evidence (facts) / *de novo* (law)

The State presented the following objectionable arguments in its closing: “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.” (App 745). Petitioner’s trial counsel did not object because it was not her

¹³ Petitioner’s trial counsel admitted at the PCR hearing: “I probably didn’t handle that correctly.” (App 1031).

practice and she believed the trial court's instruction regarding arguments of counsel cured this error. (App 1338-1339). "However, counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766 (2002). As this Court noted in *Matthews*, the State may not vouch for the credibility of its witnesses based on information outside of the record. *Id.* There is no basis in the record for the State's statements regarding the Vicks in closing. Further, as set forth above, improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless. *Vail, supra*.

VII. Trial counsel's performance was prejudicially deficient for failing to introduce Alta Fraley's testimony for mitigation at sentencing.

PRESENTED IN: March 10, 2021 Amended PCR; never ruled upon, even after Rule 59(e) motion. (App 989, 1050, 1140 ¶ 2, 1345-1346).

STANDARD OF REVIEW: *de novo*

Even if trial counsel's failure to call Alta Fraley as a witness in the case-in-chief is somehow a valid trial strategy, failing to call her in sentencing was not. Petitioner's trial counsel presented practically nothing for the trial court to consider in mitigation. (App 808-809). She does mention Alta Fraley in passing, but, as established in Argument I, trial counsel never bothered to contact or interview Alta Fraley for any reason. Had she contacted Alta, she would have discovered that Alta would have testified her father never exhibited sexual behaviors towards young girls, and never towards Alta. (App 1318). Trial counsel's explanation for her anemic presentation during sentencing was: "it was a horrible day." (App 1346). "The United

States Supreme Court has held that counsel's failure to conduct a reasonable investigation into mitigating circumstances constitutes ineffective assistance.” *Simpson v. Moore*, 367 S.C. 587, 605, 627 S.E.2d 701 (2006) (citing *Wiggins v. Smith*, 539 U.S. 510, 511 (2003)); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2009) (holding counsel’s investigation as to mitigation evidence was inadequate and incomplete). As set forth in Argument I, there is no valid reason to ignore Alta Fraley, and without her testimony Petitioner’s trial counsel effectively abandoned her obligation to seek mitigation evidence.

VIII. Trial counsel’s performance was prejudicially deficient for failing to introduce evidence of Vivitrol side effects for mitigation at sentencing.

PRESENTED IN: Jan. 31, 2019 Supplement/Amendment; never ruled upon, even after Rule 59(e) motion. (App 989, 1042-1045, 1167-1169, 1345-1346, 1361-1362, 1384-1419).

STANDARD OF REVIEW: *de novo*

Even if trial counsel’s failure to present Petitioner’s reaction to Vivitrol in the case-in-chief is somehow a valid trial strategy, failing to present it in sentencing was not. At sentencing, Fraley’s trial counsel made no mention of Vivitrol, which once occupied a prominent position in his defense. (App 808-809, 902-914). For the reasons set forth in Arguments II & VII, Petitioner’s trial counsel was likewise prejudicially deficient for failing to address Vivitrol in sentencing.

IX. The PCR court violated Petitioner’s state and federal rights by delegating its responsibility to draft an order to the South Carolina Attorney General’s Office.

PRESENTED IN: July 13, 2022 motion to strike and its supplements; never ruled upon, even after Rule 59(e) motion. (App 989, 1045-1046, 1112-1127).

STANDARD OF REVIEW: *de novo*

The procedure followed by the PCR court in obtaining the October 14, 2022, order denied Petitioner an opportunity to have his PCR claims adjudicated by an independent judicial officer, in violation of the separation of powers doctrine. *See* S.C. Const. Art. I, Sec. 8. Specifically, the Court did not provide the State with specific findings for denying Petitioner’s claims other than delegating the responsibility of drafting an order of dismissal. (App 1127). The PCR court instead adopted the State’s adversarial order without edits, despite that this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for providing or omitting findings of fact and/or denying the issue(s) presented. *See generally Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding “Pursuant to S.C. Code Ann. § 17-27-80...the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.”).

With the violation of a constitutional right, there must be a remedy. *See Black’s Law Dictionary* 1761 (8th ed. 2004) (*Ubi jus, ibi remedium* – “Where there is a right, there is a remedy”). An appropriate remedy is before this Court in Petitioner’s motion to strike the State’s answer. (App 1112-1127). Because Petitioner has presented a meritorious case for relief, the PCR court is authorized to strike the State’s answer

and enter default against it. Rule 55(e), SCRCF. Further, an entry of default and default judgment against the State would not result in any windfall or unfair advantage to Petitioner – he would only receive a new trial, something the facts already entitle him to.

X. The State’s tardy and misleading proposed order violated Petitioner’s right to Due Process.

PRESENTED IN: July 13, 2022 motion to strike and its supplements; October 24, 2022 motion to alter or amend. (App 989, 1045-1046, 1110-1127).

STANDARD OF REVIEW: *de novo*

The PCR court emailed counsel on March 10, 2022, with its decision and request for the State to prepare an order “within 30 days”. (App 1127). The State did not prepare an order in 30 days and did not request an extension, and on June 2, 2022, counsel for the Petitioner reminded the State of its responsibility. (App 1126). Though claiming an order would be prepared “as soon as possible”, the State did not prepare an order after this reminder, and on July 7, 2022, the PCR court requested an update. (App 1125). On July 12, 2022, the State’s attorney claimed she had been sick and promised to have a proposed order in a week. (App 1116). On July 20, 2022, the State’s attorney requested an extension to July 25, 2022, due to her “heavy workload”. (App 1116).

On July 28, 2022, the State’s attorney supposedly submitted a proposed order via email, but the file was corrupted and unreadable. (App 1120-1121). On the same day, the PCR court requested an uncorrupted file, but the State did not respond until the next day because the judge’s email was “flagged as possible spam”. (App 1120).

On August 30, 2022, the State promised to submit it “tonight”, after blaming delays on court obligations and COVID-19. (App 1113). The next morning (August 31, 2022), the State promised a proposed order “around lunch”. (App 1113).

Later in the day on August 31, 2022, the State finally produced a proposed order. (App 1060-1109). This proposed order by and large reuses the State’s brief’s Statement of Facts on appeal. (App 953-968, 1060-1109). There is, however, one major change: the State replaced the language discussing the abandonment of Petitioner’s Vivitrol defense with language which now implies Petitioner did submit a Vivitrol defense. (App 1110-1111). The State, which prevailed on direct appeal by, *inter alia*, arguing Petitioner abandoned his Vivitrol defense, is estopped from changing its position now. *See Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997) (judicial estoppel precludes party from adopting position in conflict with one earlier taken in same or related litigation). The State cannot, and should not have, changed its position in its proposed order.

The conclusion of the State’s proposed order endeavors to explain Petitioner’s right to appeal while omitting any mention of issue preservation and/or the need for a Rule 59(e), SCRPC, motion. (App 1108-1109). The South Carolina Attorney General’s office is quite aware of the need to preserve errors and the consequences of failing to do so; this omission appears to be intentional. Further, the remarkable number of excuses for the delays in providing a proposed order implies an intent to delay resolution of this matter; Petitioner requested a hearing to explore the basis for these delays, but this request was denied. (App 989, 1046).

The United States Constitution's guarantee of Due Process of law can be violated when the State oversteps the bounds of propriety and fairness. *See, e.g., Berger v. United States*, 295 U.S. 78, 84 (1935). The acts set forth above represent such an overstep, and as a remedy for this violation, this Court should reverse the PCR court's refusal to strike the State's answer.

XI. The substantial delays in this matter violate Petitioner's right to a speedy civil trial under the South Carolina Constitution.

PRESENTED IN: July 13, 2022 motion to strike and its supplements; October 24, 2022 motion to alter or amend. (App 989, 1045-1046, 1110-1127).

STANDARD OF REVIEW: *de novo*

Even if the delays described above do not rise to the level of prosecutorial misconduct, they nonetheless violate Petitioner's right under the South Carolina Constitution to a speedy civil trial. *See* S.C. Const. Art. I Sec. 9 ("All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained."). This Court has not outlined the contours of this unique right. If the federal right to a speedy criminal trial is analogous, then a court would consider: (1) length of the delay, (2) reason for the delay, (3) the party's assertion of the right, and (4) prejudice to the party. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972). A number of events, completely outside of the control of the Petitioner, have delayed the resolution of this matter: (a) the Berkeley County Clerk of Court's inexplicable rejection of Petitioner's initial application, which ultimately led to a hearing on an unnecessary motion to dismiss, instead of a final hearing (App 1158-1166); (b) Petitioner's trial counsel's failure to appear at the first final hearing (App 1049); (c) the State's delays in preparing the

proposed order (Argument X, *supra*); and (d) the PCR court's refusal to rule on certain matters, requiring a motion to alter or amend (App 1039-1111). These delays are the primary¹⁴ reason the Petitioner's application, initially filed on July 24, 2018, was finally decided on January 12, 2022. (App 989, 1158). Petitioner asserted his entitlement to a speedy civil trial as soon as was practical. John Penek, MD, one of Petitioner's intended witnesses in this matter, died on July 8, 2020.¹⁵ As time passes, additional witnesses may die, disappear, or lose their recollection. As in Arguments X & XI, *supra*, the appropriate remedy for this violation is striking the State's answer and entering default judgment for Petitioner.

XII. In the alternative, the cumulative effect of the errors set forth herein demands reversal.

PRESENTED IN: December 6, 2021 PCR hearing (orally, without objection); never ruled upon, even after Rule 59(e) motion. (App 989, 1050, 1362-1363, 1381).

STANDARD OF REVIEW: *de novo*

When counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a PCR applicant may be relieved of his burden to show prejudice. *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002). An applicant asserting a claim of cumulative error must show the multiple errors adversely affected his right to a fair trial. *Id.* Here, even if the PCR court's findings of no

¹⁴ Petitioner concedes that certain other delays were not necessarily outside of his control. (App 1049, 1153-1157). However, these delays did not have nearly the effect of the other delays set forth in this petition.

¹⁵ <https://higginsfuneralhome.com/tribute/details/3868/John-Penek-MD/obituary.html>

prejudice are upheld, Petitioner is left with a trial defense that: (1) did not interview a very obvious defense witness (Petitioner's daughter) for guilt or mitigation; (2) abandoned a meritorious argument (Vivitrol intoxication/insanity) as a defense or for mitigation; (3) allowed damaging pharmaceutical hearsay testimony in, without challenge, (4) failed to object to prior bad acts testimony so significant it was part of the State's closing; (5) allowed the State to vouch for its witnesses in that closing; and (6) allowed Minor 1's parents to present prejudicial hearsay testimony. Petitioner could not have received a fair trial with such a defense.

CONCLUSION

The petition should be granted, without further briefing, and Petitioner's conviction should be vacated.

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