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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

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On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Kershaw County
Honorable Doyet A. Early, III, Trial Judge
Honorable Daniel M. Coble, Post-Conviction Relief Judge

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Appellate Case No. 2025-000553

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NAKIA K. JOHNSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## PETITIONER'S ISSUES PRESENTED

I. 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?

II. 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?

III. 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?

## RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED

I. Whether the post-conviction relief court correctly determined Petitioner failed to establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to contemporaneously object to evidence of alleged acts that occurred outside of Kershaw County because the evidence was admissible under the common scheme or plan exception to Rule 404(b), SCRE?

II. Whether the post-conviction relief court correctly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to move to quash the lewd act indictment as unconstitutionally overbroad and vague where time is not a material element of lewd act upon a minor and the indictment provided sufficient notice under controlling precedent?

III. Whether the post-conviction relief court correctly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object when the mother of the minor testified about domestic violence by Petitioner because trial counsel articulated valid strategic reasons for not objecting and the testimony was admissible as context for the minor victim's delayed disclosure?

## STATEMENT OF THE CASE

Petitioner Nakia K. Johnson was indicted during the August 2014 term of the Kershaw County Grand Jury for First Degree Criminal Sexual Conduct with A Minor (2014-GS-28-0419), Second Degree Criminal Sexual Conduct with a Minor (2014-GS-28-0420), and Lewd Act with a Minor (2014-GS-28-0910).[1] Petitioner was represented by Virgin Johnson, Jr., Esquire, and Korey L. Williams, Esquire. Fifth Circuit Assistant Solicitors Nicole Simpson and Kathryn Cavanaugh prosecuted the case.

On June 22-26, 2015, a jury trial commenced before the Honorable Doyet A. Early, III. At the conclusion of the trial, the jury convicted Petitioner of Second-Degree Criminal Sexual Conduct with a Minor and Lewd Act with a Minor. The jury acquitted Petitioner of First-Degree Criminal Sexual Conduct with a Minor. Judge Early sentenced Petitioner to serve concurrent terms of twenty (20) years for Second Degree Criminal Sexual Conduct with a Minor and fifteen (15) years for Lewd Act with a Minor.

Petitioner filed a timely Notice of Appeal. E. Charles Grose, Jr., Esquire (Counsel Grose), perfected Petitioner's appeal to the Court of Appeals. Following briefing and oral argument, the Court of Appeals affirmed Petitioner's conviction for a Lewd Act with a Minor, reversed his conviction for Second Degree Criminal Sexual Conduct with a Minor, and remanded for a new trial solely on his vacated conviction for Second Degree Criminal Sexual Conduct with a Minor. State v. Johnson, Op. No. 2018 -UP- 109 (S.C. Ct. App. filed March 14, 2018).

[1] During the March 2012 term, the Lee County Grand Jury indicted Applicant for Criminal Sexual Conduct with a Minor—2nd Degree (2012-GS-31-55). Applicant was represented by Tony Desaussure, Esquire. On October 24, 2011, Applicant appeared for a bond hearing and waived jurisdiction to Lee County in Kershaw County. That charge was dismissed with leave to restore pending the outcome of his Kershaw County cases.

On March 29, 2018, Petitioner filed a Petition for a Rehearing. On April 10, 2018, the State filed a Petition for a Rehearing. The Court of Appeals denied the Petitions by order on June 21, 2018.

On July 23, 2018, Petitioner filed his Petition for Writ of Certiorari to the South Carolina Supreme Court. On July 26, 2018, the State filed its Petition for Writ of Certiorari. On October 19, 2018, the Supreme Court denied the State's Petition and granted Applicant'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). The Remittitur was returned to the circuit court on the same day.

Petitioner filed his application for post-conviction relief on January 11, 2021. The State filed its Return, Motion for a More Definite Statement, and Partial Motion to Dismiss on April 12, 2021. On September 12, 2023, an evidentiary hearing was held at the Richland County Courthouse before the Honorable Daniel Coble. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented the State. Petitioner was present and represented by Ola A. Johnson, Esquire. At the hearing, Petitioner proceeded on the allegations related to his affirmed conviction for Lewd Act with a Minor (2014-GS-28-0910). In support of these claims, Petitioner testified on his own behalf and presented testimony from Louise Pinkney. The State presented testimony from Virgin Johnson, Jr., Esquire. In an order filed on January 14, 2025, Judge Coble denied relief and dismissed the application with prejudice.

Applicant timely filed a notice of appeal on March 21, 2025.

## STATEMENT OF THE FACTS

Petitioner was the stepfather of the minor victim and had been married and divorced from the minor victim's mother. Petitioner and the minor victim's mother maintained a relationship and living arrangement with their shared children and the minor victim. (App'x p. 153). When the minor victim was approximately eleven years old, Petitioner began to sexually abuse her. (App'x p. 158). Petitioner abused the minor victim for years, whenever and however the opportunity presented itself. (App'x pp. 159–182). Including any time the minor victim's mother or other adults were out of the house. Petitioner would send the other children to a different part of the home before proceeding to abuse the minor victim. (App'x pp. 158–159).

Over a course of several years, Petitioner forced the minor victim to perform oral sex on him and engage in vaginal intercourse by threatening the minor victim that he would have to kill her mother if she found out because the mother would tell on Petitioner. (App'x pp. 160–162). The minor victim's mother became aware of the abuse when Petitioner and the minor victim left to go to the store, but instead Petitioner took the minor victim to a graveyard and began to abuse her again. (App'x pp. 183, 239). The mother called Petitioner to tell him what to get at the store, and when her call was answered, no one could hear her. The minor victim's mother overheard the following conversation:

> At first I couldn't make out what he was saying, but then I heard him say, you know I want to nut in you, but I can't. And I didn't hear anything. Then I heard him say, you know why? And she didn't say anything. He said, do you know why? And she said, because I'll get pregnant. And he asked her did she miss him. She didn't say anything. And he asked her how does she want to do it; does she want to get on top or does she want him to get on top. And I think she said, you on top.

(App'x p. 240).

Petitioner realized the minor victim's mother had overheard this conversation, and they argued on the phone before the mother told Petitioner to bring her daughter back. (App'x p. 184).

Petitioner then rushed back to the home, where the mother was waiting, and pulled the minor victim from the car, confronting Petitioner and asking the minor victim what happened. (App'x pp. 147–148; 185–186). The minor victim initially denied that anything had happened, but eventually admitted what Petitioner had done to her. (App'x pp. 185–186). Petitioner denied abusing the minor victim, but the minor victim responded, "Yes, you did." (App'x p. 186). The mother then pulled a pistol on Petitioner and told him to leave before calling the police. (App'x pp. 147–148; 185–186). The police arrived and took the minor victim to the hospital for a physical examination and interviews with the family resource center. (App'x p. 188). Investigators from the Kershaw County Sherriff's Office contacted Petitioner and requested he provide an interview, Petitioner cooperated and denied abusing the minor victim. (App'x pp. 495–497).

## STANDARD OF REVIEW

The standard of review for post-conviction relief 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 post-conviction relief court's factual findings and will uphold them if there is any probative evidence in the record to support 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 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack 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 will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839–40. Appellate courts will reverse the decision of the post-conviction relief 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. The post-conviction relief court correctly determined Petitioner failed to establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to contemporaneously object to evidence of alleged acts that occurred outside of Kershaw County because the evidence was admissible under the common scheme or plan exception to Rule 404(b), SCRE.

The post-conviction relief court correctly denied relief because Petitioner failed to prove prejudice from Trial Counsel's decision not to contemporaneously object.[2] Petitioner has not shown that, had Trial Counsel preserved the issues for direct appeal, they would have been successful on appeal. Given the record, the post-conviction relief court properly found that Petitioner failed to show resulting prejudice from the failure to object contemporaneously. This Court should deny certiorari to this issue.

To prove prejudice here, Trial Counsel's deficient performance must have prejudiced the petitioner so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). The court makes this determination based upon the totality of the evidence. Id. at 695. Realistically, this is found "only

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[2] Notably, Trial Counsel contemporaneously objected to the admission of the same prior bad act evidence (a forensic interview with the minor victim) that was ruled on pre-trial for being inconsistent regarding time and place and for being more prejudicial than probative. (App'x pp. 365-366). The trial judge overruled the objection. (App'x p. 366). Therefore, although the post-conviction relief court found Trial Counsel performed deficiently, Respondent contends this finding was in error. Respondent presents this argument as an additional ground for sustaining the post-conviction relief court's denial of relief. See Rule 243(g), SCACR (providing that, in appeals from post-conviction relief decisions, the respondent may "offer additional sustaining grounds"); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); see generally I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417–23, 526 S.E.2d 716, 721–25 (2000); Moorhead v. First Piedmont Bank and Trust Co., 273 S.C. 356, 360, 256 S.E.2d 414, 416 (1979) (holding a right decision will be affirmed, even if the lower court relied on the wrong ground).

in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86, 111-12 (2011) (quoting Strickland, 466 U.S. at 697). In examining whether an applicant has proven prejudice, courts should consider the specific impact Counsel's error had on the outcome. Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). Here, the Court must inquire as to whether there is evidence to support the trial court's finding. Milledge v. State, 422 S.C. 366, 380, 811 S.E.2d 796, 804 (2018) (holding a post-conviction relief court must view the trial court's ruling on an issue through the same lens applied on appeal, giving appropriate deference to the trial court's findings.).

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id. When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Where there is a close degree of similarity between the crime charged and the prior bad act, prior bad acts are admissible to demonstrate a common scheme or plan. Gaines, 380 S.C. at 30, 667 S.E.2d at 731. Evidence of prior bad acts is admissible to prove the crime for which a defendant is charged if it establishes: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) the identity of the person charged. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983).

Here, at the pretrial hearing, the State moved to admit evidence of other acts of sexual abuse against the same minor victim that occurred in different locations as the family moved around the state. Trial Counsel vigorously opposed the evidence under Rule 404(b), SCRE, and

requested a Rule 403, SCRE, analysis. (App'x pp. 101–103). The trial judge reviewed the minor victim's forensic interview with David Kellin in camera (App'x pp. 59–81), heard full argument, and made specific findings on the record. Citing State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999), State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008), and State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct. App. 2004), the judge expressly found:

> As to the other alleged incidents that occurred outside of this jurisdiction, I have reviewed the cases as presented by the State, including State vs. Weaverling, State vs. Martucci, and State vs. Mathis, and I find that -- obviously we're all familiar with Rule 404 and State v. Lyle. And I made an analysis under that, and I find that there had been a number of cases that have a common factual pattern of this case which have allowed the other acts to be brought into the case as an exemption to Lyle under the common scheme or plan. 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'x pp. 116–117).

The trial court's ruling was correct, particularly when considering the law existing at the time of trial. South Carolina courts have long recognized that evidence of a defendant's repeated sexual abuse of the *same child* constitutes a common scheme or plan, even when the acts occur over time and in different locations. See State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955) ("continued illicit intercourse between the same parties"); Weaverling, 337 S.C. at 471, 523 S.E.2d at 792–93 (repeated sexual acts with same victim admissible to show common scheme). Here, the acts demonstrated an ongoing pattern of sexual abuse by Petitioner against the minor victim that began in Fairfax and continued as the family moved — precisely the type of "continuing course of conduct" approved in Martucci, 380 S.C. at 254–56, 669 S.E.2d at 609-11.

Turning to Petitioner's misplaced reliance on State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). Perry was decided *five years after* this trial and merely clarified the logical-connection test from Lyle that the trial judge already applied. Even under Perry, the evidence here showed far

more than "mere repetition": it established a cohesive plan of abusing this specific minor victim over a multi-year period. Id., 430 S.C. at 41, 842 S.E.2d at 663 (quoting State v. Perez, 423 S.C. 491, 502, 816 S.E.2d 550, 556 (2018)).

Furthermore, the minor victim's statements in the forensic interview were detailed, coherent, and consistent, satisfying the clear-and-convincing standard for uncharged acts. See State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996). Corroboration is not required in sexual-assault cases. S.C. Code Ann. § 16-3-657.

Additionally, Petitioner's complaint about the absence of a limiting instruction is likewise unavailing. Trial Counsel never requested one. Moreover, because the evidence was properly admitted to prove a common scheme encompassing the charged lewd act, no limiting instruction was required. See State v. Johnson, 439 S.C. 331, 344, 887 S.E.2d 127, 133 (2023) (holding no limiting instruction required where evidence was part of the *res gestae* of the charged conduct).

Finally, any claim of prejudice is refuted by the direct appeal itself. The Court of Appeals affirmed the lewd-act conviction, expressly holding that Mother's testimony about the pocket-dialed phone call corroborated the minor victim's account of the graveyard incident — providing sufficient evidence for the jury to convict on that count. State v. Johnson, Op. No. 2018-UP-109 (S.C. Ct. App. Mar. 14, 2018) (App'x pp. 651–658). There is simply no reasonable probability that a contemporaneous objection would have changed the outcome of the trial, or had the issue been preserved and raised on appeal, Petitioner would have been successful. Strickland, 466 U.S. at 694; Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

The post-conviction relief court's finding of no prejudice is fully supported by the record and controlling law. Petitioner failed to meet his burden under the second prong of Strickland. Accordingly, this Court should deny certiorari to this issue.

**II. The post-conviction relief court correctly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to move to quash the lewd act indictment as unconstitutionally overbroad and vague where time is not a material element of lewd act upon a minor and the indictment provided sufficient notice under controlling precedent.**

The post-conviction relief court correctly denied relief where Petitioner failed to prove that Trial Counsel was deficient for failing to move to quash the lewd act indictment and that there was any resulting prejudice. Applicant's indictment sufficiently apprised him of the charges against him and put him on notice of what he had to defend at trial. Given the record, the post-conviction relief court properly found that Petitioner failed to show Trial Counsel was ineffective for not moving to quash the indictment and that he suffered resulting prejudice.

An indictment is a notice document. Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007). This Court has established a two-prong test for determining the sufficiency of an indictment when it allegedly involves an overbroad time period: (1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury. State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100, 103 (Ct. App.2005) (holding an indictment alleging commission of second-degree criminal conduct during periods of June 1 through July 20, 1995; July 1 through July 31, 1995; and August 1 through August 18, 1995, was sufficient as to time); State v. Wingo, 304 S.C. 173, 175, 403 S.E.2d 322, 323 (Ct. App.1991) (finding an indictment charging first-degree criminal sexual conduct with a minor covering a two-year period was sufficient as to time). It is uncontested that the time period in the indictment is prior to the grand jury's return of the indictment.

South Carolina courts have long recognized that young victims of sexual abuse often cannot recall exact dates, so indictments alleging offenses over an extended period are routinely upheld when the circumstances warrant it. State v. Nicholson, 366 S.C. 568, 574, 623 S.E.2d 100,

103 (Ct. App. 2005). Here, the post-conviction relief court correctly noted: "A young child victim cannot reasonably be expected to recall the exact dates of sexual abuse." (App'x p. 810) (quoting State v. Tumbleston, 376 S.C. 90, 101, 654 S.E.2d 851, 855 (Ct. App. 2007)) (internal quotations omitted). The facts here—ongoing abuse of a minor victim by her stepfather as the family moved within and around Kershaw County—plainly warranted the extended timeframe.

Turning to Petitioner's misplaced reliance on State v. Baker, 411 S.C. 583, 769 S.E.2d 860 (2015). In Baker, the State amended the indictments just two weeks before trial to dramatically expand the timeframe. A plurality of this Court found prejudice because of the late surprise and the resulting impairment of the defense. Id. at 592, 769 S.E.2d at 865. Here, no amendment ever occurred. The original indictment was returned well in advance of trial (App'x p. 647), and Petitioner had full discovery, including the minor victim's detailed forensic interview with David Kellin (App'x pp. 59–81; pp. 116–117), long before trial. Simply put, there was no surprise to Petitioner.

The recent decision in State v. Dent, 446 S.C. 121, 919 S.E.2d 394 (2025), does not alter the analysis. Dent reaffirms the constitutional requirement of fair notice but does not overrule the settled rule that time is not material in child-sexual-abuse cases involving young victims. In the case *sub judice*, the indictment here identified (1) the minor victim by name, (2) the county (Kershaw), (3) the approximate multi-year timeframe during which the family lived in the area, and (4) the specific offense. This satisfied due process. (App'x p. 810).

At the post-conviction relief hearing, Petitioner claimed the broad timeframe prevented him from presenting alibi evidence (App'x pp. 725–726), but his testimony was vague and unsubstantiated. He asserted only that he "probably" could prove he was working in Allendale in 2007 and that "Minor was not even in the county during that time." (App'x p. 726). He never

produced specific time sheets, work records, or alibi witnesses that would have covered the entire period or the specific Kershaw County incidents described by the minor victim: abuse at her grandmother's house (App'x p. 157; pp. 159–164), at Aunt Melissa "Missy" Hall's house and computer room (App'x p. 167; p. 169–172), and on the dirt road near Aunt Missy's house (App'x pp. 176–179).

Moreover, Trial Counsel reasonably focused the defense on attacking the minor victim's credibility, the lack of physical corroboration, and the inconsistencies in the State's case rather than pursuing a motion that would have been denied. (See App'x pp. 739–740) (Trial Counsel acknowledging the judge's ruling on related issues but confirming he had to "deal with it."). Because the indictment was legally sufficient, counsel's decision not to move to quash it was not deficient performance. Edwards v. State, 372 S.C. 493, 496, 642 S.E.2d 738, 739 (2007) (holding that an indictment is a notice document).

Nevertheless, even assuming, *arguendo*, that Trial Counsel's representation was deficient, Petitioner cannot show prejudice. There is no reasonable probability that a motion to quash would have been granted or that the outcome of the trial (or direct appeal) would have been different. Strickland, 466 U.S. at 694; Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

The post-conviction relief court's ruling is fully supported by the record and controlling law. Accordingly, this Court should deny certiorari to this issue.

**III. The post-conviction relief court correctly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object when the mother of the minor testified about domestic violence by Petitioner because trial counsel articulated valid strategic reasons for not objecting and the testimony was admissible as context for the minor victim's delayed disclosure.**

Petitioner argues that the post-conviction relief court erred in denying relief because Trial Counsel was ineffective for not objecting to allegedly inadmissible character evidence. However, the post-conviction relief court correctly found, after reviewing the full record and hearing live testimony, that Trial Counsel made a reasonable strategic decision not to object to Pamela Hall's fleeting references to prior domestic violence and infidelity. Thus, Petitioner failed in his burden of proving any deficiency or any prejudice from the alleged deficiency. This Court should deny certiorari to this issue.

As noted by the post-conviction relief court, Strickland requires that Trial Counsel be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 693. Therefore, judicial scrutiny of the trial counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid

reason for employing such a strategy, the conduct does not constitute ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

At trial, Pamela Hall gave three brief references: (1) that Petitioner had previously pulled a gun on her and pulled out a few of her braids (App'x p. 229–230); (2) that she and Petitioner had argued about him cheating with other women (App'x p. 238; p. 245); and (3) that, on the day of the disclosure and sexual-assault exam, she asked police to check on her mother and children at the house because "he had his gun, and I know sometimes about the altercations that we've had" (App'x p. 249). Trial Counsel did not object.

At the post-conviction relief hearing, Trial Counsel explicitly articulated his strategic reasoning. He testified that he consciously chose not to object because he "didn't want to highlight the fact here is another woman in this situation that already—we got three women, in this situation, and a child. At some point in time, I was just trying to cut it off." (App'x p. 737). He further explained that he sat at the counsel table in real time, debating whether to object, weighing the risk of highlighting the testimony against his planned cross-examination of Hall about her drawing a pistol on Petitioner (which she did after learning of the alleged abuse). (App'x p. 737; see also cross-examination of Deputy Barnwell at App'x p. 147, where counsel elicited that Hall told the deputy she had pulled a gun on Petitioner). Trial Counsel concluded that objecting "probably just … wasn't the best thing to do" under the circumstances. (App'x p. 737).

These are valid strategic reasons. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017) ("counsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy"). The post-conviction relief court correctly credited Trial Counsel's on-the-record explanation and rejected Petitioner's attempt to second-guess it. (App'x pp. 801-802). Courts must afford "highly deferential" scrutiny to counsel's tactical choices

and must not engage in hindsight. Strickland, 466 U.S. at 689; Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Petitioner's claim that the reasons were "not valid" or "unclear" is simply an invitation to re-weigh strategy—an invitation the post-conviction relief court properly declined.

Nevertheless, assuming *arguendo* that Trial Counsel had objected, the trial court would likely have found the testimony was admissible. Hall's brief references provided context for the minor victim's multi-year delay in disclosure and explained the family dynamics and fear that kept the minor victim silent. State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (finding *res gestae* evidence admissible when it is an integral part of the crime or needed to aid the fact-finder in understanding the context). The minor victim testified that Petitioner's abuse of her mother (including a "big argument" that caused the family to move) contributed to her reluctance to disclose. (App'x p. 154). The State also presented expert testimony on how witnessing domestic altercations affects a child victim's disclosure. (App'x p. 441). The probative value was not substantially outweighed by any danger of unfair prejudice. Rule 403, SCRE; State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014); cf. State v. Galloway, 443 S.C. 229, 244, 904 S.E.2d 866, 874 (2024) (holding that "the admission of the victim's testimony about Galloway's violence towards Waldrop was permissible under Rule 404(b) because it was offered for the proper purpose of explaining the victim's delayed disclosure rather than for the improper purpose of showing Galloway's propensity to be violent."); see also id., (quoting State v. Smith, 391 S.C. 353, 361-62, 705 S.E.2d 491, 495 (Ct. App. 2011) ("When the State adequately explains how the evidence of the other act logically connects to an issue in the case, it demonstrates how the judge or jury can use the evidence without using it for the prohibited purpose of inferring guilt from the defendant's propensity to commit the crime."), rev'd on other grounds by State v. Smith, 406 S.C. 215, 750

S.E.2d 612 (2013)). Thus, the post-conviction relief court properly found Petitioner failed to prove Trial Counsel's performance was deficient.

Additionally, the post-conviction relief court properly found Petitioner failed in his burden of proving prejudice from the failure to object. The references were fleeting, non-detailed, and not the focus of the State's case. The lewd-act conviction rested overwhelmingly on the corroborated graveyard incident: the minor victim's detailed account plus Pamela Hall's direct testimony about the pocket-dialed phone call she overheard. State v. Johnson, Op. No. 2018-UP-109 (S.C. Ct. App. filed Mar. 14, 2018) (App'x pp. 651-658). There is no reasonable probability that sustaining an objection would have changed the outcome at trial or on appeal. Strickland, 466 U.S. at 694.

The PCR court's finding is fully supported by the record and controlling law. Accordingly, this Court should deny certiorari to this issue.

**|CONCLUSION & SIGNATURE PAGE FOLLOWS|**

## CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's order. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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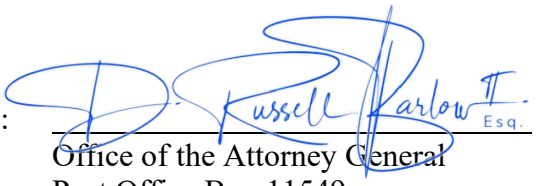
BY: 

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