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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Robin B. Stillwell, Trial Judge
The Honorable R. Scott Sprouse, Circuit Court Judge
Appellate Case No: 2024-000627

DWAYNE C. TALLENT, 357180, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

BRIEF OF RESPONDENT

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I. Did the PCR court correctly deny PCR relief where the applicable law at the time of trial demonstrated no basis for error and objection, and where the question of preservation of the appellate issue was never pursued in appellate court and is now merely presumed for purposes of establishing prejudice under *Strickland*?

STATEMENT OF THE CASE

The Greenville County grand jury indicted Petitioner Dwayne C. Tallent (hereinafter "Petitioner") for criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the second degree, lewd act on a child, and contributing to the delinquency of a minor. (2014-GS-23-011873; 011877; 011875; 7 011874). Petitioner proceeded to a jury trial before the Honorable Robin B. Stillwell and was represented by attorney Matthew J. Kappel. A jury convicted Petitioner of all charges following trial on July 17-19, 2017, before the Honorable Robin B. Stillwell. (App., p. 809). Judge Stillwell sentenced Petitioner to thirty years imprisonment for CSC 1st, and concurrent sentences of twenty years imprisonment for CSC 2nd, fifteen years imprisonment for lewd act, and three years for contributing to the delinquency of a minor. (App., p. 814-815).

Petitioner appealed his conviction to the South Carolina Court of Appeals on July 24, 2017, and he perfected the appeal with the filing of his Final Brief on January 31, 2019. Therein, Petitioner raised two issues for review:

1. Did the trial court err in denying the Appellant's motion to sever the charge of contributing to the delinquency of a minor from the trial of CSC and Lewd Act?

2. Did the trial court err in admitting evidence of the Appellant's manufacture, sale and use of cocaine, crack cocaine, and methamphetamine?

(App., p. 235). The Court of Appeals affirmed his conviction by published opinion on June 10, 2020. (App., p. 270). See *State v. Petitioner*, 430 S.C. 438, 845 S.E.2d 508 (Ct. App. 2020). Petitioner filed a Petition for Writ of Certiorari on September 3, 2020, but the Petition was denied on March 9, 2021. (App., p. 289; p. 318). The Remittitur was then issued on March 15, 2021.

Petitioner filed his application for post-conviction relief on February 22, 2022. Therein Applicant asserted six grounds for relief:

1. Trial counsel was constitutional ineffective for failing to properly prepare and investigate;
2. Trial counsel was constitutionally ineffective for failing to make necessary objections to preserve issues for appeal;
3. Trial counsel was constitutionally ineffective for failing to make necessary motions to suppress evidence and testimony;
4. Trial counsel was constitutionally ineffective for failing to adequately cross-examine witnesses;
5. Trial counsel was constitutionally ineffective for failing to communicate all plea offers to Applicant in a timely fashion and to give accurate and adequate advice to Applicant in regards to said offers; and
6. Trial counsel was constitutionally ineffective for failing to conduct adequate discovery, offer relevant evidence, make adequate argument to the jury, and present an adequate defense.

(App., p. 16). The State made its Return to the Application on June 20, 2022. (App., p. 22). PCR counsel filed a PCR memorandum in advance of the hearing. (App., p. 52). The evidentiary hearing was then convened on January 17, 2024, before the Honorable R. Scott Sprouse. (App., p. 32). Attorney J. Faulkner Wilkers represented Petitioner and Assistant Attorney General Joe Maye represented the State. Petitioner abandoned all but his allegation that counsel was ineffective for failing to make a contemporaneous objection during trial that allegedly led to an appellate issue being unpreserved for review. (App., p. 35). Mr. Kappel testified at the hearing, arguments were presented to the PCR court, and Respondent provided a post-hearing memorandum. (App., p. 65). The PCR court issued an Order of Dismissal on March 12, 2024.

Petitioner filed a notice of appeal of the PCR court's decision. Following the submission of the Petition for Writ of Certiorari and the State's Return, the matter was transferred to this Court pursuant to Rule 243(l). Certiorari was granted on September 23, 2025. This Brief of Respondent now follows.

STATEMENT OF FACTS

Pretrial Motions

Petitioner's trial began on July 17, 2017, with pretrial motions. Therein, Mr. Kappel informed the court of his *Lyle* 404(b) motion seeking to suppress the testimony of C.R., a second alleged victim that the State had available to testify at trial. (App., p. 325). With the necessary motions identified, the court proceeded to empanel a jury and then release them for lunch while the motions were addressed. (App., p. 350).

Mr. Kappel then asserted his motion to suppress and noted the need to take some testimony in order for the court to make a ruling. (App., p. 353). The State called both E.G. (hereinafter "Victim") and C.R. to provide in-camera testimony for purposes of establishing the admissibility of C.R.'s testimony under *Lyle* and *Wallace*.

Victim testified that she was 29 years old (at the time of trial). Petitioner came into her life sometime during her infancy or early toddler years, married her mother, and became a stepdad to her. He began abusing her at the age of 5 years old. The abuse began with the touching of genitals, both his and hers, and Petitioner masturbating in front of her. It progressed from there to Petitioner getting her to perform sexual favors, which included Petitioner rubbing his penis on both her vagina and rectum, and Victim performing and receiving oral sex. (App., p. 370-371).

Victim testified in-camera that as she got older, the abuse became progressively worse and more frequent. She noted that there was one instance of penile penetration when she was 9 but noted that it seemed to be accidental from otherwise non-penetrative abuse. (App., p. 373). By age 14, Petitioner had begun abusing E.G. via rectal penetration, but during that year the abuse ended because she went to live with her biological father. (App., p. 373). E.G. testified that the abuse took place in their home (79 Ferguson Road), and usually in Petitioner's bedroom while her mother

was at the store or at work. (App., p. 374-375). E.G. testified that Petitioner took efforts to make sure she did not say anything about his abuse by describing it as their "secret;" it was something that was special between them that other people would not understand. (App., p. 374).

On cross-examination, E.G. further testified that at the start the touching began first through clothing or bedding, but then developed into penile contact without a barrier. From there it progressed to digital penetration, and touching/digital penetration while masturbating. She reconfirmed that the penile penetration incident was once, and seemingly by accident. (App., p. 378-379). The rectal penetration began with digital penetration, then progressed to partial penile penetration, and ultimately became full penile penetration. (App., p. 381-382). On redirect, E.G. also testified that Petitioner would also kiss her and "French kiss" her. (App., p. 386).

C.R. testified that she was 15 years old (at the time of trial). She testified that Petitioner was essentially her stepdad, even though she noted that he never actually married her mother. Petitioner moved into her life around the time that she was 18 months to 2 years old. He helped raise her and she called him "Dad" growing up. (App., p. 387-388). His abuse of her began when she was about 5 years old, and it took place at 79 Ferguson Road. (App., p. 389). She testified that Petitioner would use his hand to touch her genitals, both her vagina and her "bottom". This occurred both with clothing on, and without clothing on. (App., p. 391). C.R. testified that her abuse had not progressed to include penile contact. (App., p. 391). Her abuse took place at 79 Ferguson Road in Petitioner's bedroom, and sometimes in her room, while her mother was at work. (App., p. 391-392). C.R. noted that Petitioner wanted to kiss her too, explaining that she asked Petitioner about kissing and Petitioner followed by showing her. (App., p. 392). In an effort to keep his abuse secret, he told C.R. that no one would understand the love he had for her. (App., p. 393). Her abuse ended at age 11 when Petitioner went to prison. (App., p. 390).

At the conclusion of their testimony the defense's sole argument was that the severity of the abuse differed between E.G. and C.R., such that one described oral sex and penetration while the other describing touching. Mr. Kappel referenced generally *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003), *State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987), overruled by *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). (App., p. 395), and the absence of escalation.[1]

In response, the State cited to *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009) and *State v. Taylor*, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012). The solicitor noted that defense counsel had failed to address all but one of the factors that our Supreme Court had instructed courts to consider in the evaluation of whether there is a close degree of similarity between the bad act and the crime charged, so as to establish admissible evidence of a common scheme or plan. He argued to the court that essentially every factor set forth under *Wallace* was met by the facts of the case. The State argued that 1) both victims were at the age of five when the abuse began, 2) Petitioner established the same relationship with both victims (i.e. their stepfather[2]), 3) both victims suffered abuse at the same 79 Ferguson Road home while primarily in the bedroom of Petitioner, 4) both victims' were coerced into silence by Petitioner telling them that his love/relationship was special and that others would not understand, and 5) that even the type of abuse was similar because it started with touching of both vagina and rectum. The Solicitor noted that E.G.'s escalated abuse primarily took place in her older age years and that C.R. was likely spared that escalation due to Petitioner's intervening arrest and conviction when she was only 11.

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[1] Each of these cases was decided before *Wallace*.

[2] C.R.'s testimony demonstrated that Petitioner and her mother never married, but that Petitioner filled the role of a stepfather and that she grew up calling him dad.

(App., p. 398-401). Additionally, though not listed during the argument, both victims also testified that the abuse would come during opportunities when their respective mothers were at work or at the store.

The Court informed the parties that such evidence is not appropriate for showing character, but that it can be admitted to show other purposes under *Lyle*. Here, the evidence was offered and considered as demonstrating a common scheme or plan. (See App., p. 408). With that in mind, the court took the issue under advisement during the lunch break so as to review the various cases and testimony presented. In so doing, the court noted the need to determine the evidence is reliable, clear and convincing, the degree of similarity, and whether it is overly prejudicial under Rule 403. (App., p. 402).

After lunch the court returned and noted that it had taken sufficient time to review the referenced cases and law and that C.R.'s testimony was admissible under Rule 404(b) as evidence of common scheme or plan. The court found that the evidence was relevant, that the similarities clearly outweighed the dissimilarities, and that the probative value outweighed the prejudicial effect. (App., p. 408). The court further found that C.R.'s testimony was admissible under rule 403. The trial court went on to find:

> I've read a long line of cases which had very similar, very similar facts. And under all of the prevailing cases and under the greater weight of jurisprudence in the State of South Carolina, the testimony from the -- from the second young lady is admissible under 404(b) and 403. I'm looking right now at the case of *Scott* -- or excuse me, *State v. Wallace*, where, in particular, the Court goes through just some items that may lend guidance to a trial court, which include the age of the victims, the relationship between the victims and the perpetrator, the location where the abuse occurred, the use of coercion or threats, the manner of the occurrence, for example, the type of sexual battery. In looking at all of those factors, looking the age of the young girls, looking at the relationship of the young girls to the Defendant in this case, the location of where it happened in

> each alleged incident, also, looking at the manner of coercion and abuse, specifically, the verbiage that was used, given all of that together, I find clearly in this instance that the similarities outweigh the dissimilarities in the case.

(App., p. 409); See *State v. Wallace*, 384 S.C. 428, 434, 683 S.E.2d 275, 278 (2009), overruled by *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). The trial court then noted that in the various cases considering this type of testimony, the probative value generally outweighs the prejudicial effect, and that the South Carolina Supreme Court has even overruled the Court of Appeals as to the propriety of such evidence under Rule 403. (App., p. 409-410).

The Trial

Following the court's ruling on the pretrial motion to suppress C.R.'s testimony, the trial commenced. Pertinent to the issue of C.R.'s expected testimony, the State informed the jury about the abuse against victim, and then stated: "Other corroboration is going to be another young lady. You're going to hear that after the Defendant moved on from E.G.'s family and E.G. he went into another situation with another woman with another young child, you're going to hear how this began again. And you're going to hear from that young lady as well." (App., p. 428-429). Defense counsel followed with his opening statement on behalf of Petitioner which included the following excerpts:

> And on three separate occasions during his interview with E.G. he encouraged her to talk to other people. Encouraged her to talk to this girl named C.R., and her sister, R.R. Why? Because you don't want -- when you're doing an investigation, particularly in a case like this, you don't want people running around talking to each other to find out what you said, what did she say, how do you want me to say it, what do you want me to say, how is this going to work out for us? You don't do that. And this investigation is replete with that kind of activity from this officer.
>
> . . .
>
> She'll tell you that never did E.G. ever act as if something like this was happening. You take this other young lady, C.R. and it's the

> same thing. E.G. is not a blood relative, again, of Ma. She's Sherry's daughter, yet, Lenore treated E.G. as her own. C.R. same thing. C.R. belongs to a woman named Cindy. Dwayne dated Cindy and was -- arrived on the scene when C.R. was about 17 months old. And they lived at 79 Ferguson Road, which is where Dwayne lived. And Ma did the same thing. Ma treated C.R. and her older sister, R.R. as her own. They had a swimming pool. They had horseback riding. They'd go shopping. They had a special, unique relationship. And she is going to tell you that never once did any notion of something like this ever occur. That nothing was ever said to her, nothing was ever disclosed to her. Nothing ever gave her even the remotest sense of this actually happening.

(App., p. 437; p. 439). The trial court recessed for the day following opening statements.

The following morning, the State called E.G. ("Victim") as its first witness. She testified consistently to the testimony provided in-camera during the motion hearing.

Victim was twenty-nine years old at the time of trial. Victim's biological mother and father divorced before she was two years old and he had a limited role in her life. On the other hand, Petitioner was her stepfather and father figure from when she was eighteen months old until she ultimately moved away at the age of fourteen. (App., p. 452-453). She was around five years old when Petitioner began sexually abusing her. (App., p.465-466). Victim testified it began when she was little and she was bored. She ran into the bedroom and plopped down on him. Petitioner had an erection and began to rub up against Victim through the blanket. (App., p. 466). This occurred in a trailer in Deer Road Run. (App., p. 453-454).

Victim testified that she loved and cared for Petitioner. Petitioner wasn't always bad. He was caring and took the family camping and fishing. (App., p. 472-473). Petitioner told her the conduct was their secret. (App., p. 474). At age 5, Victim recounted telling Petitioner's sister about the abuse once while at the sister's home. The sister ran after Petitioner, but ultimately nothing came of her disclosure and Victim presumed that his behavior had been explained away.

(App., p. 474-475). Petitioner later glared at Victim after this disclosure, as if she were in trouble. He later told her that people would not understand and it was their secret. It was something special they had. (App., p. 474-475).

Victim ultimately came to live at 79 Ferguson Road around the time that she was 10 or 11 years old. (App., p. 458). There the abuse continued and would take place in his room while her mother was at work or at the store. (App., p. 469; 476). The abuse escalated in severity and included Petitioner masturbating with Victim in the room, masturbating while touching (but not penetrating her vagina), rubbing his penis between Victim's legs, kissing and fondling Victim's breasts, performing oral sex on Victim, forcing Victim to perform oral sex on him, one occasion where he penetrated her vagina with his penis,[3] and digital penetration of her rectum with his fingers and the tip of his penis. (App., p. 468-478; 470; 481-482; 486-487). All of this conduct began prior to her turning 11 years old. (App., p. 469; 472). At age 14, the abuse escalated to one occurrence of full penetration of her rectum. (App., p. 481-482). She testified at this age, she did not know any better and did not realize it was wrong until she was older. (App., p. 481).

When she was about eleven years old, her two brothers, Christopher and Joseph, moved into her home at 79 Ferguson Road. Victim was not allowed to be alone with the brothers unless Petitioner was present: "He kept me around him." (App., p. 482). One day, Petitioner was masturbating and rubbing Victim's vagina in the bedroom when her brother walked in the room. He asked, "[H]ow long has this been going on?" Then Petitioner chased him out of the room. Later officers came to the house and Victim told them nothing happened. (App., p. 482-484). She

[3] As testified to during the motion hearing, Victim again described this incident as being accidental in nature from other nonpenetrative abuse. (App., p. 480)

explained why:

> I was scared of any and all consequences that could – I didn't want people to know. I feared what people would have thought of me. I feared at what if they didn't believe me, and whether or not if I said something and they didn't believe, he would try to hurt people I cared about.

(App., p. 484, lines 13-18). She also admitted at the time she felt some blame for what was happening. (App., p. 484, lines 19-22). She later denied abuse to law enforcement and to a forensic interviewer, but she explained she was not telling the truth back then. (App., p. 485-486). The abuse ended when she moved in with her biological father. Victim reported the abuse when she was twenty-six years old. (App., p. 499-500).

Joseph Greco, Victim's oldest brother, testified against Petitioner, in summary noting that Petitioner was often physical affectionate with Victim, with hugs, pats on the butt, and "skin" contact, and that Victim spent a lot of time in Petitioner's bedroom. (App., p. 553).

Joseph noticed Petitioner hugged Victim a lot and consistently maintained had "skin" contact. "He'd always have his hands on her." (App., p. 553). He would pat her on the butt. Petitioner spent a lot of time in the bedroom with Victim and always called for her. (App., p. 553-554). One time he walked into the bedroom and Petitioner "shot up like a deer in the headlights, you know, wide-eyed, like [he] didn't know I was there." (App., p. 555, lines 20-24). Joseph explained before Petitioner shot up, Victim was on the bed and Petitioner was on top of her, towards her feet. (App., p. 555-556). He also recalled on another occasion seeing them both under the covers and Petitioner moving his hand "pretty funny" around his crotch area, which "weirded" Joseph out. (App., p. 557). Things changed the day Joseph's brother walked into Petitioner's bedroom and Joseph heard him shout and come out of the room with Petitioner chasing him out of the house. (App., p. 558). On the way out he said, "Dude, Dwayne's molesting [Victim]." (App.,

p. 559, lines 12-13).

Christopher Greco also testified against Petitioner. He noticed Petitioner always touched Victim, rubbing her inner thigh. He found it awkward and inappropriate. (App., p. 575-576). He testified it was not uncommon for Victim to be in bed with Petitioner. (App., p. 577). The only time Christopher was invited into the bedroom was to use drugs with Petitioner. (App., p. 578). On one occasion, Christopher was up to use the bathroom when he heard a slight moaning. He looked through the keyhole of the bedroom and saw Petitioner and Victim under the covers. Petitioner was touching himself and Victim with his other hand. He heard Petitioner telling Victim "this is how you do it." Christopher kicked open the door and demanded to know how long it had been going on. He called Petitioner sick. Petitioner "freaked out" and jumped out of bed. Petitioner chased Christopher outside, threw coolers at him, and told Christopher that Christopher could ruin his whole world. (App., p. 578, lines 11-17; 579; p. 593, lines 18-24). When asked if they were clothed, Christopher testified Petitioner was in his boxers, he could not tell whether Victim was dressed or not. (App., p. 581). Christopher told his father about the incident, which resulted in their father contacting DSS. Christopher and his brother moved out afterwards. (App., p. 580).

C.R. provided 404(b) testimony admitted as a common scheme or plan. She was fifteen years old when she testified at trial. She and her mother moved in with Petitioner at his 79 Ferguson Road home around the time that she was 18 months old. (App., p. 652). Though C.R.'s mother did not marry Petitioner, C.R. often referred to him as Dad and Petitioner was the father figure in CR's life. (App., p. 653-654). C.R. loved Petitioner and testified that she still does. (App., p. 655). Petitioner began abusing CR when she was around five years old. She did not know it was wrong but testified that it made her awkward and uncomfortable. As she later realized the abuse

was wrong, she kept it to herself because she was scared. (App., p. 655-657).

She testified that the abuse began with Petitioner touching her vagina, both with clothing on and without clothing. Petitioner also used his hands to touch C.R.'s chest and kissed her on the lips once at the age of six or seven. She explained that this abuse came as a result of her asking Petitioner how people kissed. She felt awkward after the kiss and that abuse did not continue. The abuse took place in Petitioner's bedroom or in her bedroom while her mother was at work. (App., p. 658-661). She testified that the abuse was frequent, taking place once a day and continued until age 11, when Petitioner was no longer in the home.[4] (App., p. 659). Petitioner told her not to tell because nobody would understand it and that nobody would understand his love for her. (App., p. 662, lines 7-9). C.R. testified that on plenty of occasions she would push Petitioner away to try to get the abuse to stop, but never spoke of it to others. [5] (App., p. 667). In contrast to her testimony during the motion hearing, she did not experience any touching of her "bottom." (App., p. 666).

Deputy Richter visited her at school – she did not know he was going to visit. Although tempted to disclose the abuse, she decided she did not want to tell Richter because it would ruin her school day, and ruin her family. (App., p. 663-664). She later disclosed the abuse to a DSS

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[4] Petitioner was arrested and bonded out on a separate matter in October of 2012. He was later indicted by a Greenville County Grand Jury, tried, and convicted in September 2013. (App., p. 363; See 2012GS2305974A; See also Appellate Case No. 2013-002083). The fact that the Petitioner's leaving the home was due to an arrest was excluded from evidence under Rule 403. (App., p. 366).

[5] C.R. testified that as she got older and realized that his behavior was wrong, she felt weird "and disgusted with herself." She knew that if she spoke up that DSS would conclude she was not in a safe environment and that she would be taken from her home and family. All of which took place in a fashion worse than she had feared. (App., p. 667-668). In contrast, Victim (E.G.) testified that as she got older and learned that Petitioner's behavior was wrong, she did not know how to stop it and felt that the relationship was more-so of a girlfriend to Petitioner. She was scared to tell Petitioner that she did not want that, "so she played along." (App., p. 481).

caseworker, recalling that the caseworker had informed her that Petitioner was alleged to have touched her. In response C.R. broke down crying. (App., p. 664-665).

During trial, the prosecutor asked if her life was made easier or harder since she disclosed her abuse, and she replied, "It was so much harder on me." (App., p. 668, lines 9-11). She explained why:

> Because knowing that I came out, I knew that right then and there, the place that I was at was not a safe environment. I knew that I would be [taken] from my home. I knew that I would be [taken] away from my family, which I, basically, have been.

(App., p. 668, lines 13-23). She concluded her testimony by stating that she had been pressured by Petitioner's side of the family to change her story, that she did not *want* to come to court to testify, and that coming forward had made her life harder. (App., p. 668-669).

The defense put up the testimony of four witnesses. Selena Brunson, who briefly shared the home with Petitioner, testified that she never witnesses anything wrong. (App., p. 683-694). Lenore Brissey, Petitioner's mother, testified that she had a close relationship with both Victim and C.R. and neither girl ever told her of Petitioner's abuse. (App., 708-710; 717). Diana Rogers and Debbie Seymore, Petitioner's sisters, both testified that Victim never disclosed to them that Petitioner had abused her. (App., p. 723-730).

The PCR Evidentiary Hearing

At the PCR evidentiary hearing, Mr. Kappel was the sole witness called to testify. PCR counsel then asked him a total of eight questions. The substance of which demonstrated that Mr. Kappel represented Petitioner at trial, recalled the trial, and recalled making an argument to suppress 404(b) evidence regarding another alleged victim. He noted that the motion was denied, and that when the witness was called toward the end of trial he did not raise objection or renew his

argument made during the suppression hearing.[6] Mr. Kappel considered this to be "an unfortunate oversight" on his part concerning what he believed to be highly prejudicial testimony. (App., p. 35, line 20 through p. 37, line 5).

On cross-examination, despite having just testified that he believed the 404(b) witness to be highly prejudicial based upon his recollection of the trial and his arguments to suppress, when asked if the intent of his 404(b) argument was to keep out C.R.'s testimony he could only respond: "You know honestly I can't remember the specifics. My intention was to keep out the testimony of another alleged victim." (App., p. 37). Mr. Kappel went on to add that he did not believe the evidence satisfied Rule 404(b). When asked if he was aware of the controlling case law at the time of the trial, Mr. Kappel could not recall and was unable to find his filed motion. (App., p. 38). When asked if he would agree that *State v. Wallace* was the controlling authority at the time, Mr. Kappel responded "I'm not going to answer that," and vaguely asserted that he cited to the current and relevant law for his motion at the time. When asked if he was able to identify any error by the trial court in the standard used for reviewing the Rule 404(b) issue, Mr. Kappel disagreed with the court's reasoning in admitting the evidence. However, he did not offer any testimony that he believed that the court's ruling was in contravention of the controlling authority or the legal standard at the time of trial. He was arguing that the stated similarities "weren't sufficient." (App.,

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[6] PCR counsel also asked if "subsequent to [the suppression hearing] there was additional evidence that the trial had been continued . . ." Mr. Kappel recalled that *he did* recall such a continuance or delay. In review, Respondent can find no indication that the trial was continued or otherwise delayed in the context for which the question suggests. The suppression hearing was conducted and ruled upon on July 17, 2017. Opening statements followed immediately after the ruling. After opening statements, the court adjourned for the day at 3:55pm rather than begin a witness that could not be completed in the limited time remaining that day. The State began and concluded its case-in-chief on July 18, 2017.

p. 38-40). Mr. Kappell also could not recall *State v. Scott*, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013), nor did he believe he could answer affirmatively as to its holding once made aware of it. (App., p. 40-41). Mr. Kappel also could not remember whether he made references to C.R. and her testimony during his opening statement, nor could he remember whether the State had made the same type of references in its opening. (App., p. 41).

STANDARD OF REVIEW

The standard of review for PCR depends on the specific issue before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's findings and will uphold them if any probative evidence in the record supports them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." *Thompson v. State*, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. *Id.* Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. Trial counsel cannot be found constitutionally ineffective for failing to preserve an issue on appeal where the trial court's ruling was not in error and where Petitioner's argument for prejudice rests upon a change in the controlling law that did not exist at the time of trial.

Petitioner's argument is based on a number of improper presumptions and Petitioner seeks to overlook the critical question of *whether trial counsel was ineffective* in favor of litigating the supposed impropriety of the 404(b) evidence under a legal standard that did not exist at the time of trial. Moreover, Petitioner is attempting to obtain relief, not on the basis of an error of the court or for the failure of counsel to contest an error of the trial court, but by suggesting that counsel's failure to preserve for appeal a ruling that was without error denied him the opportunity to have his conviction reversed based on a change in the law that had not yet taken place. Petitioner's arguments are mistaken; *ineffective assistance of counsel cannot arise from the failure to challenge a ruling that was appropriate at the time of trial*. The ruling of the PCR court was appropriate and the Petition should be denied.

State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) was indisputably the controlling authority at the time of Petitioner's trial. The South Carolina Supreme Court's holding set forth a clear test and standard for review: "[t]he trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity. When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)."[7] *Id.*, at 278. Furthermore, the Supreme Court noted that "in this type of case" – where the in-camera testimony *of a separate victim* is offered as 404(b) evidence of a common

[7] The Supreme Court also noted the commonplace evidentiary requirements for relevance, 403 balancing, and a finding that the evidence be clear and convincing under Rule 404.

scheme or plan – the Supreme Court also set forth a non-exhaustive list of factors to consider and compare in a sexual abuse case. Those included: "(1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery." *Id.* The Supreme Court went on to find that:

> [a] close degree of similarity establishes the required connection between the two acts and no further "connection" must be shown for admissibility. Here, the similarities between the acts include *petitioner's relationship to the victims* (his stepdaughters), *abuse beginning at about the same age*, *abuse occurring in the family home when the mother was absent*, and *an admonishment not to tell because no one would believe it*. In sum, there are similarities in the class of victim, timing, place, and warning that outweigh any dissimilarity.

Id. (emphasis added). Moreover, the Supreme Court found no error in limiting the testimony of the 404(b) witness by excluding the last progression of the course of abuse, finding "the fact that Victim's abuse was interrupted before it could culminate in intercourse does not diminish the similarity between the progression the abuse took in each case." *Id.* Petitioner's case was practically a carbon copy of the factual circumstances presented to the trial court. There was similarity as to the age of the Victim at the start of abuse, the relationship of the Victim to the defendant, the location where the abuse tended to occur, the absence of Victim's mother when the abuse was committed, and the rationale given by the defendant to keep Victim from disclosing the abuse. And, some similarity exists in the type and progression of the abuse against E.G. and C.R., wherein C.R.'s abuse was interrupted at age 11 due to his arrest – the approximate age where prior

abuse against E.G. began to escalate.[8]

Petitioner briefly attempts to argue against the court's application of *Wallace*, but the argument is not only unpersuasive, it is flatly unsupported by the record. Citing to *State v. Kirton*, Petitioner attempts to demonstrate that common plan or scheme evidence is "generally" applied in cases of sexual crimes for the purpose of tending to show "continued illicit intercourse between the same parties" and then distinguish such from Petitioner's case of two separate victims. Petitioner is well aware that no such limitation exists, given that he explicitly references *Wallace* and *Scott* for his articulation of the 404(b) standard.[9] (See Brief of Petitioner, p. 8-9). Petitioner then attempts to highlight dissimilarities for purposes of 404(b) admissibility, but like trial counsel, points to only differences in the type of abuse – much of which can be explained by the interruption of C.R.'s abuse at age 11. As argued by the State at motion hearing, the *Wallace* standard (and indeed the *Perry* standard later) cannot be said to require "mirror image" instances of abuse in

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[8] Though not addressed at trial, it is also important to identify the differences in behavior between E.G. and C.R. While a victim is *never*, in any fashion, responsible for or at fault for the abuse they endure, there is a noticeable difference between the degree of discomfort and resistance exhibited by E.G. and C.R. (*Supra*, page 13-14 of Brief of Respondent; *Supra*, footnote 6). It cannot be stated that all sexual abuse occurs in a vacuum, regardless of circumstances; an abuser's decisions may logically relate to how compliant he perceives his victim to be and what his risk of discovery appears to be. This too might explain the lesser severity in abuse that trial counsel relied upon as his sole basis for suppression, in addition to the highly persuasive explanation that C.R.'s abuse was interrupted before the approximate age of escalation.

[9] In giving its ruling, the trial court misspoke and began with a reference to *State v. Scott.* However, the court began again and discussed the application of *State v. Wallace.* The mention of *Scott,* however, further solidified the jurisprudence relied upon by the court. In *Scott*, the Court of Appeals reiterated that "[a] close degree of similarity exists when the 'similarities outweigh the dissimilarities'" and that the trial court did not abuse its discretion in determining that the distinctions raised by the defense were insufficient to outweigh the many other similarities. *State v. Scott*, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013)(quoting *Wallace*, 683 S.E.2d 275, 278 (2009).

order to consider them a similarity. (App., p. 81-82). Petitioner then argues that the "only basis" for the court's ruling was that the "'similarities outweighed the dissimilarities.'" (Brief of Petitioner, p. 8-10). Petitioner is well aware that the trial court articulated *all* of the listed factors set forth by *Wallace*, and found factors 1-4 (and arguably factor 5) all similar between E.G. and C.R.'s testimony. (See App., p. 409). To state otherwise verges upon a misrepresentation of the record. Petitioner is well aware that such an argument would not carry the day in light of *Wallace,* and his assertion that the probative value of C.R.'s testimony is slight "due to the lack of substantial similarities" is unpersuasive *at best.*

Petitioner also attempts to suggest error in suggesting that "the solicitor offered no argument that the 404(b) testimony served any legitimate purpose, or that a logical connection exists between the alleged abuse of the 404(b) witness and the current charges. (Brief of Petitioner, p. 10). Petitioner is well aware that these are the legal standards articulated by *State v. Perry* that was not the controlling authority at the time of trial. *State v. Perry*, 430 S.C. 24, 37, 842 S.E.2d 654, 661 (2020). Such is improper, and he compounds it with articulations that the state failed to establish an admissible plan or scheme under 404(b) and that if such pattern were to exist, "there was no evidence that the 404(b) witness felt similarly manipulated." (Brief of Petitioner, p. 13). Such is again, contrary to the record. Collectively, despite the facts and law against him, Petitioner argues that the first prong of *Strickland* was met when counsel failed to preserve for appellate review the trial court's application of *Wallace*, so that he could then benefit from the change in law under *Perry*. Petitioner abandons one of the principal rules of *Strickland*: "the court must consider the law as it existed at the time of trial and 'not as it has evolved today ....'" *Chappell v. State*, 429 S.C. 68, 79, 837 S.E.2d 496, 501 (Ct. App. 2019).

To the extent that Petitioner attempts to argue that Petitioner's appeal under *Perry* (as a new law applied to a preserved issue) would have been successful, the facts are equally unsupportive. Perry demands a presentation of a legitimate purpose and logical connection for admissibility, and such appears obvious in this. C.R.'s testimony is corroborative to that of E.G. because it demonstrates Petitioner's methods of grooming and that he *repeated* his methods very shortly after E.G.'s family were out of his life.

Petitioner's method is to marry or date a woman with a female child of approximately 18 months old. He establishes himself as their caring stepfather/father figure over the next 3-4 years. He then begins his abuse around the age of age 5 and limits it to fondling of private parts and non-penetrative abuse, potentially while masturbating. He then over the course of many years introduces more extreme forms of abuse to include digital penetration, rectal abuse, oral sex, and anal sex, most of which takes place once the victim is around the age of 11. He makes sure to do this when his wife or partner is at work or otherwise out of the house, he usually performs the abuse in the seclusion of his bedroom, and he convinces the victims not to speak of the abuse by characterizing his actions as being a secret love or special relationship that others would not understand. And, this scheme allowed him to successful commit child abuse on nearly a daily basis without discovery *for a combined 15 years.*

Though not highlighted as a factor at trial, the duration and frequency of abuse are both *significant* similarities, as such can arguably *only* be accomplished via a common-scheme or plan devised to avoid detection, in contrast to a singular or infrequent of abuse. In short, even with a change in the law – *Perry* would not have afforded Petitioner a new trial. Respondent argues that his conviction would likely have been upheld even under the new standard.

Notwithstanding Petitioner's misapprehensions regarding preservation of issues for appeal (*infra*), the overarching and insurmountable error in Petitioner's arguments for certiorari is his reliance upon *Perry* (2020) as a means of showing ineffective assistance of counsel *in 2017.*

Petitioner does not contest the fact that *Wallace* was the controlling authority at the time. Petitioner does not contest that *Wallace* permitted the introduction of common plan or scheme evidence when the similarities outweighed the dissimilarities. And while Petitioner would attempt to persuade this Court that his argument for suppression was correct even under *Wallace*,[10] despite the record showing similarity *in every single Wallace factor*, Petitioner's real argument is that Petitioner was prejudiced for not having received appellate review for the issue during the time that *Wallace* was ultimately overturned by *Perry*.

Petitioner's entire argument rests upon the premise that had counsel raised a contemporaneous objection, *to a ruling where there is no apparent error*, he would have preserved the issue for appeal and Petitioner would have received the benefit of a change in the law before the conclusion of his direct appeal. Petitioner conveniently overlooks this massive distinction and he offers no argument to the PCR court's reliance upon the maxims of collateral review under *Strickland*: "the court must consider the law as it existed at the time of trial and 'not as it has evolved today'", and that an attorney will not be deemed deficient in his representation for failing "'to be clairvoyant or anticipate changes in the law.'" (App., p. 10, quoting *Chappell v. State*, 429 S.C. 68, 79, 837 S.E.2d 496, 501 (Ct. App. 2019)). In short, counsel cannot be deemed ineffective for allegedly failing to preserve meritless issues for appeal in the hope that the law will change

[10] Mr. Kappel's arguments to the trial court referenced pre-*Wallace* case law and he addressed only one of the factors that require consideration.

during the pendency of appeal. As such, the PCR court's findings and holding were correct and certiorari should be denied.

II. The PCR Court did not err in finding that the *Wallace* issue would likely have been deemed preserved and that Petitioner failed to satisfy his burden in showing why the issue was not raised on appeal.

The PCR court did not err in its consideration of the issue of preservation. There were valid arguments that the issue would have been preserved for review and the PCR court rightfully denied relief in finding that Petitioner failed to satisfy his burden of proof as to why the issue was not pursued on appeal. Certiorari should therefore be denied.

Petitioner asserts that trial counsel was ineffective for failing to preserve the 404(b) issue for appeal. However, the record shows that the *Wallace* issue *was not even raised* on appeal. Instead, Petitioner has *presumed* a lack of preservation and there are facts within the record that render that presumption tenuous at best. Moreover, in presuming the issue of preservation Petitioner has essentially presumed the very prejudice he argues exists under *Strickland.*

Here, the motion in limine was concluded and the Court immediately proceeded to giving the jury opening instructions and allowing counsel to make their opening statements. Critically, the opening statements of both the State and the Defense demonstrate the perceived understanding of the finality of the court's ruling. The State explained the allegations of abuse that E.G. would testify to and then informed the jury that they would hear from another young lady victimized by Petitioner under similar circumstances as E.G., and that such would corroborate E.G.'s testimony. (App., p. 428-429). No objection was raised by the defense to this opening.

Not only did defense counsel not object, but during his own opening statement he referenced the existence of more than one victim against Petitioner as well. He provides details about her relationship to Petitioner and even provided her name to the jury in an effort to discuss

how her testimony might be impeached by a failure to disclose the abuse. (App., p. 437; 439). These are the actions of *both* parties that understood the court's ruling to be final.

The record evidence goes further, though. Defense counsel also demonstrated his understanding of the finality of the ruling when addressing the disputed drug abuse evidence. (App., p. 491). Witness C.R. was then referenced by the State during direct examination of its first witness, E.G., and whether E.G. knew C.R. at the time that C.R. came forward with allegations of abuse. (App., p. 502-503). Again, no objection was raised by the defense. The State's fourth witness, Detective William Richter, testified as to his effort to investigate child sexual abuse by Petitioner and that in doing so, he spoke with C.R. He noted that she initially denied such abuse, but at a later date came forward and disclosed abuse which was made a separate criminal case. (App., p. 614-616). Again, no objection was raised by the defense.[11] By the time the jury actually heard C.R. testify, they were well aware of the fact that C.R. had made similar allegations of abuse against Petitioner. The ruling had been treated as final by both parties and the court for the entirety of trial.

This is especially so in comparison to Mr. Kappel's supposed characterization of the matter at the evidentiary hearing. Mr. Kappel called his supposed failure to raise a contemporaneous objection "an unfortunate oversight." (App., p. 36). But that assertion simply does retain credibility in light of the persistent references to the contested evidence by both parties without objection. Instead, the record demonstrates that counsel did not forget to object; it suggests that counsel believed the court's ruling on a pivotal portion of the State's case to be a final adjudication on the

[11] An objection was raised to the officer testifying as to the "vibe" that C.R. was giving off during their first meeting, but not to the basic articulation that C.R. came forward to report abuse.

issue and that his motion was simply not supported by the existing law. Quite simply, there can be no basis for ineffective assistance of counsel in the absence of a valid basis for objection.

In review, the PCR court correctly noted that motions in limine are not "generally" final determinations on legal issues, and that a contemporaneous objection is needed to preserve the issue for appeal. However, the court noted that there are exceptions to the rule, such as when the ruling is reached immediately prior to the introduction of the contested evidence. When the finality of a ruling is clear, there is no need to renew the objection. In that vein, the PCR court referenced *State v. Wiles.* In *Wiles* Supreme Court's considered preservation arguments under circumstances where the court *and both parties* referenced the contested evidence in their opening statements. Such was indicative of their understanding that the ruling was final. The PCR court found that "there is support" for the argument that had the issue been raised on appeal it would "likely" have been found preserved, and that Petitioner's argument is based upon an unproven presumption. (App., p. 9-10). This finding is correct, as there is no affirmative decision that prevented appellate counsel from raising this issue for consideration by the appellate court. Petitioner's assertion to the contrary is unproven and he has proceeded to presume the underlying basis for his ineffective assistance claim.

Inexplicably, *and on two separate occasions*, Petitioner suggests that the PCR court's rationale was that *Wiles* was satisfied even when *only* the prosecutor's opening statements made reference to the second victim. First, the PCR Court made no such finding, as the PCR Court found explicitly that "both the parties" had "referenced C.R. and the purpose of her testimony to the jury during opening arguments." (App., p. 9). Second, the record clearly and emphatically demonstrates defense counsel's reference to C.R. as a second victim, and his attempt to roadmap his impeachment of C.R.'s testimony. (App., p. 437; 439). Petitioner also misconstrues the PCR

court's reference to *State v. Morales* and *State v. Jones*. Petitioner attempts to argue that "the PCR court further erred in its interpretation of the record from the criminal trial" in citing to *Morales*. In the first full paragraph on page 9 of the Order of Dismissal, the PCR court set forth the general rule for preservation, but then listed the exceptions that exist to the rule. Nowhere in the Order does the PCR court articulate that the exception used in Morales is explicitly applicable to the case at hand. Petitioner uses the court's citation as mere specter of error, despite the total absence of its further mention or application.

However, as an additional sustaining ground, it should be noted that the exception in Jones and Morales articulated its function as one where the record demonstrates that nothing was presented at trial that would cause the court to give additional or renewed consideration to the evidence ruled upon in limine. Here, that general premise and purpose is established. The admissibility of the 404(b) evidence was dependent upon the comparative similarities between the two victims' articulation of their abuse. E.G. testified first and testified consistently with her in-camera proffer, and none of the other witnesses offered any testimony that would impact the application of the *Wallace* factors. As such, there is an argument to be made that the finality of the ruling was in place due to the absence of *intervening* relevant evidence.

Moreover, Petitioner elicited extremely limited testimony during the PCR hearing and did not provide any allegations or testimony that would prove to the court that the claim was not raised on appeal solely because of a lack of preservation. In tandem with that failure, the PCR court also noted that there is nothing prohibiting counsel from raising an issue on appeal, even if its preservation is in question. PCR counsel's presumption, without providing testimonial support, runs afoul of Petitioner's burden to prove his own case. A PCR court cannot speculate as to what a witness might testify to in support of a claim for relief. See generally *Bannister v. State*, 333

S.C. 298, 303, 509 S.E.2d 807, 809 (1998); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992).

As argued above, Petitioner cannot *presume* a lack of preservation as a basis for ineffective assistance of counsel. Appellate counsel are not prohibited from raising claims where preservation is in question, especially under circumstances where there is a clear ruling by the trial court on the issue and a sound basis to argue that the issue is in fact preserved. Additionally, preservation is a defense that must be raised by the respondent, and appellate counsel can have no certainty that such a defense would be raised. Finally, as was the case with *State v. Scott*, even where the issue of preservation is "questionable," appellate courts have entertained the substantive issue of applying the *Wallace* similarity factors. *Id.*, at 243. This would likely hold especially true for cases such as this, where a change in the law creates a circumstance where the appellate court's would permit supplemental briefing of the issue where it was addressed by the court. Contrary to Petitioner's assertion, there was *nothing* stopping appellate counsel from supplementing his brief to include an argument for reversal under *Perry*. (See Brief of Petitioner, p. 16).[12]

The PCR court's rulings in this regard were appropriate and the PCR court's denial of relief should be affirmed.

CONCLUSION

The PCR court's reasoning and legal basis for denying relief under *Strickland* was proper. For all the foregoing reasons, the ruling of the PCR court should be affirmed.

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[12] While Respondent disputes the underlying merits of Petitioner's argument, it must be said that this claim – to the extent it carries any merit at all – would be better presented as a failure of *appellate counsel* to present an arguably preserved claim or otherwise supplement his existing brief in light of new law. However, this approach was not pursued.

Respectfully submitted,

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