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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Daniel McLeod Coble, Circuit Court Judge

NAKIA K. JOHNSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000553

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR judge err in refusing to find prejudice resulting from trial counsel's failure to contemporaneously object to testimony about alleged acts that took place outside of Kershaw County that the trial judge erroneously ruled admissible pre-trial pursuant to Rule 404(b), SCRE?

2. Did the PCR judge err in refusing to find trial counsel ineffective for failing to move to quash the lewd act indictment as unconstitutionally overbroad and vague because the indictment alleged the offense took place between January 1, 2007, and October 11, 2011, and failed to provide fair notice of the charge with sufficient certainty and particularity?

3. Did the PCR judge err in refusing to find trial counsel ineffective for failing to object and move for a mistrial when the mother of the minor testified about domestic violence by Petitioner?

STATEMENT

In June of 2014, the Kershaw County Grand Jury indicted Petitioner, Nakia K. Johnson, for criminal sexual conduct with a minor first degree and criminal sexual conduct with a minor second degree, indictments #2014-GS-28-0419, 0420. (App. pp 645-646). In August of 2014, the Kershaw County Grand Jury indicted Petitioner for lewd act on a minor, indictment #2014-GS-28-0910. (App. pp. 647-648). On June 22, 2015, Petitioner proceeded to jury trial before the Honorable Doyet A. Early, III. Virgin Johnson and Corey Williams represented Petitioner at trial. Nicole Simpson and Kathryn Cavanaugh prosecuted the case. The jury found Petitioner not guilty of criminal sexual conduct with a minor first degree but guilty of criminal sexual conduct with a minor second degree and lewd act. Judge Early sentenced Petitioner to twenty (20) years for criminal sexual conduct with a minor second degree and fifteen (15) years concurrent for lewd act.

A timely notice of intent to appeal was filed and the direct appeal perfected. E. Charles Grose, Jr. represented Petitioner on appeal. William M. Blitch, Jr. represented the State. In an unpublished opinion the South Carolina Court of Appeals affirmed the conviction for lewd act but reversed the conviction for criminal sexual conduct with a minor second degree. State v. Johnson, Op. No. 2018-UP-109 (S.C.Ct.App. filed March 14, 2018). (App. pp. 651-658). Both the State and Petitioner filed petitions for rehearing, and both were denied on June 21, 2018. Both the State and Petitioner filed petitions for writ of certiorari in the South Carolina Supreme Court. On October 19, 2018, the South Carolina Supreme Court denied the State's petition and granted Petitioner's petition. Following briefing and oral argument, the South Carolina Supreme Court dismissed the appeal as improvidently granted. State v. Johnson, Op. No. 2020-MO-002 (S.C.Sup. Ct. filed January 22, 2020).

On January 11, 2021, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 659-665). On January 27, 2021, Petitioner filed a memorandum in support of the PCR application. (App. pp. 666-681). On April 12, 2021, the State filed a return, motion for more definite statement and partial motion to dismiss. (App. pp. 682-694). On September 19,2022, Petitioner filed an amended PCR application. (App. pp. 695-697). On January 3, 2023, Petitioner filed a second amended PCR application. (App. pp. 698-699). On September 12, 2023, an evidentiary hearing was held before the Honorable Daniel Coble. Ola A. Johnson represented Petitioner at the PCR hearing. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented the State. In a written order filed January 14, 2025, Judge Coble denied relief and dismissed the application. (App. pp. 763-812). A timely notice of intent to appeal was served and filed on March 21, 2025. This petition for writ of certiorari follows.

ARGUMENTS

1. **The PCR judge erred in refusing to find prejudice resulting from trial counsel's failure to contemporaneously object to testimony about alleged acts that took place outside of Kershaw County that the trial judge erroneously ruled admissible pre-trial pursuant to Rule 404(b), SCRE.**

The jury found Petitioner guilty of criminal sexual conduct with a minor second degree and lewd act involving Petitioner's step-daughter, Minor. The jury found Petitioner not guilty of criminal sexual conduct with a minor first-degree. The criminal sexual conduct with a minor second degree was reversed on direct appeal. State v. Johnson, Op. No. 2018-UP-109 (S.C.Ct.App. filed March 14, 2018). (App. pp. 651-658). This appeal challenges the lewd act charge. Prior to trial counsel moved to exclude alleged acts that occurred outside of Kershaw County, where the trial took place, as inadmissible under Rule 404(b), SCRE. (App. p. 101, line 1 – p. 102, 103, lines 1-2). The judge commented, "What he's talking about, there's been some allegations that something may have taken place in Fairfax and the beach and Bishopville." (App. p. 101, lines 15-17). The prosecutor responded, "Yes, sir, Your Honor. There were allegations - - first of all, you had the opportunity to view victim's statement to David Kellin, which he indicated these acts had been going on for a period of three years. As she indicated in the video, they lived in different areas of the state and these acts occurred in those different areas. We believe, under the 404(b), common scheme or plan, that these acts that occurred outside of Kershaw County come in under 404(b), as well as res gestae theory, Your Honor." (App. p. 101, line 19 – p. 102, lines 1-5). Trial counsel, while not referencing specific instances of acts occurring outside of Kershaw County, additionally asked, "Your Honor, and, of course, the next logical step, if the Court rules that it come in, I'm going to move to the more prejudicial than probative - - " (App. p. 102, lines 14-17). The judge said, "You want a 403 analysis." (App. p. 102, line 18). Trial counsel responded, "Yes, sir." (App. p. 102, line 19).

While it is unclear from the record what particular acts the judge reviewed, the judge, relying on State v. Weaverling, 337 S.C. 460, 471, 523 S.E.2d 787, 792–93 (Ct. App. 1999), State v. Martucci, 380 S.C. 232, 255, 669 S.E.2d 598, 610 (Ct. App. 2008), and State v. Mathis, 359 S.C. 450, 464, 597 S.E.2d 872, 879 (Ct. App. 2004), found the alleged acts that took place "outside of this jurisdiction" were admissible pursuant to Rule 404(b) under the Lyle common scheme or plan exception stating, "I find in this case there's a close degree of similarity or connection between the other bad acts and the crime in which the defendant is on trial, and I find that their probative value outweighs the prejudicial value under 403 and I'll allow that testimony." (App. p. 116, line 21 – p. 117, lines 1-12). The judge did not make specific findings about what specific alleged acts outside of Kershaw County were included in the ruling. The judge did not make specific findings about any possible probative value. The judge did not make a finding that the alleged acts, not the subject of a conviction, met the clear and convincing standard. See State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009) ("Where the defendant was not convicted of the prior crime, evidence of the bad act must be clear and convincing.").

At trial Minor testified that acts of touching and then penetration started in Fairfax, outside of Kershaw County. (App. p. 157, line 22 – p. 158, 159, lines 1-20). Trial counsel did not object. After moving to Kershaw County for a period of time Minor testified that the family moved back to Fairfax. Minor testified about additional acts in Fairfax, without objection. (App. p. 165, line 7, p. 166-167). Minor testified about incidents at Disney World, Myrtle Beach, and a hotel in Bishopville, without objection. (Tr. pp. 172-175).

Minor testified about the final incident that resulted in an "accidental disclosure" as a result of Minor's mother, Pamela Hall, overhearing a conversation between Minor and Petitioner

when Petitioner's phone accidentally pocket dialed the mother. Minor testified that this occurred when Petitioner drove her to a graveyard and started touching her. (Tr. p. 182, line 14 – p. 183, lines 1-25). The police incident report reflects that the graveyard was in Lee County. (App. p. 674).

In the amended PCR application Petitioner alleged, "Applicant's counsel Johnson failed to object to evidence of prior bad acts introduced by the State." (App. p. 696). During the PCR hearing PCR counsel questioned trial counsel, "But my question is starting on page 157. When we get down to questioning starting on line 22 and as it follows through the page 158, do you understand - - or do you have - - what is the reasoning you had for not objecting to this testimony by the victim about events in Fairfax which were outside of Kershaw County" Why, why did you fail to make an objection there?" (App. p. 747, lines 7-13). Trial counsel answered, "Okay, the only reason I would have is once I made the objection, all of that was part of what I asked the judge not to put out - - not to let in. Once he said it was in, the only thing I could do now is cross-examine and, and such. So I dealt with it the best I could." (App. p. 747, lines 14-18).

PCR counsel then asked, "Okay. Do you feel that you should have made an objection contemporaneous? When the evidence, when the testimony was being offered, shouldn't you have stood up and made an objection to preserve your, your motion and your pretrial motion and your objection to preserve it? Shouldn't you have made an objection at that time?" (App. p. 747, lines 19-24). Trial counsel answered, "Okay, if I didn't, I should have done it." (App. p. 747, line 25).

In the order of dismissal the PCR judge wrote:

> From the record, this Court finds that Trial Counsel made appropriate pretrial objections to the prior bad act evidence, and the trial court appropriately assessed the objection and overrruled Trial Counsel. However, Trial Counsel did not contemporaneously object during trial and failed to preserve the matter for

> appellate review. For this reason, this Court finds Trial Counsel's performance on this matter deficient when he failed to contemporaneously object and preserve the matter for appeal.
>
> Turning to prejudice, after a review of this record, this Court finds the trial court's ruling on the prior bad acts based on Martucci, Mathis, and Weaverling was correct, and Applicant's prior bad acts were admissible and would not have been reserved on appeal. This Court finds Applicant cannot show prejudice because the evidence was admissible, and the trial court's ruling would not have been reversed on appeal. Therefore, while Trial Counsel's failure to contemporaneously object was deficient, Applicant has failed to overcome his burden in proving prejudice flowing from Trial Counsel's representation.

(App. pp. 788-789)(internal citations omitted). The PCR judge correctly found trial counsel deficient for failing to contemporaneously object to the testimony about alleged acts outside of Kershaw County but erred in refusing to find prejudice. The State failed to prove the evidence was admissible. The trial judge erred in admitting the testimony about the alleged acts outside of Kershaw County. The judge failed to conduct an individualized analysis of each alleged act, to include a determination of whether the testimony met the clear and convincing standard. The judge failed to make a specific findings of whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403. The evidence/testimony about alleged acts that took place outside of Kershaw County was inadmissible as improper propensity evidence. Petitioner established prejudice by the deficient performance requiring reversal of the lewd act conviction.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an

objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

The State, as the proponent of the evidence/testimony about alleged acts outside of Kershaw County, had the burden to prove that the evidence met an exception to Rule 404(b), to prove that that the evidence met the clear and convincing standard, and to prove that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

In State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020), the South Carolina Supreme Court, citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), wrote:

> The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes "reasonably tends to prove a material fact in issue." 125 S.C. at 417, 118 S.E. at 807. The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden "should be subjected by the courts to rigid scrutiny," considering the individual facts of and circumstances of each case. 125 S.C. at 417, 118 S.E. at 807.

Although the Perry case, decided after the trial in this case, reversed the "close similarity" standard of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), the Court clarified that the "logical connection" test of Lyle, case law that existed at the time of trial, was still the correct

standard. The trial judge referenced Lyle in his ruling. (App. p. 117, lines 1-12). The alleged acts outside of Kershaw County failed under either standard.

In Perry the South Carolina Supreme Court wrote:

> It is not enough to meet the "logical connection" standard for admission of other crimes under the common scheme or plan exception to Rule 404(b) that the defendant previously committed the same crime. "Repetition of the same act or same crime does not equal a 'plan.'" Perez, 423 S.C. at 502, 816 S.E.2d at 556 (Hearn, J., concurring) (quoting Daggett v. State, 187 S.W.3d 444, 451 (Tex. Crim. App. 2005)). When evidence of other crimes is admitted based solely on the similarity of a previous crime, the evidence serves only the purpose prohibited by Rule 404(b), and allows the jury to convict the defendant on the improper inference of propensity that because he did it before, he must have done it again. See United States v. Krezdorn, 639 F.2d 1327, 1331 (5th Cir. 1981) (reversing the district court's admission into evidence of similar forgery crimes because they "would, at best, merely demonstrate the repetition of similar criminal acts, thus indicating [the defendant]'s propensity to commit this crime. Evidence of other crimes is not admissible for this purpose"). Quoting Justice Hearn one final time from her concurrence in Perez, "the repeated commission of the same criminal offense [is] offered obliquely to show bad character and conduct in conformity with that bad character." 423 S.C. at 502, 816 S.E.2d at 556 (Hearn, J., concurring) (quoting Daggett, 187 S.W.3d at 452).

430 S.C. at 41, 842 S.E.2d at 663. In the present case, the repeated allegations of various, different acts of sexual abuse outside of Kershaw County constituted improper propensity evidence and did not meet the common scheme or plan exception to Rule 404(b).

In State v. Martucci, 380 S.C. 232, 255, 669 S.E.2d 598, 610 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

> When a criminal defendant's prior bad acts are directed toward the same victim and are very similar in nature, those acts are admissible as a common scheme or plan. State v. Weaverling, 337 S.C. at 471, 523 S.E.2d at 792–93. In Weaverling, the defendant repeatedly raped the same child. Id. This Court held the defendant's prior acts were admissible even though the acts were not charged. Id. at 469, 523 S.E.2d at 791. This Court articulated that "[w]here the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to overrule the prejudicial effect, it is admissible." Id. (citing Raffaldt, 318 S.C. 110, 456 S.E.2d 390).

Martucci was a homicide by child abuse case. The Court of Appeals found that, "The evidence of Martucci's prior abuse of Child was admissible to show intent, the identity of the abuser, the absence of mistake or accident, and a common scheme or plan of abuse." 380 S.C. at 263, 669 S.E.2d at 614. The only exception argued by the State in the present case was common scheme or plan. With regard to the lewd act charge in the present case, the State failed to show that the alleged acts outside Kershaw County met the commons scheme or plan exception.

In State v. Weaverling, 337 S.C. 460, 471, 523 S.E.2d 787, 792–93 (Ct. App. 1999), the South Carolina Court of Appeals wrote:

> Weaverling faced charges that he performed fellatio on Doe on three occasions and gave Doe a pornographic magazine to look at on one occasion. Evidence of these incidents demonstrated: (1) Weaverling initiated the sexual contact by pulling down Doe's pants or shorts; (2) he obtained sexual gratification by having the child review pornography; (3) beginning when Doe was seven or eight years old, almost every time they saw one another, Weaverling would get Doe alone, pull down Doe's pants, and perform oral sex on Doe; and (4) Weaverling would have Doe look at a pornographic magazine or movie during the sexual assaults. The challenged testimonial evidence of Weaverling's prior bad acts shows the same illicit conduct with the same victim under similar circumstances over a period of several years.

The three charged acts and the uncharged acts in Weaverling were remarkably similar – to wit - felatio. In the present case the State failed to demonstrate the same type of similarity between the charged act of lewd act and the alleged various uncharged sexual acts occurring outside of Kershaw County.

In State v. Mathis, 359 S.C. 450, 464, 597 S.E.2d 872, 879 (Ct. App. 2004), the South Carolina Court of Appeals found the trial judge properly admitted evidence of uncharged sexual misconduct allegedly committed by Mathis on the victim three times prior to the Labor Day 2000 incident for which he was charged under the common scheme or plan exception to Rule 404(b). The Court of Appeals noted that, "The three earlier assaults on the victim were all

attempted in the same manner and under similar circumstances." Mathis, 359 S.C. at 464, 597 S.E.2d at 879. The present case is distinguished from both Weaverling and Mathis because the State failed to prove "similarities" between the repeated allegations of various, different acts of sexual abuse outside of Kershaw County and the charged lewd act.

Additionally, the State failed to prove the acts outside of Kershaw County by clear and convincing evidence. All of the evidence with regard to both charged and uncharged acts, with the exception of the graveyard incident in Lee County and overheard by mother, was based solely on the testimony of minor. Finally, the State failed to prove the probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403.

The PCR judge erred in refusing to find prejudice as a result of trial counsel's failure to contemporaneously object to the testimony about uncharged alleged sexual acts outside of Kershaw County. The prejudice is further demonstrated by the fact that no limiting instruction was requested or given. The present case is distinguished from State v. Johnson, 439 S.C. 331, 344, 887 S.E.2d 127, 133 (2023), where the South Carolina Supreme Court found, "Evidence of Johnson's acts in Dillon and Marlboro Counties was admissible as part of the res gestae of both the alleged Marion County kidnapping and the Marion County domestic violence. Even though Johnson preserved the issue of a limiting instruction, he was not entitled to one." The alleged acts outside of Kershaw County, specifically the alleged acts in Fairfax, Disney World, Myrtle Beach, and a hotel in Bishopville were certainly not part of the res gestae of the alleged Kershaw County lewd act. Unlike in Johnson, a limiting instruction was required in the present case to prevent the jury from convicting based on an act outside of Kershaw County. Interestingly, in affirming the lewd act conviction on direct appeal the Court of Appeals wrote, "We find Mother's testimony about the telephone call corroborated Victim's testimony about the graveyard

incident, and the graveyard incident was enough evidence for the jury to convict Johnson of lewd act." State v. Johnson, No. 2015-001436, 2018 WL 1315136, at *4 (S.C. Ct. App. Mar. 14, 2018). The graveyard incident took place outside of Kershaw County in Lee County. The police incident report reflects that the graveyard was in Lee County. (App. p. 674).

Petitioner demonstrated prejudice. "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)." Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). There is a reasonable probability that if trial counsel had contemporaneously objected to the testimony about each alleged act that occurred outside Kershaw County, he would have prevailed on direct appeal.

2. **The PCR judge erred in refusing to find trial counsel ineffective for failing to move to quash the lewd act indictment as unconstitutionally overbroad and vague because the indictment alleged the offense took place between January 1, 2007, and October 11, 2011, and failed to provide fair notice of the charge with sufficient certainty and particularity.**

The lewd act indictment alleges, "That Nakia Karreim Johnson, being over fourteen years of age, did in Kershaw County on or before January 1, 2007 and October 11, 2011, willfully and lewdly commit a lewd or lascivious act upon or with the body of a child, less than sixteen (16) years of age, to wit: Minor with the intent of arousing, appealing to, or gratifying the lust and passions or sexual desires of said defendant or of the victim. All in violation of Section 15-15-0140, S.C. Code of Laws, (1976, as amended)." (App. p. 648). While the indictment specifies Kershaw County, the timeframe covers over four years, some of which time the Minor did not live in Kershaw County. The indictment fails to list locations within Kershaw County or otherwise provide any information about where the acts are alleged to have taken place.

At trial, Minor testified about living in Fairfax, discussed in issue one, and then moving back to Kershaw County to live with her grandmother. (App. pp. 153-155). Minor testified about abuse that took place at her grandmother's house in Kershaw County. (App. p. 157, line 7 - 9; p. 159, line 21 p. 160-164, lines 1-14). Minor testified that the family moved back to Fairfax. (App. p. 164, line 15 – p. 165-167, lines 1-1-15). Minor then testified that they moved again, this time to her Aunt Melissa "Missy" Hall's house. (App. p. 167, lines 13-23). Minor testified about abuse that took place in the computer room at her Aunt Missy's house. (Tr. p. 169, line 6 – p. 170-172, lines 1-10). Minor testified about abuse that took place on a dirt road close to Aunt Missy's house. (Tr. p. 176, line 6 – p. 177, 178, 179, lines 1-6).

In the memorandum of law in support of the PCR application Petitioner alleged that, "Trial Counsel was ineffective for not requesting the courts to quash the indictment as to the non-specific 4-year period covered in the indictment unconstitutional." (App. pp. 667-669). In the second amended PCR application Petitioner alleged that, "Applicant's counsel Johnson failed to move to quash the indictment as to the 4 year period covered in the indictments as unconstitutional." (App. p. 698).

During the PCR hearing Petitioner testified trial counsel failed to challenge the indictment based on the timeframe. (App. p. 717, lines 15-20). With regard to the failure to move to quash the indictment, the State asked trial counsel, Virgin Johnson, if he felt the four-year period alleged in the indictment was unconstitutional. (App. p. 739, lines 21-25). Trial counsel answered, "Personally? You know, I have to be honest. Yeah, I thought it was. I thought a lot of stuff – I didn't think it should have come in, but the judge make the decision, and he was a great judge. He made the ruling, and I had to live with it, and I – excellent judge. I just – that was—that was the call he made, and I had to deal with it." (App. p. 740, lines 1-7). Trial counsel appears to be referring to the objection based on Rule 404(b), discussed in issue one. The record reflects that trial counsel failed to move to quash the lewd act indictment as unconstitutionally overbroad and vague because the indictment alleged the offense took place between January 1, 2007, and October 11, 2011, and failed to provide fair notice of the charge with sufficient certainty and particularity

During cross examination the State asked Petitioner what was unconstitutional about the four-year time period alleged in the indictment. (App. p. 725, line 25 – p. 726, lines 1-2). Petitioner answered, "I mean, it's not giving me an opportunity to present myself or find out – like I said, those time sheets and my work schedule, at least start from the first date, the date of

January 1, 2007. I can probably prove that I was more likely at work, not in Kershaw County during those times. And from my understanding, I was being tried, tried in Kershaw County. And in 2007, I know for a fact I was in Allendale County. I worked that day, as a matter of fact. And, and Minor was not even in the county during that time, and I could have proved that as well." (App. p. 726, lines 3-13).

In the order of dismissal the PCR judge wrote, "This Court finds that after a review of the record, Applicant's indictment sufficiently apprised him of the charges against him and put him on notice of what he had to defend at trial were sufficient. Nevertheless, this Court further finds Applicant's allegation fails as a matter of law." (App. p. 810). The PCR judge further wrote:

> Notably, time is not a material element of lewd act on a minor. Tumbleston, 376 S.C. at 101,654 S.E.2d at 855; see also State v. Wingo, 304 S.C. 173, 403 S.E.2d 322, 323 (Ct.App. 1991). Thus, the State is not required to include the precise day, or even year, of the accused's conduct, and sex crime indictments alleging offenses occurring during a specified time period are sufficient when the circumstances of the case warrant considering an extended time frame. Tumbleston, 376 S.C. at 101, 654 S.E.2d at 855. A young child victim cannot reasonably be expected to recall the exact dares of sexual abuse. Id. Furthermore, even if Trial Counsel would have challenged the indictment, his challenge would have been futile.

(App. p. 810). The PCR judge then found that the present case was distinguished from State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015), because in Baker the time frame was expanded two weeks prior to trial. (App. p. 811). The PCR judge erred.

Trial counsel was ineffective for failing to move to quash the lewd act indictment as unconstitutionally overbroad and vague. Although the indictment was not amended, as in Baker, the indictment alleging an over four-year time period failed to provide fair notice of the charge with sufficient certainty and particularity. The time frame alleged in the indictment covers periods of time when Minor was not in Kershaw. The confusion was compounded by the fact that there was improper testimony about other alleged acts taking place outside of

Kershaw County. Petitioner was prejudiced by the deficient performance. There is a reasonable probability that, but for trial counsel's failure to challenge the indictment as overbroad, the result of the proceeding would have been different.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In State v. Gentry, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005), the South Carolina Supreme Court wrote:

> The indictment is a notice document. A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17–19–90. If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be

charged.

Ten years later in State v. Baker, 411 S.C. 583, 592, 769 S.E.2d 860, 865 (2015), the South Carolina Supreme Court wrote, "Accordingly, we hold the trial judge erred in refusing to quash the indictments as the non-specific, six-year period covered in the indictments was unconstitutionally overbroad because it lacked specificity as to when the alleged acts occurred. It is axiomatic that an indictment must include more than the elements of the charged offense."

The indictment in the present case included the elements of lewd act occurring in Kershaw during an over four-year time period, but no specificity as to when or where, within Kershaw County, the alleged lewd act took place. The time frame in the indictment included times when Minor was not in Kershaw County. The indictment failed to state the lewd act offense with sufficient certainty and particularity to provide Petitioner notice of what he is called upon to answer. Like the indictment in Baker, the indictment in the present case was unconstitutionally overbroad because it lacked specificity as to when or where the alleged acts occurred.

"An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles. *See* S.C. Const. art. I, § 11 ("No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed...."); S.C.Code Ann. § 17–19–10 (2014) ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury...."). State v. Baker, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015).

Ten years after Baker in State v. Dent, No. 2024-000355, 2025 WL 1947806, at *1 (S.C. July 16, 2025), the South Carolina Supreme Court wrote, "Indictments matter. In criminal trials,

where the weight of the government comes to bear against an individual citizen, indictments are a foundational part of that citizen's constitutional right to due process: they put the citizen on formal notice of the charges against him and the theories the government intends to present at trial to show the citizen violated the law, thereby allowing the citizen to prepare a defense. A conviction based on unindicted conduct cannot stand." The overbroad indictment in the present combined with the improper testimony about alleged acts outside of Kershaw County open the possibility that the jury convicted Petitioner on unindicted conduct. "The law does not mandate perfection in the drafting of indictments, but it does require fair notice of the charge against the accused." State v. Dent, 446 S.C. 121 (2025). The indictment with an over four-year time frame with no specificity as to when or where within Kershaw County the alleged lewd act occurred failed to provide Petitioner with fair notice of the charge against him.

Trial counsel was ineffective for failing to move to quash the lewd act indictment as unconstitutionally overbroad and vague. The indictment failed to provide sufficient notice by only including the elements of the offense, without any further detail about where and when during the over four-year time period the alleged lewd act took place in Kershaw County. Petitioner demonstrated prejudice. There is a reasonable probability that if trial counsel had moved to quash the indictment, the result of the proceeding would have been different.

3. The PCR judge erred in refusing to find trial counsel ineffective for failing to object when the mother of the minor testified about domestic violence by Petitioner.

Minor's mother, Pamela Hall, testified, without objection, that on a prior occasion Petitioner pulled a gun on her and pulled a few of her braids out. (App. p. 229, line 19 – p. 230, lines 1-2). Mother also testified, without objection, that she and Petitioner argued about him cheating on her with other women. (App. p. 238, lines 12-17; p. 245, lines 10-13). Mother, discussing the day of the disclosure and subsequent sexual assault exam testified, "Before we left Kershaw County Hospital, I asked one of the officers about could they have someone check on my mom and the other kids at the house. My sister had just got home from work. And, you know, he had his gun, and I know sometimes about the altercations that we've had, I was worried about them." (Tr. p. 249, lines 1-7).

In the amended PCR application Petitioner alleged, "Applicants counsel Johnson failed to object to the testimony of Pamela Hall regarding evidence of domestic violence and infidelity by Applicant (p. 229, Line 19, p. 230, Line 1-2), (p. 238, Line 14-15)." (App. p. 696). During the PCR hearing the State asked Petitioner, "Okay. We'll move on to allegation number 7, failure to object to the testimony of Pamela Hall. My question for you is that those very vague references, the tow references to a domestic violence and infidelity, do you believe that your trial would have been different if those things had not been said?" (App. p. 724, line 24 – p. 725, lines 1-4). Petitioner answered, "Of course, because not only did the jury look at me as a pedophile, they also looked at me as a terrible person that could be domestic violence or that could - - have the opportunity to present myself with some kind of domestic violence, yes." (App. p. 725, lines 5-9).

When asked about the failure to object to Hall's testimony about domestic violence and infidelity, trial counsel this was a strategic reason stating, "I just didn't want to highlight the fact here is another woman in this situation that already - - we got three woman, in this situation and a child. At some point in time, I was just trying to cut it off." (App. p. 737, lines 16-19). It is unclear how an objection to Hall's testimony about domestic violence would highlight other women in Petitioner's life. Later trial counsel testified, "The more I think about it, I don't think I object. And I think I was sitting at the table trying to figure out should I object or, or should I not because also in the back of my mind, I'm dealing with how much I was going to object to her because she drew a pistol on him, and I was trying to make a argument as to why she drew the pistol on him and they didn't charge her. So, so, strategically I just - - probably just thought at the moment it was - - just wasn't the best thing to do." Hall drew the pistol on Petitioner when she thought he sexually molested her daughter. The given reasons are not valid strategic reasons for the failure to object to the testimony about domestic violence and infidelity.

In the order of dismissal the PCR judge wrote, "This Court finds Trial Counsel provided a reasonable strategy for not objecting to the testimony as he did not want to highlight that testimony to the jury." (App. pp. 801-802). The PCR judge erred. Trial counsel testified he did not object to Hall's testimony about domestic violence and infidelity because he did not want to highlight other women in Petitioner's life. While not wanting to highlight other women might apply to the infidelity allegation, it does not apply to the domestic violence allegation by Hall. With regard to trial counsel's other reason for not objecting, not addressed in the order of dismissal, an objection to the domestic violence allegation in Hall's testimony would not have precluded trial counsel from questioning Hall about drawing the gun and not being charged. The reasons given are not valid strategic reasons.

In Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017), the South Carolina Supreme Court wrote:

> As we have often stated, counsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. *E.g.,* Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. *See* Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (finding counsel's performance was deficient in making a decision not to object to the admission of testimony when the underlying strategy was not sound).

The purported underlying strategy for not objecting to Hall's testimony about domestic violence was not sound. The allegation of domestic violence was improper character evidence in violation of Rule 404(b) SCRE. Counsel was deficient for failing to object.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in

the outcome." Id. There is a reasonable probability that if trial counsel had objected to the improper testimony, the result of the proceedings would have been different.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Kathrine H. Hudgins
Senior Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of September, 2025.