THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Kenneth G. Goode, Circuit Court Judge

Court of Appeals Appellate Case No. 2013-000854
Opinion No. 5092 (S.C. Ct. App., Feb.20, 2013)

Mark Edward Vail, ... Respondent,

v.

State of South Carolina, ... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Did the Court of Appeals err in reversing the lower court's denial of the Respondent's application for post-conviction relief when there was probative evidence to support the lower court's ruling that counsel was not ineffective for failing to object to hearsay testimony during trial, several of the challenged statements were admissible, trial counsel articulated a valid strategic reason for failing to object, and counsel's performance did not affect the outcome of the Respondent's trial?

RESPONDENT'S COUNTER QUESTION PRESENTED

Is there any special or important reason for the Supreme Court to grant certiorari review of the decision by the Court of Appeals reversing the lower court's denial of post-conviction relief, when:

(a) This case involves no novel question of law, the panel decision was unanimous, there is no conflict with a prior decision of the Supreme Court, and there are no constitutional or federal questions at issue; and

(b) Respondent's trial counsel lacked a valid trial strategy justifying his failure to object to numerous instances of hearsay that significantly prejudiced Respondent?

STATEMENT OF THE CASE

Respondent Mark E. Vail ("Vail"), a high school teacher and coach, was accused by a 13-year old student of engaging in consensual sex, which he denied. Vail was convicted of committing a lewd act on a minor, for which he was sentenced to eight years imprisonment, and one count of criminal sexual conduct with a minor, second degree, for which he was sentenced to ten years imprisonment, the sentences to be served concurrently. Vail filed a timely notice of appeal, but later withdrew it. On April 26, 2006, Vail filed an application for post-conviction relief. An evidentiary hearing was held January 23, 2008 before the Honorable Kenneth G. Goode, who denied relief in an order dated December 4, 2008. Vail filed a petition for a writ of certiorari on May 12, 2009. On August 26, 2011 the Court of Appeals granted the petition.

After briefing and oral arguments, the Court of Appeals issued a unanimous decision on February 20, 2013; reversing the lower court's denial of post-conviction relief and remanding the matter for a new trial. *Vail v. State,* Op. No. 5092 (S.C. Ct. App., Feb. 20, 2013). App. at 1232-1242. In reversing the lower court, the Court of Appeals held that the failure of Vail's trial counsel to object to several instances of inadmissible hearsay was ineffective, prejudicial, and unjustified by any legitimate trial strategy. App. at 1242. After its Petition for Rehearing was denied, App. at 1254, the State filed a Petition for Writ of Certiorari on June 24, 2013.

STANDARD OF REVIEW

To obtain post-conviction relief on a claim of ineffective assistance of counsel, an applicant must show, first, that his counsel failed to render reasonably effective assistance; and second, that he was prejudiced by the ineffective assistance. *Dawkins v. State,* 346 S.C. 151, 155-56, 551 S.E.2d 260, 262 (2001), *citing Strickland v. Washington,* 466 U.S. 688 (1984). To show prejudice, the applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Dawkins*, 346 S.C. at 156, 57, 551 S.E.2d at 262. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* No prejudice occurs, despite trial counsel's deficient performance, where there is otherwise "overwhelming evidence" of defendant's guilt. *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010).

An appellate court "will uphold the PCR court if any evidence of probative value supports the decision." *Smith,* 386 S.C. at 565, 689 S.E.2d at 631. An appellate court will reverse the PCR court's decision when it is controlled by an error of law. *Simpson v. State*, 317 S.C. 506, 508, 455 S.E.2d 175 (1995).

ARGUMENT

I. NO SPECIAL OR IMPORTANT REASONS EXIST TO GRANT CERTIORARI REVIEW.

Rule 242(b) of the South Carolina Appellate Court Rules addresses the considerations that govern certiorari review, noting that the court will grant the writ only for "special and important reasons." The rule provides a non-exclusive list indicating "the character of reasons which will be considered":

1) Where there are novel questions of law.

2) Where there is a dissent in the decision of the Court of Appeals.

3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

4) Where substantial constitutional issues are directly involved.

5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

None of the examples listed in Rule 242(b) applies to the present case. The law is settled with respect to ineffective assistance of counsel and corroborative hearsay statements. The Court of Appeals' decision was unanimous and did not conflict with past Supreme Court decisions. No constitutional or federal issues are involved.

No other reasons of a similar character exist for granting certiorari in the present case. Indeed, the State has not even attempted to show that "special and important" reasons exist for granting review. Instead, it has simply re-stated the same argument rejected by the Court of Appeals. The purpose of delegating PCR appeals to the Court of Appeals is thwarted if certiorari is granted for cases like this one, where no special or important reasons exist for certiorari review.

II. LEGAL BACKGROUND

A. South Carolina Rule of Evidence 801(d)(1)(B)

SCRE 801(d)(1)(B) provides that a statement is not hearsay if:

> The declarant testified at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose . . . .

A prior statement of a witness is admissible under Rule 801(d)(1)(B) if: (1) the witness testifies and is subject to cross examination at trial; (2) the opposing party's counsel accuses the witness, explicitly or implicitly, of testifying untruthfully because an improper motive or bias; (3) the witness's prior statement is consistent with the witness's trial testimony; and (4) the witness's prior statement was made before the witness was subjected to the improper motive that caused the witness to allegedly testify untruthfully at trial. *State v. Saltz*, 346 S.C. 114, 121-22, 551 S.E.2d 240, 244 (2001). To be admissible under subsection (B), a statement must "predate" the alleged fabrication or improper influence or motive. *State v. Fulton,* 333 S.E. 359, 375, 509 S.E.2d 819, 827 (1998). In short, this rule allows "rebutting an alleged motive, not bolstering the veracity of the story told." *Saltz,* 346 S.C. at 124, 551 S.E.2d at 245 (quoting *Tome v. United States,* 513 U.S. 150, 157 (1995)).

B. South Carolina Rule of Evidence 801(d)(1)(D)

SCRE(d)(1)(D) provides that a statement is not hearsay if:

> The defendant testified at the trial or hearing and is not subject to cross-examination concerning the statement, and the statement is . . . (D) 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.

The South Carolina Supreme Court has made it clear that the time and place limitation will be strictly enforced. *See State v. Munn,* 292 S.C. 497, 499-500, 357 S.E.2d 461, 463 (1987), *overruled on other grounds, State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005). ("The particulars or details are not admissible but so much of the complaint as identifies 'the time and place with that of the one charged' may be shown.")

C. South Carolina Rule of Evidence 803(3)

SCRE 803(3) provides a hearsay exception for:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

When statements admitted under Rule 803(3) to show the declarant's state of mind also contain factual assertions, a limiting instruction is required to ensure that the factual assertion is considered by the jury solely as bearing on the declarant's state of mind, and not for the truth of the factual matter asserted. *U.S. v. Brown*, 490 F.2d 758, 763 (D.C. Cir. 1973); 30B Michael H. Graham, *Federal Practice and Procedure: Evidence* § 7044 at 438 (Int. ed. 2006) ("Graham").

D. South Carolina Rule of Evidence 403

SCRE 403 provides, in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

III. TRIAL COUNSEL'S STRATEGIES

To withstand a claim of ineffective assistance of counsel, trial counsel must articulate a valid trial strategy, which the court will evaluate under an objective standard of reasonableness. *Ingle v. State,* 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). For example, in *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006), the Court found that counsel's decision not to object was reasonable, since an objection would have led to the introduction of more damaging evidence.

In this case, Vail's trial counsel ("Trial Counsel") articulated three principal trial strategies. First, he testified at the PCR hearing that he did not object to some of the hearsay because Victim could testify to it. App. at 1018:23-24. As the Court of Appeals noted, such a "strategy" is invalid. App. at 1271. "[T]he failure to object to improper hearsay testimony in a CSC case because the testimony is merely cumulative to the Victim's testimony is not a reasonable strategy 'where the evidence is not overwhelming or the improper testimony bolsters the Victim's testimony.'" App. at 1270, *citing Watson,* 370 S.C. at 72, 634 S.E.2d at 644, *citing Dawkins*, 346 S.C. at 156-57, 551 S.E.2d at 263. As discussed below, the evidence against Vail was not overwhelming and the improper testimony bolstered that of Victim.

Trial Counsel's second articulated strategy was a desire for "transparency." App. at 1006:24. As he put it, "I didn't want to appear like we were trying to play

hide the ball in there." App. at 1029:5-6. This is the same approach rejected in *Gallman v State*, 307 S.C. 273, 276, 414 S.E.2d 780, 782 (1992), where trial counsel testified his strategy was not to object because "objections would give the jury the idea that something was being hidden." *See also Dawkins*, 346 S.C. at 157, 551 S.E.2d at 263, (defense counsel did not object to hearsay so as not "to confuse or upset the jury.")

Trial Counsel's third articulated strategy was to undermine Victim's credibility. He hoped to accomplish this in various ways: by focusing on alleged conduct for which he had alibi witnesses, App. at 971:7-20; by highlighting inconsistencies in Victim's testimony, App. at 1028:24-1029:1; and by showing that Victim had an obsession with Vail, App. at 994:9-20. However, a strategy of undermining Victim's credibility is inconsistent with Trial Counsel's failure to object to corroborative hearsay testimony that bolstered, rather than undermined, Victim's testimony and credibility. *See Dawkins*, 346 S.C. at 151, 551 S.E.2d at 260.

IV. PREJUDICE

The Court of Appeals found that the failure of Trial Counsel to object to hearsay statements unjustified by a legitimate strategy was "highly prejudicial and cumulative and affected the outcome of the trial." App. at 1273. In reaching this conclusion, the Court of Appeals recognized that the case against Vail rested on circumstantial evidence with "a heavy emphasis on Victim's credibility." App. at 1272. As a result, "we cannot find the admission of the inadmissible hearsay was harmless beyond a reasonable doubt." App. at 1272. *See State v. Jennings,* 394 S.C. 473, 478-79, 716 S.E.2d 91, 94 (2011) ("Improper corroboration testimony that is *merely cumulative to*

the victim's testimony. . . cannot be harmless because it is precisely this cumulative effect which enhances the devastating impact of improper corroboration") *citing Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (emphasis in original). *See also Jennings,* 394 S.C. at 482-83, 716 S.E.2d at 95-96 ("In my judgment, it may be a rare occurrence for the State to prove harmless error beyond a reasonable doubt in these circumstances. But these determinations are necessarily context dependent . . . .") (Kittredge, J., *concurring*).

No prejudice occurs, however, despite trial counsel's deficient performance, where there is otherwise "overwhelming evidence" of guilt. *Smith v. State,* 386 S.C. 562, 566, 689 S.E.2d 629, 631 (2010). In past cases where the court has found overwhelming evidence of guilt, the evidence has been much stronger than that presented against Vail. *See, e.g., Huggler v. State,* 360 S.C. 627, 635, 602 S.E.2d 753, 758 (2004) ("live, consistent testimonies of four witnesses who testified, in detail, that sexual abuse occurred"); *State v. Jarrell*, 350 S.C. 90, 96, 100-01, 564 S.E.2d 362, 366, 368 (Ct. App. 2002) (three witnesses testified almost identically as to defendant's admissions).

In contrast to cases like *Huggler* and *Jarrell*, the Court of Appeals found the evidence of Vail's guilt was not overwhelming. App. at 1272. As the Court of Appeals noted, the Vail case was a credibility contest of his word against Victim's. There were no eyewitnesses to any inappropriate activity. Although Victim was given a medical exam a few weeks after she alleged six to nine acts of intercourse, her hymen was completely intact. App. at 1272; c*f. Dawkins*, 346 S.C. at 157, 551 S.E.2d at 263 n. 7 (no overwhelming evidence of guilt when medical exam showing ruptured hymen

was performed three years after alleged abuse). While the State did present evidence of extensive phone conversations between Vail and Victim, evidence was also presented at trial and at the PCR hearing that Vail spent considerable time counseling male and female students. App. at 435:9-11; 940:10-16; 940:24-941:16; 943:3-945:6; 946:23-947:4. Moreover, Vail's fiancée, an accountant, testified at trial she was present for 80 percent of the time Vail spent on the phone with Victim. App. at 623:7-8; 678:17-19.

The State relies on *Rhodes v. State,* 349 S.C. 25, 561 S.E.2d 606 (2002) in arguing that Trial Counsel's failure to object to numerous hearsay statements was a reasonable strategy and not prejudicial. Petition at 11. In *Rhodes*, however, the statements at issue were not hearsay. 349 S.C. at 31, 561 S.E.2d at 609. Unlike Vail's Trial Counsel, the defense counsel in *Rhodes* "effectively capitalized" on the statements to which he did not object. 349 S.C. at 33, 561 S.E.2d at 610. Finally, the evidence of guilt in *Rhodes* was much stronger than that against Vail. Indeed, defense counsel's effective use of the statements at issue in *Rhodes* "was the only real strength in petitioner's defense." *Id.*

In short, the evidence of Vail's guilt is not comparable to what courts have considered "overwhelming" in other cases.

V. THE HEARSAY TESTIMONY

A. Testimony of John R. ("Father")

Dr. John R., Victim's father, testified about the conversation he had with her school principal, Thomas Mullins, on January 8, 2004.

Q: Did he give you more information?

A: He did. He was - I think Mrs. Murray and [Victim] were in his office, and it was, at that point, that ***he had told us there had been intercourse.***

App. 378:16-19 (emphasis added).

Dr. R also testified about later conversations he had with Victim.

A: Well, a lot of the admissions that came out, it didn't just all come out in one big package for us. You know, a lot of the details, especially, you know, ***the more intense sexual details***, she had a hard time telling me face to face.

. . .

A: I know that, at one time, ***it occurred in his apartment.***

B: Do you know any other place?

A: ***And that there was at least one time in his car*** while it was in our neighborhood.

Q: Was she able to give you any details about when these things had happened?

A: I know - I will be honest, a lot of those - ***the hard details about the sexual intercourse and oral sex***, I think they were probably as hard for her to tell me as they were for me to listen.

App. at 375:10 to 376:6 (emphasis added).

Q: What did she say?

A: Well, there was kind of a real poignant moment where she said, daddy, ***he took everything, she (sic) took everything I have.***

Q: Did she say she took everything or he took everything?

A: ***He did, he took everything.***

App. at 382:19-25 (emphasis added).

The Court of Appeals found these statements "far exceeded" the limitations of SCRE 801(d)(1)(B) and (D). App. at 1267. The Court of Appeals further found that

Trial Counsel's failure to object was unjustified by any valid trial strategy, as the "only purpose" this testimony served "was to corroborate and bolster Victim's story and to evoke an emotional response from the jury, which was improper." App. at 1271, *citing Dawkins* 346 S.C. at 157, 551 S.E.2d at 263. The Court of Appeals found Father's testimony "particularly prejudicial." App. at 1272.

The State's Petition does not dispute the Court of Appeals' conclusion that Father's testimony contained hearsay statements, unjustified by any valid trial strategy. Instead, the State contends that one – and only one – of those statements did not prejudice Vail. According to the State, Father's testimony that Victim told him "he took everything" was not prejudicial. Petition at 13.

As an initial matter, the State's interpretation of "he took everything" strains belief. According to the State, the phrase could reasonably be construed as non-sexual in nature, despite the charges against Vail and despite Father's references to "intense sexual details," "it occurred in his apartment . . . and . . . at least one time in his car," and "the hard details about sexual intercourse and oral sex." App. at 375:10-376:6.

Even if the phrase "he took everything" is construed completely out of context, the State fails to address the other hearsay statements in Father's testimony, which constitutes additional sustaining grounds for denying certiorari and upholding the Court of Appeals' decision.

B. Testimony of Thomas Mullins

Thomas Mullins, the Principal of First Baptist Church School, testified on redirect without objection, as follows:

Q: What prompted you to seek [Vail] out?

A: ***Once there was a rumor or a statement that there was some inappropriate behavior with him and another student.***

App. at 440:15-18 (emphasis added).

Trial Counsel did not object to this statement on hearsay or SCRE 403 grounds, nor did he request a limiting instruction. The State argues Mullins' testimony was not offered for its truth, but to explain subsequent conduct. Petition at 7. The statement was unnecessary to explain any subsequent conduct, however. As the Court of Appeals found, the statement had "minimal probative value." App. at 1268. "We are unable to determine how Mullin's testimony was relevant, much less part of a legitimate trial strategy." App. at 1271. When asked why he had failed to object to Mullins' testimony, Trial Counsel initially replied, "I don't know." App. at 1006:19-21. *See Smith*, 386 S.C. at 568, 689 S.E.2d at 633 ("The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledges there was **no** trial strategy in mind when he failed to object to the improper hearsay and bolstering testimony") (emphasis in original). He then offered "transparency" as his justification for not objecting. App. at 1007:11-12.

The Court of Appeals further found that, in light of the charges against Vail, Principal Mullins' testimony about a "rumor" of Vail's "inappropriate behavior" with another student was "highly prejudicial." App. at 1272. Trial Counsel even admitted the potential prejudice of Mullins' testimony:

Q: Well, if you didn't, if the record shows that you didn't ask him for clarification as to who exactly that rumor was supposedly about, then would you agree that it's potentially very damaging for the jury to hear that there were rumors of him doing inappropriate things or having inappropriate contact with another student?

A: Could it be? Sure. It could be. Was it the end all, be all? I don't know, but it could – I mean, I don't know what they were thinking. Like I said, I don't remember. They may not have – I am sure. And again, I don't know that. I didn't address it.

App. at 1008:1-11.

C. Testimony of Virginia Murray

Virginia Murray, a teacher at First Baptist, described a conversation with Victim about Vail, on the day Victim learned Vail had left the school.

Q: What happened before that?

A: She went on to say that it was more than – she was very upset that he had left, and it was because of her and everybody would hate her because of it. And I said I'm sure that it's fine. And then she went on to say that ***she had given her virginity to him*** and that's why she was really upset.

App. at 320:11-16 (emphasis added).

The Court of Appeals found that the PCR Court erred in ruling that Murray's dramatic testimony fell under the exception of SCRE 803(3). App. at 1096. The Solicitor's question did not focus on Victim's state of mind or emotion, but on "what happened." App. at 320:10. While Murray's response notes that Victim was upset, it also contains an independent statement ("she had given her virginity to him") offered for its truth.

As the Court of Appeals found, Murray's statement does not fall within Rule 803(3). App. at 1269, *citing State v. Tennant,* 394 S.C. 5, 16, 714 S.E.2d 297, 303 (2011) ("If the reservation in the text of [Rule 803(3)] is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition – 'I'm scared' – and not belief – 'I'm scared because someone threatened me.'" (quoting

State v. Garcia, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999)). Murray's testimony paralleled the example given in *Garcia*, essentially stating that Victim told her she was upset *because* "she had given her virginity to him." As the Court of Appeals noted, this was inadmissible hearsay corroboration of Victim's testimony that "went into detailed accounts of the alleged relationship that were unnecessary to Trial Counsel's strategy . . . ." App. at 1271. Like the testimony of the Father, the "only purpose" Murray's testimony served "was to corroborate and bolster Victim's story and to evoke an emotional response from the jury, which was improper." App. at 1271. The prejudice from Murray's testimony is obvious.

D. Testimony of Caroline O.

Caroline O., a teenaged friend of Victim's sister, testified that Victim told her the following:

> Q: Did you ever talk to [Victim] about it after that?
>
> A: [Victim] and I didn't talk very often. She might have called me once or twice just, hey, this is what's going on. At one point, ***she told me that he was mad at her for telling us and somehow he found out that she had told us that they had sex.***

App. 300:14-19 (emphasis added).

The State argues that the statements quoted above fall under the Rule 803(3) hearsay exception. Petition at 7-8. Rule 803(3), however, provides an exception for a statement of the ***declarant's*** then existing state of mind, emotion, sensation, or physical condition. The testimony quoted above, however, concerns the state of mind or emotion of Vail ("he was mad at us"), not the declarant (Victim). At most, it may be Victim's "statement of memory or belief to prove the fact remembered or believed,"

but such statements are specifically excluded by Rule 803(3). App. at 1269, *citing Tennant,* 394 S.C. at 16, 714 S.E.2d at 303 (SCRE 803(3) is limited to declarations of condition). Moreover, the Solicitor's question had nothing to do with Victim's state of mind or emotion. Instead, the Solicitor asked Caroline whether she had talked to Victim "about *it*" – the sexual relationship.

Even if this statement were offered to show Victim's state of mind or emotion, Trial Counsel should have requested a limiting instruction or objected on grounds of unfair prejudice under SCRE 403. Graham, *supra*, § 7044 at 438 and *cases cited therein.* Caroline's testimony obviously bolstered Victim's testimony and credibility. Trial Counsel's failure to object, on grounds of hearsay or unfair prejudice, was ineffective, prejudicial, and unjustified by any valid trial strategy.

E. Testimony of Sister and Caroline O.

Kelsey R., Victim's fifteen-year old sister ("Sister"), testified about the November 22, 2003, telephone conversation that she and Caroline O. had with Victim, when Victim first alleged a sexual relationship with Vail. App. at 292:15-24; at 293:11-19. The conversation occurred after Victim became jealous and upset at a note she discovered that Caroline had written about Vail. App. at 207:5-17; 208:12-17; 223:5-8.

> Q: What happened after you talked about that note?
>
> A: You know, we just explained to her, you know, you just need to chill out, it's nothing big. ***And she admitted to us that she and Coach Vail had been having sex.***

App. at 238:19-23 (emphasis added).

On redirect, Sister testified:

Q: ***Yes. She had told me originally that they had sex. But they had been talking, and they had both eventually stated saying, you know, we just went to the pier on Folly Beach.***

App. at 273:2-5 (emphasis added).

Caroline also testified without objection about the November 22, 2003 telephone conversation:

A: Later on after we ate, ***she talked to Kelsey and Kelsey was informed that she and Mr. Vail had been having sex.***

App. at 292:22-24 (emphasis added).

A: ***. . . As soon as she informed Kelsey that they had been having sex, ... [Victim] informed me that they had been having sex as well.***

App. at 293:13-19 (emphasis added).

A: ***Yes. I believe the three-minute call was when [Victim] first informed Kelsey about the two of them having sex, ...***

App. at 294:13-15 (emphasis added).

The State argues that Sister and Caroline's testimony quoted above was not hearsay because it fit within Rule 801(d)(1)(B). Petition at 5. According to the State, the testimony was offered to rebut an implicit accusation by Trial Counsel that Victim had an improper motive of jealousy after learning of Vail's engagement. Petition at 6. The State asserts that Trial Counsel made this accusation during his cross examination of Victim. Petition at 6, *citing* App. 155:11-18 and 210:8-15.

While Trial Counsel questioned Victim about Vail's engagement, he did not accuse her, directly or indirectly, of testifying untruthfully because of jealousy or any other improper motive. *See Saltz*, 346 S.C. at 121-22, 551 S.E.2d at 244. The portions of the cross examination cited in the Petition are:

Q: Was there ever talk about them getting married?

A: Yes, sir.

Q: And that was pretty wide - - everybody thought they were going to get married?

A: Yes, sir.

Q: And everybody speculated about what date they were going to get married on?

A: Yes, sir.

App. at 155:11-18.

Q: Okay. Do you remember when you found out – well, you found out that he had gotten engaged to Miss Mullins at that time?

A: A couple of days after everything blew up.

Q: Okay. And how did you find that out?

A: Mr. Mullins called my house to speak to my dad, and he made a point of explaining to me what had happened between he and Amanda over Christmas Break.

App. at 210:8-15. None of the questions above explicitly or implicitly accuse the witness of anything.

Even if the cross examination is somehow construed as containing an accusation of an improper motive, that motive would be jealousy. But the trial record is clear that the motive of jealousy arose earlier than the November 22 statements. Victim admitted she had a longstanding crush on Vail. App. at 59:15-18. The hearsay statements about which Sister and Caroline testified at trial were made in response to Victim's discovery of Caroline's note about Vail. App. 207:9-14; 208:12-17; 223:5-8. They did not predate the note or her feelings of jealousy that the note aroused, and therefore could not fall within Rule 801(d)(1)(B).

The State argues that Trial Counsel's failure to object was a reasonable strategy, because he needed Sister and Caroline to testify that Victim later recanted her November 22 statements. Petition at 9-10. The State's argument ignores the fact that Victim herself testified, before either Sister or Caroline took the stand, that she had recanted. App. at 130:19-20; 224:9-10. No need existed, therefore, for Sister or Caroline to testify about the recantation.

F. Testimony of Sister

During her direct examination, Sister further testified as follows:

Q: ***Did she tell you when and where they had intercourse?***

A: ***She had told me at his apartment, in his car in the parking lot and in some half built houses.***

App. at 250:8-11 (emphasis added).

The State has not identified an accusation by Trial Counsel which these statements were offered to rebut. Significantly, Victim made these statements to Sister during walks together "after everything all came out and unfolded." App. at 247:11-15; at 250:3-7. In other words, the statements could not have predated any improper motive or influence and could not, therefore, be admissible pursuant to Rule 801(d)(1)(B).

Nor could the testimony be admissible under Rule 801(d)(1)(D). It is not limited to time and place, because the solicitor's question refers to "intercourse." App. at 250:9. Moreover, the exchange follows several questions about Sister's communications with Coach Vail. App. at 249:3 to 250:2. When Sister testified, therefore, that her sister told her "they" had had intercourse in "his" apartment and

car, it was the same as testifying that Victim told her she had had intercourse with Coach Vail in his car and apartment. *See Munn*, 292 S.C. at 499-500, 357 S.E.2d at 463 (except for time and place, "particulars or details" are not admissible). Sister's testimony was inadmissible hearsay and not subject to any exception. The State has not offered any argument that it comports with any trial strategy. The prejudice is obvious.

CONCLUSION

The State has failed to identify any special or important reasons why the Court should grant certiorari review. The Court of Appeals correctly found that Trial Counsel's failure to object to several instances of inadmissible hearsay was prejudicial and unjustified by a valid trial strategy. For these reasons, this Court should deny the State's Petition for Writ of Certiorari.

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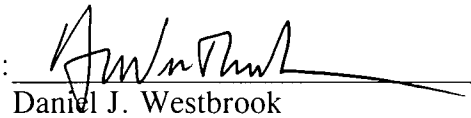
By: 

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July 24, 2013

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Mark Edward Vail, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by having them hand delivered to the following address(es):

Pleadings:

Return to Petition for Writ of Certiorari

Counsel Served:

Ashleigh R. Wilson
Assistant Attorney General
State of South Carolina
1000 Assembly Street
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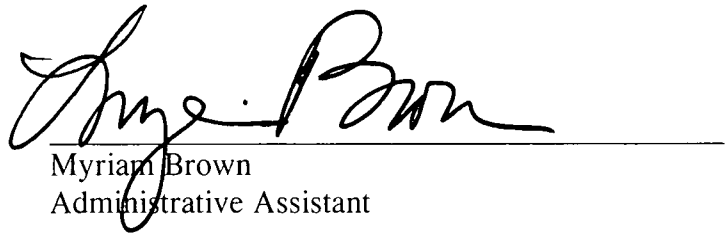

Myriam Brown
Administrative Assistant

July 24, 2013