

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Case No. 2017-CP-11-00801
Appellate Case No. 2024-000128

RECEIVED

Nov 06 2024

S.C. SUPREME COURT

Thomas Anthony Styla,

Respondent-Petitioner,

v.

State of South Carolina,

Petitioner-Respondent.

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

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QUESTION PRESENTED

Did the circuit court correctly grant post-conviction relief upon a finding of ineffective assistance of counsel in calling a witness that counsel had not interviewed prior to trial?

STATEMENT OF THE CASE

This case is before the appellate court upon a notice of appeal filed by the State, as Petitioner-Respondent, and a cross-appeal filed by Thomas Anthony Styla, as Respondent-Petitioner. Both appeals arise from post-conviction relief proceedings in the Cherokee County Court of Common Pleas, heard by Judge J. Mark Hayes, II, in which Mr. Styla was the applicant. Already pending in this Court is an amended petition for writ of certiorari filed by Respondent-Petitioner Styla (hereafter, “Applicant”) with respect to rulings of the PCR court denying three of his claims of ineffective assistance of counsel. The State seeks a writ of certiorari with respect to the PCR court’s finding of ineffective assistance with respect to one issue raised by Applicant.

Applicant incorporates the Statement of the Case contained in his amended petition for writ of certiorari, previously filed. For purposes of this return, that Statement of the Case is supplemented with the following information relevant to the petition for writ of certiorari filed by the State.

The underlying criminal prosecution of Applicant stemmed from an allegation made by a minor, M.C., that in December 2009 Applicant penetrated the minor’s vagina with his fingers in a bedroom of the home Applicant shared with the minor’s grandmother. App. pp. 76, 79-81. M.C. was nine years of age and in the fourth grade when the alleged conduct took place, but she did not make any allegation of the alleged

conduct until she was fourteen and in the eighth grade. Her initial disclosure was to her middle school guidance counselor, Robin Christian Smith. App. pp. 75, 80, 85, 92, 215.

The State called the minor, M.C., and three other witnesses, her mother, a former employee of the Sheriff's Department, and an expert witness in the field of child sexual abuse dynamics. The only evidence of the alleged penetration presented in the State's case-in-chief was the testimony of M.C. The State offered no medical or forensic evidence or eyewitness testimony to corroborate M.C.'s testimony. Applicant denied the allegation and put up a defense, including his own testimony that he did not commit the alleged offense. Thus, the determination of his guilt or innocence turned entirely on whether the jury believed M.C. or Applicant.

The State did not call the school guidance counselor, Smith, as a witness. Although Applicant's trial counsel had not interviewed the guidance counselor prior to trial, the defense called Smith as a witness. Smith gave testimony that would not have been admissible had she been called by the State. That testimony included details of the specific allegations made by the minor to Smith – details about the alleged incident that was the subject of the charge for which the defendant was on trial and also details concerning additional alleged incidents of misconduct – details that far exceeded the limitation as to time and place under the evidence rules and case law.

The PCR court found ineffective assistance of counsel and granted a new trial, due to counsel's failure to interview the guidance counselor before calling her as a witness. That ruling was supported by the evidence, and the State's petition for a writ of certiorari should be denied.

ARGUMENT IN OPPOSITION TO STATE'S PETITION

THE PCR COURT'S FINDING OF INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE AFFIRMED, BECAUSE IT WAS SUPPORTED BY THE EVIDENCE IN THE RECORD; COUNSEL'S PERFORMANCE WAS BOTH DEFICIENT AND PREJUDICIAL, AND APPLICANT IS ENTITLED TO A NEW TRIAL.

The Sixth Amendment of the United States Constitution guarantees to a criminal defendant the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see* U.S. Const. amend. VI. Generally, to establish ineffective assistance of counsel, the PCR applicant must establish (1) that trial counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Tappeiner v. State*, 416 S.C. 239, 248-49, 785 S.E.2d 471, 476 (2016). The first component of the *Strickland* standard requires a showing that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688; *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 840 (2018); *Tappeiner*, 416 S.C. at 248-49, 785 S.E.2d at 476; *Matthews v. State*, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). The second component requires a showing of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; *Tappeiner*, 416 S.C. at 249, 785 S.E.2d at 476; *Matthews*, 350 S.C. at 275, 565 S.E.2d at 768. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; *Tappeiner*, 416 S.C. at 249, 785 S.E.2d at 476; *Matthews*, 350 S.C. at 275-76, 565 S.E.2d at 768.

On appeal, the reviewing court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. *Ramirez v. State*, 419 S.C. 14,

20, 795 S.E.2d 841, 844 (2017); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 146 (2014); *Lounds v. State*, 380 S.C. 454, 460, 670 S.E.2d 646, 649 (2008); *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Applicant alleged and the PCR court held that trial counsel rendered ineffective assistance by calling as a witness the school guidance counselor, Robin Christian Smith, without investigating and interviewing the counselor to ascertain what her trial testimony would be. The PCR court's finding was supported by the evidence, and the State's petition for writ of certiorari challenging that finding should be denied.

It is well recognized that a criminal defense attorney has a duty to conduct a reasonable investigation, or to make a reasonable decision that makes particular investigation unnecessary. *See Strickland*, 466 U.S. at 691; *Walker*, 407 S.C. at 405, 758 S.E.2d at 147; *Lounds*, 380 S.C. at 460, 670 S.E.2d at 649 (2008); *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007), *quoting Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986); *Reeves v. State*, 415 S.C. 366, 377, 782 S.E.2d 747, 752 (Ct.App. 2015). As this Court stated in *Ard*,

while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case."

Ard, 372 S.C. at 331-32, 642 S.E.2d at 597, *quoting Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla 1986), *aff'd*, 828 F.2d 670 (11th Cir. 1987) (emphasis in original). In this case, the PCR court found that counsel's failure to interview the school guidance counselor before calling her as a witness was prejudicial deficient performance.

Robin Smith was the person to whom the minor, M.C., made her initial allegation of inappropriate conduct. Smith made typewritten notes immediately following the

minor's disclosure to her. App. pp. 343, 358-59. A copy of those notes was in the possession of the defense. App. pp. 586-87. Without first interviewing Smith, the defense called Smith as a witness, for the stated purpose of using her notes to impeach the trial testimony of M.C. by highlighting inconsistencies between the trial testimony and Smith's notes. App. pp. 587, 625. However, on the witness stand, Smith disavowed the accuracy of her notes and testified that the statements the minor made to her were different than what was reflected by her notes in several respects. App. pp. 348-50. Smith stated she had hurriedly typed the notes and the inconsistencies were typographical errors. App. pp. 349-50. Defense counsel was not prepared for the disavowal of her notes, never imagined it, and was shocked by it. App. pp. 587-88, 624, 629-30.

Counsel agreed that had he talked to the witness before calling her, he would have known she claimed the notes were erroneous, if she had told him. App. p. 589. He admitted he would not have known if the typed notes were accurate until he asked her. App. pp. 589-90. When Smith was questioned by the prosecution ahead of trial, she revealed to the prosecution that her notes were not accurate in at least two particulars. App. pp. 365-66. The PCR court found it was more likely than not that Smith would have similarly informed defense counsel of the discrepancies between her recollection and her notes, had defense counsel interviewed her prior to trial. App. p. 1082.

Counsel admitted he did not interview Smith prior to calling her as a witness at trial. App. pp. 587-88. He acknowledged the far safer practice would have been to talk to her first. App. p. 587. He even argued to the jury that "it's your duty to call and talk to your witnesses." App. p. 412. He agreed it was important for a lawyer to talk to a witness. App. p. 588. Counsel's only explanation for not talking with Smith ahead of

trial was that she was no longer at the school and all he wanted out of her was what was in her report. App. p. 629. However, he admitted he should have talked to her at the courthouse before putting her on the stand. App. p. 629.

Counsel also admitted the testimony given by Smith was damaging to the defense – he testified she turned out to be an adverse witness to the defense. App. p. 588. He did not expect and was not prepared for her testimony that disagreed with and disputed her notes. App. pp. 587-88. He was shocked that she claimed the inconsistent statements were typographical errors. App. p. 624. He never imagined she would disavow her notes. App. p. 629. Indeed, because he was surprised by the testimony, he had to very hastily formulate a “plan B” to address the unexpected testimony. App. p 625. That plan B included attempting to discredit Smith, his own witness, in closing argument, but the closing arguments of both the prosecution and the defense amplified the damage done by her testimony. App. pp. 410-13, 450-52, 643-44. In its order finding ineffective assistance for failure to interview Smith before calling her as a witness, the PCR court reviewed the specifics of Smith’s testimony and both defense counsel’s and the prosecution’s closing argument to the jury about Smith’s testimony. App. pp. 1078-82, 1084. The PCR court further reviewed the case law of this state and other jurisdictions with respect to the duty to conduct an *independent* investigation, including *at a minimum interviewing witnesses*. Ultimately, the court found counsel’s failure to interview Smith before putting her on the stand was unreasonable and thus deficient performance. App. pp. 1082-84.

The testimony elicited from Smith was extremely damaging and prejudicial to the defendant. During Smith’s testimony, defense counsel elicited testimony the State would

not have been able to introduce had the State called Smith as a witness in its case-in-chief. Defense counsel elicited testimony about the specific acts described to Smith by the minor, including specifics of the alleged incident for which the defendant was on trial and additional allegations of touching on a four-wheeler and comments about the minor's shorts. App. pp. 345-50, 352-54, 362-63, 366. This testimony exceeded the stringent limitation of hearsay except as to time and place in the context of criminal sexual conduct allegations. See Rule 801(d)(1)(D), SCRE; *State v. Simmons*, 423 S.C. 552, 563, 816 S.E.2d 566, 572 (2018); *Thompson v. State*, 423 S.C. 235, 240-41, 814 S.E.2d 487, 490 (2018); *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). Defense counsel further elicited testimony that the minor led Smith to believe there were many incidents of sexual abuse or inappropriate conduct. App. pp. 352-54. The minor never testified it happened many times; rather, this was something that did not come out in other trial testimony, only in the testimony of Smith. App. pp. 591-92. Counsel acknowledged this testimony from Smith came in through his own questioning of the witness. App. pp. 590-92.

The specific allegation that the minor disclosed penetration, which exceeded the evidentiary limitation as to time and place, was emphasized during the prosecution's questioning of Smith on recross-examination. App. p. 363. Trial counsel admitted he was aware of the limitation as to time and place, and it was his own questioning of Smith that allowed the prosecutor to elicit from Smith the testimony concerning penetration that exceeded the time and place limitation. App. pp. 586, 592-93. Smith's belief that other incidents of misconduct on a four-wheeler may have happened more than once, elicited

first in counsel's questioning of her on direct, was also repeated and emphasized during questioning by the prosecution. App. p. 364; pp. 590-92.

In its orders finding ineffective assistance of counsel, the PCR court found that the testimony of Smith was harmful to the defense and counsel's deficient performance was prejudicial. App. pp. 1083-86, 1105-07. In its order granting relief, the court noted that the assessment of witness credibility is within the exclusive province of the jury. The court further noted that witnesses may not testify whether another witness is telling the truth or improperly bolster the credibility of another witness. The court listed specific aspects of Smith's testimony and found it exceeded what she would otherwise have been allowed to say, exceeding the restriction as to time and place. In particular, the court noted Smith's testimony that she was led to believe there were numerous other incidents of abuse or inappropriate conduct, Smith's testimony as to the specific acts the minor advised had occurred, and Smith's bolstering of the minor's credibility by stating she believed it was possible the minor had been abused many times. App. pp. 1083-86. In its order denying the State's motion to alter, amend, and reconsider as to this issue, the PCR court further emphasized that Applicant met his burden of proof as to prejudice under *Strickland v. Washington* and specifically held he met his burden "to show that, but for the constitutional deficiencies alleged, there is a reasonable probability that the outcome of the trial would have been different." App. p. 1105. The court reiterated that the testimony of Smith bolstered the testimony of the minor and opened the door to specific details about the alleged abuse and other bad acts that would not have otherwise been admissible. App. p. 1106.

The State is seeking a writ of certiorari, claiming that Applicant failed to establish either deficient performance or resulting prejudice so as to warrant a finding of ineffective assistance of counsel. As noted above, the PCR court's findings must be affirmed if there is any probative evidence to support them. Here, the findings are supported by the evidence, and the State's petition should be denied.

Counsel's failure to interview Smith before calling her as a witness was deficient performance. It fell below the objective standard of reasonableness that must be applied in evaluating a claim of deficient performance. *See Strickland*, 466 U.S. at 688. The evidence supports the PCR court's finding that counsel's failure to interview Smith was unreasonable.

Counsel's decision not to conduct an investigation into Smith's potential testimony was not a reasonable determination that made the particular investigation unnecessary, as required under the *Strickland* standard. *See Strickland*, 466 U.S. at 691; *Ard*, 372 S.C. at 331, 642 S.E.2d at 597. Counsel articulated two possible explanations for not questioning the witness and the State's petition posits a third explanation, not given by counsel. None of these explanations are reasonable or valid. First, counsel testified the main problem with regard to interviewing Smith was that she was no longer at the school. App. p. 629. This explanation has no validity and is objectively unreasonable, since counsel was able to locate the witness in order to procure her presence at trial. This explanation is also undermined by counsel's admission that he ***should have*** talked to the witness at the courthouse. App. p. 629. Second, counsel testified all he wanted out of Smith was what was in the report. App. p. 629. But a reasonably competent attorney knows he cannot limit a witness's testimony to only the

questions he chooses to ask. A reasonably competent attorney knows his own questions open the door to cross-examination and to matters that would not otherwise be admissible in the State's evidentiary presentation. Counsel's explanation is simply not objectively reasonable.

Finally, the State offers another explanation, one not articulated by defense counsel, speculating that counsel could reasonably have expected Smith to remain consistent with her own written notes because Smith was "a practicing professional and a mandatory reporter." This explanation, had it been given by counsel, was also not objectively reasonable. The *Strickland* standard for objectively reasonable performance requires that counsel conduct an *independent* investigation. See *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597. A reasonably competent attorney cannot make assumptions about what a witness's testimony will be merely because the person is a "practicing professional" or a "mandatory reporter." The witness's status has no bearing on the duty to conduct an *independent* investigation. Counsel's responsibility to ascertain what the witness's testimony will be before calling her to the stand applies to witnesses of all ilk, whether lay persons or professionals, whether friendly or hostile, whether expected to be helpful or expected to be adverse to the client's position. If the reason counsel failed to interview Smith was her professional or reporter status, as the State now suggests, that reason was not objectively reasonable.

The PCR court's finding that counsel's failure to interview Smith was unreasonable and was deficient performance is supported by probative evidence. Case law recognizes the duty to conduct a reasonable investigation. See *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *Ard*, 372 S.C. at 331, 642 S.E.2d at 597.

Case law recognizes the duty to interview witnesses. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 597; *Ingle*, 348 S.C. at 471, 560 S.E.2d at 403. Counsel himself admitted that duty. App. p. 412. He testified the far safer practice was to interview the witness. App. p. 587. He testified he should have talked to Smith at the courthouse. App. p. 629. He could not merely rely on her notes or on her professional or reporter status, because to do so fell short of his responsibility to conduct an *independent* investigation. *See Ard*, 372 S.C. at 331-32, 334, 642 S.E.2d at 397, 598.

The PCR court correctly analyzed the issue of the failure to investigate and to interview the witness in the context of this Court's precedents and decisions from other jurisdictions, including *Ingle v. State*, *McKnight v. State*, and *Troedel v. Wainwright*, all cited in the PCR court's order. In *Ingle*, this Court reversed a PCR court's finding that counsel articulated a sound trial strategy for not interviewing a witness before calling her to the stand. *See Ingle*, 348 S.C. at 471, 560 S.E.2d at 403. Counsel testified he relied on the client's assertion the witness was honest and would provide the testimony the defense sought, and counsel presumed her testimony would be favorable to the defense because she was not called as a witness by the State. *Id.* This Court found these explanations did not amount to reasonable strategy for calling the witness without first ascertaining what her testimony would be. *Id.*

In *McKnight*, this Court found ineffective assistance due to counsel's calling an expert who had benefitted the State in the first trial of the defendant and due to counsel's failure to investigate medical evidence contradicting the State's experts' opinions. *See*

McKnight, 378 S.C. at 43-47, 661 S.E.2d at 359-61. In *Troedel*,¹ a federal district court found ineffective assistance based on, among other deficiencies, counsel's failure to depose the prosecution's gunpowder residue expert and failure to consult with any other expert in the field. See *Troedel*, 667 F.Supp. at 1461. While these cases do not explicitly address the failure to interview a witness before calling her at trial, they are premised on the same fundamental principle – the duty of defense counsel to conduct a reasonable investigation.

The State's petition seeks to distinguish these cases factually, but the factual distinctions do not alter the applicability of the legal principles on which these decisions relied. The premise of each case is that counsel has an obligation to conduct a reasonable, independent investigation. One aspect of that obligation is the duty to interview a witness to ascertain her testimony before putting her on the stand. In *Ingle*, this Court held counsel could not reasonably rely on the client's belief the witness would be honest or the assumption the witness's testimony would be favorable because she was not called by the State. See *Ingle*, 348 S.C. at 471, 560 S.E.2d at 403. Similarly, in this case, counsel could not reasonably assume that Smith's notes were accurate and that she would testify consistently with those notes. Such an assumption does not satisfy the duty to conduct an *independent* investigation. None of the explanations offered by counsel or

¹ In its petition for writ of certiorari, the State contends the PCR court placed undue reliance on the *Troedel* decision of the federal district court of the Southern District of Florida. To the contrary, the *Troedel* decision was quoted and cited with approval by this Court in *Ard*, including the language quoted above, *supra* at 4, and it was absolutely appropriate for the PCR court to consider *Troedel* in evaluating the claim of ineffective assistance due to counsel's failure to interview Smith before calling her as a witness for the defense. The PCR court's order also cited *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir. 1986), another federal decision cited with approval by this Court in *Ard* and referenced above, *supra* at 4.

suggested by the State to justify counsel's failure to interview Smith are valid. The PCR court properly found counsel's failure to do so was unreasonable and, therefore, was deficient performance. App. pp. 1082-86. That finding, supported by the evidence, should not be disturbed on appeal.

Counsel's deficient performance in failing to interview Smith before calling her as a witness was also prejudicial. Under the *Strickland* standard, there is a reasonable probability that but for counsel's unprofessional errors the outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. The evidence supports the PCR court's finding that counsel's deficient performance in failing to interview Smith was prejudicial.

When interviewed pre-trial by the prosecution, Smith revealed that her typewritten notes were not consistent with her recollection of what the minor disclosed to her. App. pp. 365-66. Based on her revelation to the prosecution, it is reasonable to infer that she would have similarly disclosed to the defense the inaccuracy of her notes, what her recollection actually was, and what her trial testimony would be, had she been asked. The court's finding as to the likelihood of a similar disclosure to the defense is supported by the evidence in the record that Smith made such a disclosure to the prosecution when interviewed prior to trial. App. pp. 365-66, 1082.

The State contends Applicant did not meet his burden to prove ineffective assistance because Smith did not testify at the PCR hearing as to what she would have said if interviewed by defense counsel. On the contrary, the absence of such testimony does not undermine Applicant's claim, in light of the evidence that she disavowed the accuracy of her notes when interviewed by the prosecution. *See Pauling v. State*, 331

S.C. 606, 503 S.E.2d 468 (1998). In *Pauling*, notes of a triage nurse indicated the alleged sexual assault victim denied penetration. The defendant's counsel failed to interview the nurse or call her to testify at trial, even though her testimony was critical and would have impeached the alleged victim's credibility. The State argued the burden to establish ineffective assistance was not met because the triage nurse did not testify at the PCR hearing. This Court held the nurse's notes, in evidence in the PCR proceedings, were sufficient evidence to support a finding of prejudice. See *Pauling*, 331 S.C. at 609-11, 470-71.

Similarly, in this case, the evidence that Smith previously disavowed her notes when interviewed by the prosecution supports the PCR court's finding of prejudice. Just as this Court could infer the triage nurse would have testified consistently with her notes in *Pauling*, it was proper for the PCR court to infer in this case that Smith would have disclosed the inaccuracy of her notes to defense counsel, consistently with her disclosure of the inaccuracy of her notes to the prosecution. The PCR court's finding of prejudice, like this Court's finding of prejudice in *Pauling*, is supported by the evidence.

The prejudice from counsel's failure to interview Smith before calling her as a witness is amply supported by the evidence before the PCR court. Had counsel known Smith would disavow her notes, he would not have tried to use her testimony about her notes to discredit the minor witness. Had Smith refused to even talk with counsel, counsel would have known she was hostile and likely damaging. In either event, placing her on the stand would have been objectively unreasonable. As it turned out, Smith's testimony was extremely prejudicial to the defense. Without Smith's testimony, the jury would have had before it only the testimony of M.C. and Applicant as to whether the

alleged incident of penetration occurred. With Smith's testimony, the jury heard the minor previously disclosed penetration to Smith, corroborating the trial testimony of M.C. With it, the jury heard the details of other alleged improper conduct. With it, the jury heard, repeatedly, that Smith believed the minor was sexually abused many times. The prejudicial nature of this testimony is clearly supported by the evidentiary record.

The State takes issue with a passage of one of the PCR court's orders as to the likelihood that Smith would have been hostile to the defense. App. p. 1106. In the order granting relief, the PCR court also made a finding that it was more likely than not that Smith would have disclosed her altered recollection – *i.e.*, the inaccuracy of her notes – to defense counsel had he interviewed her, in keeping with the disclosure Smith made to the prosecution when it interviewed her. App. p. 1082. The State contends the issue is what Smith may or may not have told counsel had he interviewed her, and therefore there is no proof the outcome would have been altered had counsel questioned the witness prior to trial. Contrary to the State's position, the *Strickland* standard does not require an absolute showing of what the witness would have told counsel and that the outcome would have been different. Indeed, the *Strickland* standard does not even require a showing that it was more likely than not that a particular outcome would have resulted. The Supreme Court expressly rejected the "more likely than not" standard. *See Strickland*, 466 U.S. at 693-94. Instead, the Supreme Court articulated a lower standard, requiring only a showing of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*, 466 U.S. at 694. And the Court further instructed that a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The PCR court's findings as to likelihood exceeded the level of proof required under *Strickland*. The actual *Strickland* standard is met here. There is a reasonable probability that Smith would have disclosed to counsel the inaccuracies of her notes, as she did to the prosecution, and that counsel would not have put her on the stand. Her otherwise inadmissible testimony that bolstered the credibility of the minor and implied repeated acts of sexual abuse was highly prejudicial and undermines confidence in the outcome of the trial.

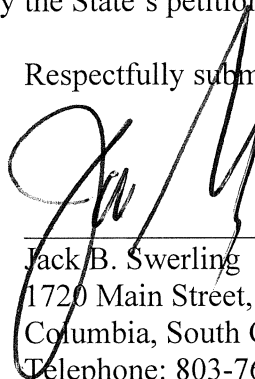
The State contends counsel "effectively adjusted his strategy" in the manner he questioned the witness and in his closing argument, thus negating the claim of ineffective assistance. On the contrary, counsel's hastily formed "plan B" was not effective and did not undo the damage caused to the defense's case by calling this witness. The damage was so extreme counsel's "plan B" required him to call his own witness a prevaricator and a liar. App. pp. 410-13. The transcript of Smith's trial testimony and of both attorneys' closing arguments demonstrates the witness was extremely harmful and prejudicial to the defense, providing testimony about matters that otherwise had not been introduced through the minor's testimony, repeatedly suggesting that the alleged abuse had occurred many times, and bolstering the minor's credibility with Smith's personal belief as to what had occurred. The testimony of this witness was the focus of a substantial amount of the closing argument, covering some seven pages of the trial transcript. Where the case turned entirely on the jury's assessment of the credibility of the minor versus the credibility of the defendant, there is a reasonable probability Smith's damaging testimony influenced the jury to reach a guilty verdict. The PCR court appropriately found, based on probative evidence in the record, that but for counsel's

failure to interview Smith before calling her as a witness for the defense, there is a reasonable probability the outcome of the trial would have been different. App. pp. 1105-06.

CONCLUSION

The PCR court's findings of deficient performance and prejudice are supported by probative evidence. This Court should deny the State's petition for a writ of certiorari.

Respectfully submitted,



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