STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2013-001885

SUSAN TAPPEINER, 338050,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S. C. 29204
(803) 738-8622
(803) 738-1600 (FAX)

ATTORNEY FOR PETITIONER.

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QUESTIONS PRESENTED

I.

Did the lower court err in failing to grant the Petitioner relief where she met her burden of proof with regard to her claim that Trial Counsel failed to provide her reasonable professional assistance of counsel prior to and during her trial in that he failed to adequately prepare and present a defense in Petitioner's case?

II.

Did the lower court err in refusing to allow Petitioner to introduce a video tape of the interior of the house where the sexual assault alleged in this case was said to have occurred?

III.

Did the lower court err in failing to rule that Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Petitioner's trial?

IV.

Did the lower court erred in finding that Trial Counsel's deficient performance, in failing to object to repeated references throughout trial to the fact that the decision to arrest the Petitioner was not made until after her two hour police interview where the statements made by the Petitioner had been ruled inadmissible, did not prejudice Petitioner's right to a fair trial?

V.

Did the lower court err in failing to grant Petitioner a new trial where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped where that evidence was material to the defense and where he failed to adequately cross-examine the State's expert witness concerning reasons why the complaining witness may have delayed reporting his alleged assault by the Petitioner?

VI.

Did the lower court err in failing to find Trial Counsel ineffective for failing to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not permitted to provide an expert opinion at trial?

VII.

Did the lower court err in failing to find Trial Counsel ineffective for failing to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not permitted to provide an expert opinion at trial?

VIII.

Did the lower court err in concluding that Petitioner had failed to demonstrate prejudice arising from Trial Counsel's failure to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault?

IX.

Was Trial Counsel ineffective for failing to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial?

X.

Did the lower court err in failing to grant Petitioner a new trial where she successfully demonstrated at her PCR hearing that Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments?

STATEMENT OF THE CASE

The Petitioner was indicted at the March, 2009 term of the Beaufort County Grand jury for Second Degree Criminal Sexual Conduct (CSC) with minor (2009-GS-07-703). Charles B. Macloskie, Esquire (Hereafter Counsel) and Desa Ballard, Esquire (Hereafter Attorney Ballard). represented the Petitioner in the Court of General Sessions on this charge. On October 26-28, 2009, the Petitioner proceeded to trial by jury at the conclusion of which the Petitioner was found her guilty as charged. Attorney Ballard became involved in this case after the Petitioner's conviction and participated in the sentencing phase of the Petitioner's trial which took place on November 16, 2009. At that proceeding, the Honorable Carmen Mullen sentenced the Petitioner to confinement for ten (10) years, suspended upon the service of five (5) years plus three (3) years of probation.

A timely Notice of Appeal was filed on Petitioner's behalf by Counsel. Desa Ballard, Esquire, initially represented Petitioner on appeal. The Petitioner subsequently hired Tara Dawn Shurling, counsel herein. Thereafter, Petitioner submitted an Affidavit in Support of Motion to Withdraw Direct Appeal to the South Carolina Court of Appeals. The Court of Appeals dismissed Petitioner's appeal by Order of Dismissal and Remittitur dated May 11, 2010.

Petitioner filed an Application for Post-Conviction Relief filed on May 17, 2010. The State filed its Return on August 18, 2010. Petitioner filed an Amended Application for Post-Conviction Relief on April 4, 2013. An evidentiary hearing was convened on April 4, 2013, during which the Petitioner was present and represented by Tara Dawn Shurling, Esquire and the State was represented by Assistant Attorney General, Ashleigh Wilson. A Second Amended Application for Post-Conviction Relief was filed on behalf of Petitioner on April 4, 2013, however, that Amended Application was withdrawn at the evidentiary hearing held on that same date.

In her Applications for Post-Conviction Relief Petitioner raised the following allegations in support of her claim that she received ineffective assistance of counsel prior to and during her trial in violation of her right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amends to the Untied States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. The Petitioner has alleged generally that she received ineffective assistance of counsel prior to and during her trial in violation of her rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim she has raised the following specific allegations:

1. Trial Counsel was ineffective in failing to develop and employ a clear theory of defense.

2. Trial Counsel was ineffective for failure to present evidence concerning what prescription medications the Applicant was taking during time of incident.

3. Trial Counsel was ineffective for failing to introduce testimony from Dr. Nolan in case for defense.

4. Trial Counsel was ineffective for failure to hire Dr. Martin, or an expert of equal credentials, to testify during the case in chief.

5. Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Applicant's trial.

6. Trial Counsel was ineffective for failing to introduce evidence concerning the medications the Applicant was taking during the operative time period, and the effect of those medications when combined with alcohol.

7. Trial Counsel was ineffective for failing to object to repeated references throughout trial to the fact that the decision to arrest the Applicant was not made until after her two hour police interview where the statements made by the Applicant had been ruled inadmissible.

8. Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped at age 8 where that evidence was material to the defense.

9. Trial Counsel was ineffective for failing to discuss use of character witnesses with the Applicant and failed to produce such witnesses at trial.

10. Trial Counsel was ineffective for failing to fully discuss potential risks and benefits of testifying at trial.

11. Trial Counsel was ineffective for failing to request a jury view of the scene, or in the alternative, to introduce evidence demonstrating the size and layout of the Applicant's home.

12. Trial Counsel was ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault.

13. Trial Counsel failed to object to repeated references to the victim as 13 years old at the time of the alleged assault where the victim was two months away from his 14th birthday at the time of the alleged assault.

14. Trial Counsel failed to establish his client's height and weight at trial.

15. Trial Counsel failed to provide the Applicant effective assistance of counsel when he called the Applicant's husband as a witness, and questioned him concerning an incident when the victim had asked the Applicant to help him get a camera battery, without ascertaining whether the husband had an accurate recollection of the timing of that request.

16. Trial Counsel failed to provide the Applicant effective assistance of counsel when he failed to question the Applicant's husband, when he testified at trial, concerning the victim's pattern of visitation in their home during the time period prior to the accusations by the victim.

17. Trial Counsel was ineffective when he failed to adequately question the Applicant's husband on the witness stand concerning his observations concerning the Applicant's coordination and general physical condition when she mixed alcohol with her prescription medications.

18. Trial counsel was ineffective for failing to fully discuss with the Applicant the fact that she would retain the right for him to make the final argument to the jury if the defense presented no evidence at trial.

19. Trial Counsel failed to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not asked to provide an expert opinion at trial.

20. Trial Counsel failed to request a jury charge relating to consent and competence as those concepts applied to the Applicant as opposed to the victim.

21. Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments where said remarks;

a. personally vouched for credibility of Victim's testimony;
b. personally staked the jury in the outcome of this trial;
c. were calculated to imply the Applicant had confessed where her statements had been ruled inadmissible.

22. Trial Counsel failed to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial.

23. Trial Counsel failed to produce testimony relevant to the Victim's frequent presence in the Applicant's home when neither she nor her husband was home.

24. Trial Counsel failed to introduce from neutral witnesses evidence concerning the reaction of the Applicant's dogs to any activity in her home.

25. Trial Counsel failed to argue in closing that it would not be Criminal Sexual Conduct by the Applicant if the complaining witness in fact assaulted her while she was incompetent to consent.

26. Trial Counsel failed to request jury charge on the fact that South Carolina law allows minors under the age of 14 to be charged with Criminal Sexual Conduct.

27. Trial Counsel failed to adequately cross-examine the State's expert witness concerning the known reasons for delayed reporting of sexual assaults.

In deciding this collateral action the lower court had before it a copy of the trial record, a copy of the sentencing record dated November 16, 2009, a transcript of the PCR hearing held on April 4, 2013 and all exhibits introduced during that proceeding, the Applicant's records from the South Carolina Department of Corrections and the records of the Beaufort County Clerk of Court regarding the subject conviction and sentence.

Following the submission of proposed orders by both sides, the lower court issued an Order of Dismissal which was filed on June 18, 2013. That Order of Dismissal addressed only a portion of the issues raised and argued by Petitioner in her applications for relief and at her evidentiary hearing. In the Order of Dismissal the lower court found Trial Counsel's representation to be deficient however, concluded that Petitioner had failed to meet her burden of proof with regard to demonstrating prejudice in connection with that deficient performance.

The Respondent filed a Motion to Alter or Amend pursuant to Rule 50(e), SCRCP, on June 27, 2013. Petitioner served and filed her first Motion to Alter or Amend on July 9, 2013. Thereafter, the Respondent filed a second Motion to Alter or Amend on July 15, 2013. That motion however is obviously a duplicate filing of the previously filed Motion to Alter or Amend filed by the State on June 27, 2013 inasmuch as the two documents appear to be identical. The lower court entered an Amended Order of Dismissal on August 2, 2013. That Amended Order expressly mentioned the Rule 59(e) motion filed by Petitioner. App. p. 845, para.3. That Order does not mention the 59(e) filed by the Respondent. The records of the Beaufort County Clerk of Court do not reflect a separate ruling on Respondent's 59(e) motion.

Petitioner filed a second Motion to Alter of Amend on August 16, 2013. Inasmuch as this was Petitioner's second Motion to Alter or Amend, she did not wait for a ruling on that motion to file her Notice of Appeal which was served and filed on September 5, 2013. An Order Denying the Applicant's Second Motion to Alter or Amend pursuant to Rule 59(e) SCRCP was signed by the Honorable Perry Buckner on August 29, 2013, received by Counsel on September 3, 2013 and was filed with the Beaufort County Clerk on September 9, 2013.

She now asks that the writ be issued and that she be permitted to submit a full briefing on the issues summarized herein.

ARGUMENT

Standard of Review

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000); Rule 71.1(e), SCRCP.* In evaluating an Application for Post-Conviction Relief, the

moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). In other words, the Applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.; Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). On the other hand, counsel may not explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial simply by labeling them matters of trial strategy or tactics. In the case of Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

> Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

Relevant Testimony

A thorough review of the twenty-seven (27) allegations raised by Petitioner in the lower court requires the examination of significant portions of the testimony presented during the lengthy evidentiary hearing held in this matter, as well as, portions of the trial record. What follows below is a summary of the portions of these records relevant to the issues raised on collateral review.

Defense Counsel Charles B. Macloskie, testified at the evidentiary hearing held in this

matter. His testimony establishes the following. He was hired by Applicant's father immediately after Applicant was arrested. App. p. 486, l. 10. She was on bond pending trial. App. p. 487, l. 1. Prior to trial there were no serious plea negotiations in this case. Defense Counsel recalled that no offers that he could recommend were ever offered by the prosecutor handling the case. App. p. 487, l. 22. There were no last minute offers just before trial. App. p. 488, l. 22.

During his opening argument at trial, Defense Counsel argued that after hearing the evidence the jury might conclude Petitioner was the victim and the wrong person was on trial. App. p. 151 ll. 10-14. Defense Counsel testified that although Petitioner couldn't remember what happened on the night in question, he came ***"to think that it might have been completely different than the allegations in the indictment; that, this young boy was the one who made the advances, not Mrs. Tappeiner."*** App. p. 490, ll. 7-10.

The Petitioner weighed approx 109 at the time of the trial. App. p. 490, l. 21- p. 491, l. 1. In his trial testimony, the Victim described himself as weighing 115 lbs. The Solicitor responded to this assertion by asking, ***"Okay, you weighed less than that last year, obviously."*** Victim responded "yes" App. p. 170, ll. 9-10. Defense Counsel did not object to this leading question and at the PCR hearing he acknowledged that he should have. App. p. 491, l. 2- p. 492, l. 6. At trial Defense Counsel cross-examined the Victim about the fact that in the police report in this case it is noted that he reported his weight as 125 pounds. App. p. 492, l. 9-23.

In the *Jackson v. Denno* [1]hearing held in this trial, App. p. 38, l. 16 – p. 134, l. 12, Defense Counsel used a clinical psychologist, Dr. Yola Nolan, to establish the effect of drugs and alcohol on the Petitioner's ability to give a voluntary and reliable statement. App. p. 494, l. 6- p. 495, l. 9. At the PCR hearing, Defense Counsel admitted that he never considered using, Dr. Nolan, or some other expert, to address what effect the prescription drugs the Petitioner was

[1] 378 U. S. 368, 84 S.Ct. 1774 (1964).

taking combined with alcohol, would have had on her capacity to consent.

In his PCR testimony, Defense Counsel agreed that if an adult has sex with a child it is a crime regardless of whether the child consents or not. App. p. 495, ll. 10-20.

He acknowledged however, that whether or not the adult had any criminal culpability would be affected by whether the adult was incapacitated at the time of the sex act. He likewise admitted that if the adult was unconscious, or otherwise incapable of consenting or participating in the act, the sex act would be criminal with regard to the adolescent but not the adult. App. p. 495, l. 21 – p. 496, l. 19. Defense Counsel acknowledged that this was the premise set forth in his opening statement to the jury. App. p. 496, ll. 20-23. Despite this fact, he admitted that he introduced no witnesses, in the presence of the jury, to establish at the time of the alleged incident that the Petitioner was taking heavy doses of prescription medications and was drinking. He introduced no testimony concerning the Petitioner's pattern of mixing alcohol with prescription medication. App. p. 497, ll, 14-22.

Defense Counsel acknowledged that he introduced no evidence concerning what prescription medications his client was taking on the night of the alleged event. Defense Counsel admitted that absent such testimony, he established no foundation for the defense theory he advanced in opening arguments. He forthrightly conceded that he had no explanation for failing to introduce this evidence at trial. App. p. 497, l. 23- p. 498, l. 18. Defense Counsel testified that he did not consider using Dr. Nolan, the expert he successfully used to support his position during the *Jackson v. Denno* hearing, or any other psychiatric or medical doctor, to present testimony concerning the question of the Petitioner's ability to consent to anything under the circumstances of the evening in question. During the *Jackson v. Denno* hearing, Sergeant Gonzales agreed that at the time he interviewed the Petitioner she did not smell of alcohol, she did not have slurred speech or "anything like that." He verified that she had no trouble walking

into the interview on her own. App. p. 41, ll. 5 –16. Sergeant Gonzales also acknowledged that at one point during the interview phase of his two hour meeting with the Petitioner she stated, ***"maybe he did this to me."*** App. p. 50, ll. 5 – 13. Defense Counsel had no explanation for his failure to introduce evidence in the presence of the jury that at the time of the alleged incident the Petitioner was under the combined influence of alcohol and her prescription medications, and he in no way claimed that this omission was a tactical or strategic decision. App. p. 499, l. 5-16. Following the *Jackson v. Denno* hearing, the Petitioner's pre-trial statements were excluded from evidence. App. p. 38, l. 16- p. 125 l. 17.

In excluding the statement from evidence, the Trial Judge specifically ruled that,

> ***Based on the totality of the circumstances, - - - I truly think that her will was overborne. I don't think she has a clue what she was doing. - - - I am not going to allow the statement, that interview. - - - so, again, based on the totality of the circumstances, I do believe that her will was overborne. And I do not believe her statement was voluntary. It certainly wasn't intelligent. And I don't think it was knowingly made.***

App. p. 132, l. 16 - p. 134, l. 12.

Throughout the trial however, the prosecutor made repeated references to the fact that the Petitioner was not charged until after her two-hour interview with the police. During the direct examination of Sergeant Gonzales, the following colloquy took place without objection,

Q. Okay. And how long a discussion did you have with the Defendant?

A. Approximately 2 hours.

Q. Okay. At the end of your discussion with the Defendant, what action did you take?

A. I placed her under arrest for Criminal Sexual Conduct with a minor.

App. p. 280, l. 14 – p. 281, l. 2.

Later during the testimony of Sergeant Gonzales, the prosecution returned to this topic

without objection. The Solicitor asked this witness to confirm his earlier testimony that he had interviewed the Petitioner for 2 hours and that only then, after speaking with her for that amount of time, was the decision made to arrest her. App. p. 282, l. 17 p. 283, l. 10. Later, the Solicitor chose to once again emphasize this point in his closing argument. App. p. 341 l. 25- 342, l. 17. In his PCR testimony, Defense Counsel admitted that it was a mistake not to have objected to this line of testimony and closing argument. App. p. 499, l. 21 - p. 501, l. 14. On cross-examination he reiterated his admission that testimony concerning the fact that Petitioner wasn't arrested until after her interview by the police was objectionable and should have been objected to.

Defense Counsel testified that he didn't want to put the Petitioner on the stand because he was afraid of opening the door for the statements that had been excluded from evidence coming to impeach her testimony. App. p. 507, l. 20 – p. 509, l. 20. He admitted that he may or may not have told the Petitioner that her statements, although excluded from evidence, could be used to impeach her. App. p. 509, ll. 11-20. Defense Counsel indicated that the other reason he didn't call the Petitioner as a witness in her own defense was the fact that she had no recollection of any of the events of the evening in question. App. p. 509, l. 21 – p. 510, l. 2. He confirmed on cross-examination that he ***"more likely than not advised pretty strongly against"*** the Petitioner testifying at trial. He repeated his recollection that this advice was based upon the fear that her testimony might open the door to the introduction of statements which had previously been ruled inadmissible. App. p. 536, l. 21- p. 537, l. 9. On cross-examination, Defense Counsel also noted that one of the problems he had defending the Petitioner was that she did not recall the events with any degree of clarity. App. p. 535, ll. 14-19.

Defense Counsel acknowledged that he did not consider using testimony from the Petitioner to establish her pattern of mixing alcohol and drugs; nor did he think about using her

to establish the history of her employment of the victim's sisters or the fact that she wasn't accused of these acts until after she fired the sisters. He didn't consider using any other witnesses to establish these points either. App. p. 510, ll. 3-21.

During the Petitioner's trial the complaining witness was referenced as being thirteen (13) years old at the time of the incident. At trial, the young man stated that he had just turned 15 on August 15, 2009. Therefore, on the date of the incident in question, on or about August 15, 2008, the boy would have been approximately seven (7) weeks away from his fourteenth (14) birthday. Defense Counsel did not consider objecting to the repeated references to him as a thirteen (13) year old when he was in fact very close to turning fourteen (14); nor did Counsel argue that the complaining witness was in fact nearly 14 during his arguments to the jury. App. p. 503, l. 24- p. 507, l. 1. Despite the importance of this young man's maturity to the defense theory he advanced in his opening statement to the jury, Defense Counsel did not consider raising this issue at trial.

Defense Counsel specifically stated that he did not believe he ever discussed the possibility of introducing character witnesses with the Petitioner. App. p. 507, ll. 2-4. During the PCR hearing, the Petitioner presented testimony from a non-familial witness who indicated that the Petitioner had a positive reputation for veracity and that he would believe her under oath. He also verified that he would have been willing to testify on the Petitioner's behalf at trial had he been asked to do so. Perkins, App. p. 584, ll. 10 – 24;

Throughout the Petitioner's trial, references were made to statements the complaining witness had made concerning the alleged incident. Defense Counsel acknowledged that he did not object to any of this hearsay testimony. He testified that he could not recall any strategic or tactical reason for not doing so. App. p. 510, l. 22- p. 511 a, l. 7.

Defense Counsel introduced no evidence to establish the Petitioner's height and weight.

He testified that he could not recall considering the relevance of this information to the defense. App. p. 511 a, ll. 8-15. At the PCR proceeding, the Petitioner presented testimony from her sister, Elizabeth W. Auerback. Auerback testified that she weighed 108 pounds at the time of the hearing and that she is approximately a half inch shorter than the Petitioner. App. p. 597, l. 11 – p. 598, l. 2. As previously noted, the Petitioner weighed approximately 109 pounds at the time of the trial. App. p. 490, l. 21- p. 491, l. 1. On cross-examination, Defense Counsel once again admitted that he did not make a significant issue of the Petitioner's weight at the time of the incident and he emphasized that she ***"was a lot lighter than she is now."*** App. p. 534, ll. 3-21. On cross-examination, Defense Counsel acknowledged that he did not put before the jury the fact that this young man could have overpowered the Petitioner "to a sufficient degree." He further admitted that he didn't put up any evidence before the jury concerning her drinking and prescription drug use and acknowledged that such evidence would have been useful to the defense. App. p. 535, l. 24- p. 536, l. 11.

Defense Counsel presented the Petitioner's husband, Mike Tappeiner, as the sole witness for the defense. During his testimony it became obvious that he could not pinpoint exactly when the victim had come to their home in search of a camera battery. App. p. 297, l. 20 – p. 298, l. 7; App. p. 299, l. 11 – p. 301, l. 4. In his PCR testimony, Defense Counsel could not recall interviewing the husband about this point prior to his testimony. App. p. 512, ll. 5-14. Defense Counsel did not recall ever telling the Petitioner that introducing her husband's testimony, or any evidence for that matter, would result in her losing the right to make the last argument to the jury. App. p. 512, ll. 15-18.

Defense Counsel did not consider introducing any non-familial witnesses to testify about the family dogs and their reaction to activity at the residence. He did not interview any friends or family members who might have presented testimony about the Petitioner's habits concerning

drugs and alcohol or about he family dogs. App. p. 513, l. 13-24. Defense Counsel recalled the Petitioner's husband testifying that the Victim stayed at their home that night and that he fixed breakfast for him the next morning. He testified that in his trial testimony the husband described the young man as acting very calm, like nothing had happened. App. p. 513, ll. 6-9.

When asked why he didn't ask the husband about Petitioner's pattern of mixing drugs and alcohol, and the impact of that combination on her coordination, motor skills, and other physical factors, Defense Counsel simply confirmed that he couldn't recall considering asking those questions. He didn't offer any explanation for this omission, admitting plainly that he just ***"didn't do it."*** App. p. 514, ll. 3-25. He did not assert any strategic or tactical reason for this omission.

Mary Beth Hefner was initially offered as an expert in delayed reporting in child sexual assaults, at the Petitioner's trial. A lengthy *in camera* hearing was held concerning the State's intended use of this witness. Ms. Hefner testified, *in camera*, that the Victim told her that one of the reasons he didn't report this alleged incident for six months was the fact that he has been molested before, reported the assault and nothing was done about it. The Court found that if the State asked her for her expert opinion as to why the Victim waited to report this incident, the State would be opening the door to the Defense questioning her on cross-examination about the explanation offered by the boy in his interview with Ms. Hefner. Ms. Hefner was ultimately qualified as an expert in forensic interviewing. App. p. 199, l. 25 – p. 249, l. 11. She subsequently testified concerning the fact that children often delay reporting sexual abuse and various reasons why children delay reporting such incidents. She did not offer an expert opinion as to why the Victim in this case delayed making the accessions which were the basis for the charges against the Petitioner. App. p. 250, l. 13 – p. 254, l. 4. She did not testify concerning her interview of the young man in question.

On cross-examination, Defense Counsel did not question this witness concerning what other reasons might exist for a child to delay reporting such an incident. He did not ask her whether a past negative experience with reporting such an incident might affect a child's decision not to report a later incident. Likewise, he did not ask her questions concerning whether a child's delayed reporting might be motivated by some animus toward the adult that did not manifest itself until well after the time an event occurred. Likewise, he did not ask her if an adolescent might report an alleged sexual assault as a preemptive measure to protect himself from allegations that he was in fact the aggressor in a situation with an adult that was passed out or otherwise incapacitated. Defense Counsel's cross-examination of this witness did not address the subject matter for which she was offered by the State, delayed reporting, in any manner. App. p. 254, l. 10 – p. 255, l. 25. As previously noted, Ms. Hefner ultimately did not offer any expert opinion testimony. Despite this fact, the trial court gave a standard jury charge on expert witness testimony. App. p. 353, l. 7 – p. 354, l. 1. Defense Counsel testified that he never considered objecting to that charge. App. p. 515, l. 1- p. 516, l. 5.

Defense Counsel agreed that the crux of the defenses' theory of the case was that Petitioner was incapacitated at the time of this incident and therefore, was not competent to knowingly and willfully have sex with the victim. Despite this fact, Defense Counsel admitted that he did not argue this position to the jury and he did not consider asking for a jury instruction supporting that defense. App. p. 516, l. 21- p. 517, l. 22. Defense Counsel then conceded that he had actually failed to introduce any testimony that would have laid a foundation for such a charge. App. p. 517, l. 22 – p. 518, l. 8. Defense Counsel acknowledged that, although neither consent (by the child) or diminished capacity are defenses to a charge of Criminal Sexual Conduct with a minor, a valid defense would arise if the adult was passed out, or sufficiently incapacitated, to a degree that they could not consent to sexual activity initiated by a minor.

App. p. 541, ll. 7-21.

Early in his PCR testimony, Defense Counsel volunteered that there were some problems with some of the things the prosecutor argued during the State's closing argument. App. p. 501, ll.16-19. In the course of the PCR hearing, the Petitioner demonstrated that the following closing arguments had been made, without objection, by Defense Counsel.

Despite the fact that the Petitioner's pre-trial statements were excluded from evidence at trial, during its closing arguments to the jury, the Solicitor stated the following,

> ***Before the search warrant is served, he called in the Defendant to talk to her. Right? You don't just go arresting people. ---She came down the testimony said around 2:00 o'clock in the afternoon and talked to the police. That was her face to face, eye to eye. Joshua had his turn. She had her turn. She was not under arrest. She was not under arrest. She voluntarily came in to speak. I want to make that clear. This was still an investigation. After the face to face, eye to eye a determination was made. She was charged that day with criminal sexual conduct second degree.***

App. p. 341, l. 25 – p. 342, l. 16. As previous noted, Defense Counsel admitted that it was a mistake not to object to this line of argument by the State. App. p. 501, ll.3 – 14.

During the State's closing arguments the Solicitor references his expert's history of over 200 forensic interviews. He then went on to state, ***"Folks, these are people who can detect when someone is making something up or if there is nothing there. Okay?"*** App. p. 341, ll. 19-22. In her testimony before the jury, Ms. Hefner never stated that she had interviewed the Victim in this case. App. p. 254, l. 10 – p. 255, l. 25. Defense Counsel testified that he should have objected to this argument as well. App. p. 519, ll. 15-20.

Defense Counsel likewise conceded that he should have objected to another portion of the State's closing in which the prosecution personally commented on the credibility of the sole witness offered for the defense; the Petitioner's husband. App. p. 343, l. 25- p. 344, l. 12. App. p. 510, ll. 1-9. During his closing, the prosecution also commented on the Mr. Tappeiner's

previous "problems with alcohol." Defense counsel testified that there had been no evidence introduced supporting that argument, and that it should have been objected to. App. p. 345, ll. 9-10. App. p. 520, ll. 10-15. During the testimony of the Petitioner's husband he acknowledged having *one prior DUI fifteen years earlier.* App. p. 307, ll. 3 – 5.

During his closing argument the prosecutor also asked the jury to consider ***"the eye-to-eye, face-to-face, interviews that [the victim] has had with law enforcement and the experts."*** (Emphasis added) App. p. 346, ll. 17-19. The State only presented *one* expert witness at trial and that expert did not testify to having interviewed the Victim in this case. Once again, Defense Counsel acknowledged that he did not consider objecting to this portion of the prosecutor's closing argument. App. p. 520, ll. 16-24.

Near the very end of the State's closing argument, the prosecutor made the following argument,

> ***I want you to also think in –in—in making that decision, would you let her babysit your kids? Your grand kids? Nieces and nephews? I think the answer to that is why you should find her guilty.*** App. p. 346, ll. 20 – 24.

Defense Counsel testified that he should have objected to this portion of the prosecutor's closing argument which he acknowledged, was improper because it "staked" the jury. App. p. 521, ll. 7-13.

In the Bluffton Police Department incident report, which included a statement from the victim, the victim says ***"when she left, I quickly ran out of the house and went straight to my house."*** In the Incident Report the Officer quoted the Victim as reporting that the Petitioner ***"got off of him before he ejaculated."*** Defense Counsel acknowledged that this report was part of the discovery material he received from the State. That report, with the Victim's statement, was introduced during the PCR proceeding as Petitioner's Exhibit No. 1, without objection. At trial the Victim testified that the sex act ended when he pushed the Petitioner off of him. App. p.

184, ll. 3 – 6. During the PCR hearing Defense Counsel stated that he had no reason for failing to question the Victim about this inconsistency at trial. App. p. 522, l. 10- p. 523, l. 20.

At trial, State expert witness Hefner testified to certain percentages in statistical references to the occurrence of delayed reporting of sexual abuse by children. App. p. 252, ll. 7-16. She also asserted, without citing to authority, that boys delay reporting sexual abuse more often than girls. App. p. 252, ll. 17 – 20. Defense Counsel acknowledged in his PCR testimony that he never considered cross-examining this witness concerning her authority for these assertions. App. p. 524, ll. p. 3-23. Neither did he consider cross-examining this witness concerning their authority for her claim that the literature shows that boys delayed reporting sexual abuse more frequently than girls. App. p. 524, l. 24- p. 525, l. 11. Likewise Defense Counsel admitted that he had no strategic or tactical reason that he could recall why he did not cross-examine this witness on the topic of delayed reporting. App. p. 525, ll. 17-23.

In his PCR testimony, Defense Counsel stated that he went to the Tappeiner residence where this incident allegedly occurred prior to the Petitioner's trial. He recalled meeting the Petitioner's husband there and indicated that he thought "that the subject matter was the --- the service of a search warrant." He testified that he did not recall being there for a long time and he had no recollection of going upstairs where the incident supposedly took place. App. p. 525, l. 24- 527, l. 4. Defense Counsel admitted that he never considered obtaining or developing any demonstrative evidence to illustrate for the jury just what close quarters the parties were in at this house on the night of the alleged incident. App. p. 527, ll. 5-9.

Defense Counsel recalled on cross-examination that he although spoke with Dr. Martin to answer some questions before the sentencing proceeding, but asserted that it was Ms. Ballard who spoke with Dr. Martin about the use of his testimony during the sentencing proceeding. App. p. 538, l. 17- p. 539, l. 12.

In the pre-sentence report issued in the Petitioner's case, it noted that the Victim's mother wanted the Petitioner to be sentenced to at least two years followed by community supervision with some type of intensive psychotherapy. See, Applicant's Exhibit No. 2; App. p. 653. Defense Counsel testified that he did not recall considering pointing that portion of the report out to the Court, but he felt certain the Court read it. App. p. 542, l. 17,- p. 544, l. 21.

Testimony was taken from Desa Allen Ballard, Esquire, by telephone during the Petitioner's PCR hearing. She was hired after the Petitioner's conviction, but before her sentencing. She assisted Attorney Macloskie with developing a strategy and evidence in mitigation for the sentencing phase. She hired Dr. Thomas Victor Martin to assist with presenting mitigation during the sentencing phase. App. p. 549, ll. 10-25. Attorney Ballard testified that she reviewed a summary of the evidence presented at trial that was provided to her by Attorney Macloskie. She reviewed that information with Dr. Martin. App. p. 550, l. 1-9. Attorney Ballard reviewed the trial record for a potential direct appeal sometime after the sentencing proceeding. She testified that she advised against a direct appeal based upon her opinion that there was no meritorious basis for an appeal. App. p. 551, ll. 6-19.

Dr. Thomas Victor Martin, a forensic psychiatrist, testified at the Petitioner's PCR hearing. During his testimony he was asked to clarify portions of his testimony during the sentencing proceeding in this case. For example, he recalled that at the sentencing proceeding he stated that Petitioner had ***"come to grips with some of the horror of what has happened."*** App. p. 559, ll. 6-25. App. p. 387, ll. 13-16.

In his PCR testimony he clarified that Petitioner had never admitted to any type of aggression towards anyone else. He explained that what she did admit was that she had fragments of memory that included some sort of sexual contact with the Victim. App. p. 560, ll 8-13. At an earlier point in the sentencing proceeding, Dr. Martin advised the Court that the Petitioner

"acknowledged responsibility for inappropriate sexual behavior." App. p. 385, ll. 21-24. In this PCR proceeding Dr. Martin, explained that Petitioner never admitted being the aggressor in this incident, but rather felt responsible for what, in her fragmented memory, was some sexual activity that was inappropriate. He explained that she recognized that her use of alcohol and addictive drugs had compromised her ability to function properly as a parent and an adult on the night in question. App. p. 560, l. 14 – p. 561, l. 19. Dr. Martin's PCR testimony confirmed that the Petitioner told him ***"she hadn't done it"*** and her memory that she reported to me did not substantiate that she had done anything wrong, except for perhaps, being inebriated." App. p. 574, ll. 15-18.

At the sentencing proceeding Dr. Martin described this incident as one of ***"opportunity"*** and opined that Petitioner was not a sexual predator. App. p. 388, ll. 4-9. In his PCR testimony, Dr. Martin explained that he did not mean by that statement the Petitioner had taken advantage of an opportunity but rather, that her intoxication with medications created the opportunity for the inappropriate sexual contact to happen. App. p. 562, ll. 1-17.

At the sentencing hearing Dr. Martin advised the Court that Petitioner was concerned about damage or scarring she may have inflicted by her behavior. App. p. 16, l. 22- p. 17, l. 1. Once again, in his PCR testimony, Dr. Martin clarified that what Petitioner conveyed to him was her realization that her intoxication with alcohol and Klonopin resulted in her inability to properly monitor and control inappropriate activity that took place. He indicated that she had been told the young man was harmed by what transpired and ***"she is not typically of the character of harming others."*** App. p. 563, ll. 1-12. Dr. Martin emphasized that the Petitioner never told him she perpetrated this crime. App. p. 563, ll. 13-18.

Dr. Martin explained that this patient had some memories of the activities at her home on the date in question from the earlier part of that night. Her memories become more fragmented

when she tries to recall the events later in the evening. She conveyed a fragmented memory of the young man being on top of her. She expressed the feeling that the contact was sexual. Dr. Martin testified that ***"she was very upset and distraught by the fact that she couldn't remember exactly what may have happened to her, and what he was actually doing with her. ... She could not confirm that anything that she had done would have enabled or aggressed towards this individual."*** App. p. 563, l. 19- p. 565, l. 3.

During his PCR testimony Dr. Martin testified that in his evaluation of the Petitioner he reviewed copies of records from Walgreens Pharmacy concerning the prescription record of the Petitioner from January 2005 through August 2009. He indicated that all the records he had available for review came from either Attorney Macloskie or Attorney Ballard. [2] According to his PCR testimony, those records showed that Defendant was being prescribed an average of 90, one milligram, tablets of Klonopin a month in 2008. They also showed other sedatives prescribed to Petitioner including Lunesta and Ambien CR. According to these records, by 2009 she was being prescribed Xanax. App. p. 567, ll. 3-8. Dr. Martin described Klonopin as in the family of benzodiazepines, which are sedative hypnotics. App. p. 568, ll. 19-20. His PCR testimony indicates that the dosage of Klonopin taken by the Petitioner during the operative time period ***"was at least a medium dose."*** He further provided that, ***"She would, on occasion, take more than that."*** App. p. 570, ll. 10-13. His testimony establishes that the combination of alcohol and Klonopin results in an exacerbation, or worsening of, the sedative, hypnotic effects of this medication. He described the effect of the combination as causing an exponential increase in intoxication. App. p. 570, ll. 14-21. He further provided that an individual impaired by the combination of these substances would experience disorientation, memory loss, inability

[2] The record of this case was held open for the Petitioner's counsel to submit a copy of the Petitioner's records from Walgreens Pharmacy as they were supplied to her directly by virtue of subpoena. Those records have subsequently been filed with the Beaufort County Clerk of Court's Office as Petitioner's Exhibit No. 3.

to walk and impaired motor skills. App. p. 571, l. 15- p. 572, l. 11. Dr. Martin testified that he would have been available as an expert witness during the Petitioner's trial had he been asked. App. p. 572, l. 13-20. Dr. Martin asserted on cross-examination that he did everything he was asked to do when he was hired. App. p. 572, l. 24- p. 573, l. 17.

Witness James Perkins met the Petitioner and her husband at their photo shop. He ultimately employed Petitioner in his business selling a clothing line which include women's apparel. Perkins testified that during this time period he was in the Tappeiner home on occasion. He stated that he is a contractor on Hilton Head Island. He had done work on the interior of the Tappeiner house and in June or July of 2008 he contracted with the Petitioner's husband to power wash their house. One day when he and his employees were setting up to perform that task, Perkins saw the Victim coming out of a sunroom attached to the back of the residence. He did not see anyone else at the house that day. The Petitioner and her husband were not at home. He knew the Victim by sight and had seen him at the Tappeiner residence before. App. p. 579, l. 13- p. 580, l. 25. The Victim testified at trial that he was never in the Petitioner's home when she and her husband were not there. App. p. 192, l. 18 – p. 193, l. 2.

Perkins additionally testified that he was familiar with Petitioner's dogs. He described them as hyper dogs that barked when he came into the home. He stated that they became noisy in response to any disruption in the Tappeiner home. App. p. 581, ll. 1-12. Perkins also presented testimony concerning the Petitioner's positive reputation for veracity. App. p. 584, ll. 10-18. He indicated that he would have been willing to testify for the defense at trial. App. p. 584, ll. 19-24.

The Petitioner's father, Dave Sanders, testified at the PCR hearing. According to his PCR testimony, around the summer of 2008, he noticed a change in his daughter's behavior. She was not herself. He did not discover the problems she was having from mixing her prescription

drugs and alcohol until after the incident that led to her charge. Defense Counsel did not discuss his observations concerning his daughter's problems with mixing drugs and alcohol with him. App. p. 586, l. 22- p. 588, l. 5. The Petitioner's father testified that he co-signed the note on the purchase of her house. He identified a floor plan of the house that he received during the closing of that house. That floor plan contained the measurements of all the rooms in the house. It was introduced as Petitioner's Exhibit No. 5. App. p. 588, l. 15- p. 590, l. 18.

The Petitioner presented testimony from videographer Todd Oomens. He testified to his production of a short video of the interior of the house where the incident allegedly occurred. He verified that the video was not edited in any way and that no special lenses were used to alter or distort the image. The State's objection to the introduction of the video on grounds of relevance was sustained by this Court. The Petitioner argued that this video was relevant to her allegation that Defense Counsel should have either asked for a jury view of the scene or should have introduced demonstrative evidence illustrating the interior of the house. The CD of this video was marked as Petitioner's Exhibit No. 6, for identification only. App. p. 591, l. 23- p. 596, l. 2.

As previously noted, the Petitioner's identical twin sister, Elizabeth W. Auerback, testified at this PCR proceeding. She testified that during the summer of 2008 she observed her sister drinking heavily on top of her prescription medications. She had expressed her concerns about her sister mixing these drugs with alcohol. She recalled that when Petitioner drank heavily in conjunction with her medications she could not communicate very well, she had difficulty walking, she sometimes fell and when she went to bed you could not wake her up. App. p. 598, l. 19- p. 600, l. 24.

The Petitioner testified that she fully understood all the risks associated with going forward with her PCR action. She also waived any claims she might have raised against her PCR counsel for her involvement in the Petitioner's decision to withdraw her direct appeal.

App. p. 602, l. 12- p. 606, l. 13. She testified that Defense Counsel had advised her that her case was most likely not going to go to trial. She was notified on a Friday that her case was going to trial on Monday. App. p. 606, ll. 15-25.

The Petitioner asserted that Defense Counsel never discussed putting up a defense with her prior to trial. He discussed calling her husband as a possible witness with her, but she never knew for certain whether he was going to be called. Defense Counsel never told her that if she put up any evidence at all she would lose the right to the final jury argument. App. p. 608, ll. 4-15. Defense Counsel never discussed the possibility of introducing evidence before the jury of her drug use and her drinking and how they affected her on the evening in question. App. p. 608, ll. 16-20.

The Petitioner testified that she discussed her recollections of that evening with Defense Counsel. She also met with Dr. Nolan prior to trial. Defense Counsel never discussed the possibility of using Dr. Nolan as a witness before the jury. App. p. 608, l. 21- p 609, l. 6. The Petitioner asserted however, that if Defense Counsel had told her it was necessary to establish her defense, she would have authorized him to introduce evidence concerning her problems with prescription drugs and alcohol. App. p. 610, ll. 4-8. At her PCR hearing, the Petitioner testified that she currently weighed 138 pounds. She acknowledged the she was about thirty (30) pounds lighter at the time of the incident. She admitted that in the summer of 2008 she was drinking three (3) to five (5) drinks a night. She recalled that sometimes she drank mixed drinks and sometimes she would drink a bottle of wine. She testified that she was taking Klonopin three times a day at the time of the alleged assault. In addition to the Klonipin she was taking sleeping medications including Ambien, Lunesta, over the counter sleeping medications or Tylenol PM. App. p. 610, l. 9- p. 611, l. 2.

The Petitioner testified that she told Defense Counsel that during this time period she

sometimes experienced blackouts and that there were times when she had no memory of certain episodes. She would have been willing to testify to these matters had she been advised to do so. App. p. 611, ll. 3-15. She confirmed that she had no prior criminal record. She denied having ever had any problems with the law or having fantasies about minor children. She testified that she had been married nearly fourteen (14) years and that she and her husband have two daughters ages nine (9) and thirteen (13). App. p. 611, l. 16- p. 612, l. 1.

The Petitioner's PCR testimony established that during the summer of 2008 she was already employing the Victim's sisters as babysitters episodically. The sisters began providing regular after school care for her daughters in September, 2008, after the alleged incident with their brother; the Victim. The Petitioner fired the sisters in late October, 2008 around Halloween. App. p. 612, l. 2- p. 613, l. 20. The Petitioner testified that she had an altercation with the Victim's mother concerning her decision to terminate her daughters. Petitioner indicated that she had fired the girls because she had been told that the girls and their brother had been using their hide-a-key to enter the house without permission. App. p. 613, l. 21- p. 614, l. 11.

The Petitioner's testimony also verifies that from January, 2008 through the summer of 2008 she filled her prescriptions at the Walgreens on Simmonville Road near their home. App. p. 616, ll. 7-13.

The Petitioner's husband testified at her PCR hearing. Mike Tappeiner's testimony verifies that Defense Counsel never discussed with him whether he could verify exactly when the Victim came to their home asking for help getting a camera battery before he called him as a witness at his wife's trial. He couldn't recall Defense Counsel ever discussing the purpose behind calling him as a witness for the defense before he was actually called to the stand. App. p. 620, l. 3- p. 621, l. 6. In his PCR testimony, the Petitioner's husband verified that in the

summer of 2008 she was drinking 3 to 5 drinks a night on top of her prescription medications. App. p. 621, l. 7- p. 622, l. 5. He expressed the opinion that the combination of alcohol and her prescription medications affecting her ability to walk as well as her other motor skills and her decision making. He admitted that he had expressed concern about his wife's pattern of mixing alcohol with her medications. App. p. 622, ll. 3-5.

Preservation of Issues in the Lower Court

In the Order of Dismissal originally issued by the lower court, the Court made finding of fact and rulings of law, as required by S.C. Code Ann. §17-27-80, on only three of the allegations, and a portion of a fourth, developed and argued by Petitioner below. *See, Allegations; allegation 7,10, 12 and 21(c).* In her Rule 59 (e) motion, Petitioner expressly asked for proper rulings on all the issues raised and argued by her in her PCR action. The lower court's response to this motion was to file an Amended Order of Dismissal which stated, as to Allegation 1, which was not covered in its original Order of Dismissal,

> **Petitioner fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance. Further, even if this Court were to find a deficiency in Defense Counsel's representation, any such deficiency did not prejudice the defense in that this Court does not conclude from reviewing the evidence by a preponderance of the evidence the result of the trial would have been different.**

See, Amended Order, App. pgs. 845 – 846.

With regard to the remainder of the allegations not addressed in the lower court's original Order of Dismissal, the Amended Order of Dismissal simply stated,

> **Petitioner fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance, as this court does not conclude from reviewing the evidence that by a preponderance of the evidence the result of the trial would have been**

different.

In her Second Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, Petitioner very respectfully asserted that the lower court's Amended Order of Dismissal did not remedy the inadequacies of the original order. Petitioner argued that the second order, like the first, failed to comply with S.C. Ann. § 17-27-80 which provides, in relevant part, that, "*The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented...* (emphasis added). Petitioner also pointed out that the Amended Order of Dismissal, like the original, failed to address the lower court's refusal to permit Petitioner to admit certain evidence in support of her ***Allegation 11***. ***See, App. pgs. 851 – 853.*** That omission had been duly noted by Petitioner in her original Rule 59(e) motion as well. ***See, App. p. 680, fn. 1.*** Petitioner's second effort to get the lower court to issue an order in compliance *with §17-27-80, Rule 52(a)* and *Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992)*, was subsequently denied by the lower court without analysis or explanation by order dated August 29, 2013. ***See, App. p. 856.***

This Honorable Court has consistently declined to review issues on their merits in a Post-Conviction Relief appeal unless the Order of Dismissal contains the findings of fact and rulings of law required by section § 17-27-80 for the issue in question. The requirement of a detailed Post-Conviction Relief Order was emphasized by this Court in *Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007).* Counsel for Petitioner expressly noted that she meant no disrespect to the lower Court when she argued that she could not fail to bring the insufficiency of the Orders of Dismissal to the Court's attention without risking a subsequent finding, by this Court, or the Court of Appeals, that Petitioner had waived her right to be heard on the merits of most of the issues raised during her circuit court Post-Conviction Relief action.

Petitioner now respectfully urges this Honorable Court to treat all of her issues as duly

preserved for appellate review where she has made every effort to obtain an order adequately addressing each of the issues argued herein.

A.

Question I

Allegations 1,2,3,4,6,9,10, 11,14,18,20,24 and 26

Did the lower court err in failing to grant the Petitioner relief where she met her burden of proof with regard to her claim that Trial Counsel failed to provide her reasonable professional assistance of counsel prior to and during her trial in that he failed to adequately prepare and present a defense in Petitioner's case?

The Petitioner's allegations fall into two categories. The first group of allegations address themselves generally to the failure of Defense Counsel to prepare and present a defense at the Petitioner's trial. **See, Allegations 1,2,3,4,5,6,9,10, 11,14,18,20,24 and 26**

Allegation 1

As discussed below, the Petitioner met her burden of proof with regard to her claim that Defense Counsel failed to develop and employ a clear theory of defense at her trial. In addition, she has demonstrated that readily available evidence existed which could have been offered in support of her theory of defense. She has successfully shown that her decision not to testify in her own behalf was negatively impacted by erroneous legal advice from Defense Counsel concerning the possible consequences of testifying at her trial. For these reasons, as discussed in further detail below, Petitioner now argues that the lower court erred in failing to grant her relief on these grounds. She respectfully submits that her judgment and sentence should be set aside and her case should be remanded to the Court of General Sessions for a new trial.

Allegations 2-4 and 6

In his opening argument to the jury Defense Counsel gave the jury a preview of the Petitioner theory of defense; that she was the victim of a sexual assault as opposed to the

perpetrator. Having set the stage for this defense, Defense Counsel did not prepare to present evidence at trial which would have supported that theory. Ironically, Defense Counsel did present evidence supporting the notion that the Petitioner's prescription medications negatively affected her ability to make a knowing, voluntary and intelligent statement to the police. Successfully using the testimony of expert witness Nolan, Defense Counsel was able to convince the trial judge that the Petitioner did not know what she was doing at the time she gave her statement to police. That strategy was effective even where the challenge was based purely upon the impact of her prescription medications on her ability to issue a reliable statement in the face of certain interview techniques. The officer who conducted the interview in question acknowledged that, at the time the statement was taken, there was no evidence that the Petitioner had been drinking on top of her medications. The Petitioner has demonstrated that Defense Counsel could have used the same expert he used in the *Jackson v. Denno* proceeding, or an expert of similar credentials, to testify as to the effect the combination of alcohol with those same prescription medications would have had on the Petitioner on the evening when she allegedly pulled an unwilling young man of nearly 14 years of age up a flight of stairs to sexually molest him.

In the *Jackson v. Denno* hearing, Dr. Nolan relied exclusively on historical information concerning the Petitioner's prescription drug use during the time period when this statement was taken. Fortunately for the Petitioner, the Court did not question the fact that there was no evidence before the Court to corroborate her claim that she was taking powerful prescription medications at the time her statement was taken approximately six months after the event that formed the basis for the charge in question. The Petitioner has now demonstrated that there was readily available evidence and testimony which could have established the prescription drugs she was taking at the time of this event, the frequency with which they were prescribed, and the

dosages at which they were prescribed. ***See, App. pgs 657 -661; Petitioner's Exhibit No. 3.***

Likewise Petitioner has demonstrated that expert testimony from Dr. Martin, or another similarly qualified expert, could have established for the jury the dire consequences of mixing alcohol with these powerful medications. As the Petitioner has shown, testimony was available which would have established that the Petitioner had a pattern of mixing her prescription medications with alcohol during the operative time period. The testimony of Dr. Martin illustrated that the mixture of these prescription drugs with alcohol would have affected her motor skills, her balance, her ability to walk and her capacity to communicate effectively. The testimony of her husband confirmed that the Petitioner experienced such physical problems when she combined alcohol with her regular prescription medication. Testimony from her twin sister also supported the fact that the Petitioner had a problem with mixing alcohol with her prescription medications. This testimony could have been used to create reasonable doubt as to whether the Petitioner would have been physically and mentally capable of the acts alleged by the Victim. ***See also, App. pgs. 662 – 664.***

Likewise, the Petitioner has established that Defense Counsel could and should have developed testimony to establish the Petitioner's height and weight at the time of the incident. While it is true that the jury had the opportunity to see the Petitioner at trial, that opportunity for observation was no substitute for being advised of her shockingly low weight at the time of the incident. The jury had no way of knowing whether she had perhaps lost a significant amount of weight between the time of the incident and her trial. In addition, since the Petitioner did not testify, the jury's opportunity to view the Petitioner would have been limited to seeing her either sitting or standing behind a table in the courtroom. Her testimony at her PCR hearing established that she weighed 138 pounds at the time of the hearing, but that she had weighed about 30 pounds less than that at the time of the incident. The credibility of that assertion was

witness in her own defense at trial even if the Court saw fit to suppress her statement to the police. Based on Defense Counsel's own PCR testimony, it is clear that he gave his client erroneous advice on this crucial point, and therefore was ineffective in his representation on this crucial trial decision. The Petitioner also alleges that trial counsel was ineffective for failing to discuss the possible use of character witnesses with her in preparation for trial. Once again, had Defense Counsel presented a defense on behalf of the Petitioner, including testimony from her, the possible use of character witnesses may have been an important consideration. The record below establishes that the Petitioner was a college educated woman with no prior criminal history whatsoever. The Petitioner should have been advised that if she took the stand, and the State elected to attack her character, she would have had the option of presenting character witnesses. She has demonstrated that at least one such, non-familial character witness would have been available to testify on her behalf at trial. Likewise, since Defense Counsel was not prepared to fully present evidence in support of the Petitioner's theory of Defense, she alleges that he should have advised her that she would lose the right to make the final argument to the jury if she introduced any evidence at trial. The Petitioner's testimony indicates that Defense Counsel never discussed this important consideration with her prior to or during trial. Defense Counsel did not recall ever advising her on this point. Given the limited value of the husband's testimony to the defense, this Court agrees that Defense Counsel was ineffective for failing to advise the Petitioner of this important consideration.

Similarly, Defense Counsel failed to present witnesses who were not related to the Petitioner to establish that the family dogs would have reacted excitedly to any disruption in the home. The Petitioner's husband, whose testimony might have been viewed as suspect because of his relationship to the Petitioner, was the only defense witness presented on this critical point. Even if Defense Counsel did not plan to introduce evidence on this crucial point prior to trial,

once the State made an issue of how much the husband had been drinking on the night in question, Defense Counsel should have been prepared to present a non-familial witness to establish the fact that the family dogs would have sounded an alarm if they had heard the boy screaming as he claimed.

The Petitioner has also asserted that Defense Counsel was ineffective for seeking to introduce evidence concerning the fact that the complaining witness had previously reported being the victim of a sexual assault. In a vacuum there may appear to be no advantage to the introduction of such evidence at trial. Had Defense Counsel been prepared to fully present the defense he merely hinted at during his opening remarks to the jury however, it would have been advantageous for the Defense to establish that there was in fact a reasonable explanation for how this adolescent boy was so familiar with the various sex acts alleged at such a young age. As noted above, at trial, even the Solicitor acknowledged that Defense Counsel could have taken appropriate measures to seek the introduction of this type evidence and simply did not do so. *See, S.C. Code Ann. §16-3-659.1.* As will be discussed *infra*, once the trial was underway, other powerful reasons for the introduction of this evidence developed and Defense Counsel still did not seek to establish that the facts warranted an exception to the Rape Shield Statute.

As should have been clear to Defense Counsel from the discovery materials in this case, the complaining witness claimed that he had *screamed* for help while he was being sexually assaulted and no one came to his aid. The Petitioner has alleged that Defense Counsel should have been prepared to introduce demonstrative evidence to establish the setting in which this incident occurred and the unlikelihood that the boy could have in fact screamed as he claimed without being heard by the victim's husband who was asleep in the next room. In support of this allegation, the Petitioner has introduced a floor plan of the house where this event occurred which contains dimensions of all the rooms in the house and common areas in the house. *See,*

App. p. 665; Petitioner's Exhibit No. 5. This floor plan establishes that the room where this assault allegedly happened was only a few feet away from where the Petitioner's husband lay sleeping. Had Defense Counsel introduced evidence in support of the defense theory suggested by his opening argument, this floor plan would have supported the Petitioner's claim that the version of the facts put forth by the complaining witness was not credible. Petitioner asserts that Counsel should have been prepared to demonstrate the size and layout of the house where this sexual assault allegedly occurred. Simply put, if PCR Counsel could discover this evidence, there is no logical reason why Trial Counsel could not have as well. This evidence may well have had an impact on the jury's judgment concerning the credibility of the Victim's story. While this Honorable Court may not agree that the unusual step of allowing a physical jury view of the scene was necessary, Petitioner would argue that she has demonstrated that other evidence could have been found or developed which would have given the jury a better sense of how implausible the complaining witness's story was. Defense Counsel was ineffective for failing to introduce evidence which would have demonstrated the size and layout of the house. In addition, Petitioner would submit that the lower court erred in refusing to allow her to introduce into evidence a video of the interior of the house where this crime allegedly happened. See argument *infra.*

As noted in the PCR testimony, Defense Counsel admitted that he did not present any evidence to support the theory of defense he advanced in his opening argument and further, that absent such evidence he was left with no foundation for requesting jury instructions which would have supported the Petitioner's theory of defense. Petitioner now argues that if Defense Counsel had presented readily available evidence in support of the theory that the Petitioner *was the victim* of a sexually precocious adolescent, as opposed to the aggressor as he claimed, the Petitioner would have been entitled to jury instructions which advised the jury that the Petitioner

could not be found criminally liable for having been involved in sex acts with a minor if they concluded that at the time of the acts she was either unconscious, so incapacitated as to be unable to willfully engage in the activity in question or that she was physically helpless to fend off sexual advances made against her by another. In other words, the Petitioner would have been entitled to have the jury instructed on the law reflected in *S.C. Code Ann. § 16-3-654*, which defines Criminal Sexual Conduct in the Third Degree as occurring when a person to commits a sexual battery upon a person the actor knows, or has reason to know, is ***"mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish the battery."*** (Emphasis added). Likewise, as the Petitioner asserts, she would been entitled to a jury charge that informed the jury that a juvenile, even one under the age of fourteen, may be prosecuted for committing the crime of criminal sexual conduct pursuant to South Carolina Law. *See, S.C. Code §16-3-659.* Petitioner now respectfully submits that the lower court erred in failing to rule that Trial Counsel's failure to introduce available evidence in support of her theory of defense, ultimately deprived her of the opportunity to have her jury receive instructions consistent with that defense.

For all the reasons set forth above, Petitioner urges this Honorable Court to find that Defense Counsel failed to provide the Petitioner reasonable professional assistance of counsel prior to and during her jury trial in that he neglected to prepare and present readily available evidence which would have supported the theory of defense he himself put forth in his opening argument. The Petitioner has demonstrated that the evidence in question was likely to have generated reasonable doubt concerning the veracity of the complaining witness. Therefore, the Petitioner has established that there exists a reasonable probability that the outcome of her trial would have been different but for the errors and omissions of Defense Counsel in preparing and presenting her defense at trial.

Question II

Did the lower court err in refusing to allow Petitioner to introduce a video tape of the interior of the house where the sexual assault alleged in this case was said to have occurred?

As noted above, during her PCR hearing, Petitioner attempted to introduce a video taken of the interior of the house she once shared with her husband and children. The video tape in question was taken by a professional videographer at the request of PCR Counsel. The individual who made the recording was presented as a witness for Petitioner during her evidentiary hearing. He testified to the location of the shoot, as well as, the timing and circumstances of the shoot. That witness, Todd Oomens, testified that he did nothing in the preparation of this video to alter or distort the images on the video. App. p. 591, l. 21 – p. 596, l. 5. Respondent objected to the introduction of this video on grounds of relevance. App. p. 592, ll. 21 – 23.

This short video, approximately six to seven minutes, was played for the Court during this PCR hearing. App. p. 592, l. 24 – p. 593, l. 12. PCR Counsel argued that the video was relevant inasmuch as it illustrated that Trial Counsel could have presented such a video, in lieu of a jury view of the scene, to demonstrate how implausible the victim's claims of outcry were in light of the size of the home and the proximity of the alleged location of the assault to Petitioner's husband and others in the home on the night in question. App.p. 593, ll. 14 – 25. Before PCR Counsel could finish her arguments concerning this piece of evidence, the lower court sustained the State's objection on grounds of relevance. App.p. 594, ll. 1 – 10. When PCR Counsel attempted to place additional grounds on the record for appeal, she was cut off by the lower court and instructed to proceed. Although the lower court permitted PCR Counsel to have this exhibit marked for ID purposes, she was not permitted to make further arguments for the record. App. p. 594, l. 12 – p.595, l. 14.

The burden of proof is on the Petitioner in a request for relief pursuant *to S.C. Code Ann. 17-27-45, et seq. Thompson v. State, supra,; Rule 71.1(e), SCRCP.* There is an endless list of PCR cases that have been lost on appeal due to the Petitioner's failure to present, in the context of collateral review, the very evidence he claims his trial counsel was ineffective for failure to produce at trial. The logical relevance of this evidence is obvious to anyone viewing the video in question. *See, Petitioner's Exhibit No. 6, for ID only; to be transported for inspection by this Court.* Petitioner respectfully asserts that the lower court erred in refusing to allow the introduction of this video as part of her showing on the merits of her PCR claim found in Allegation 11. For that reason, she now asks this Court to find that the lower court should have permitted the introduction of this piece of evidence and should have considered it in his decision on the merits of this allegation.

B.

The second category of allegations made by the Petitioner in support of her Sixth Amendment claims address the failures of trial counsel during her trial. See, Allegations 5, 7, 12, 15, 17, 19, 21, 22, 23, 25 and 27.

Question III

Allegation 5

Did the lower court err in failing to rule that Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Petitioner's trial?

The testimony of Dr. Martin during the PCR hearing held in this matter clearly illustrates that he was not adequately prepared to testify at the Petitioner's sentencing proceeding. Multiple statements made by Dr. Martin during the sentencing proceeding would indicate to any listener that the Petitioner had in fact admitted culpability in the alleged sexual battery against the Victim. Dr. Martin is a well experience forensic psychiatrist. The testimony he presented at the Petitioner's sentencing proceeding would lead any reasonable listener to conclude that the

Petitioner admitted her culpability for the charged offense to this doctor. Yet, it is clear from Dr. Martin's PCR testimony that she did not. His clarifications concerning conversations with the Petitioner about this incident paint a very different picture from that presented by his testimony during the sentencing proceeding. For this reason, Petitioner respectfully asserts that the lower erred in failing to find that Counsel, and Attorney Ballard, failed to provide Petitioner effective assistance of counsel prior to and during her sentencing proceeding in that they neglected to adequately prepare this witness for presentation of testimony at that hearing. Petitioner asserts that their failures in this regard resulted in this highly regarded expert giving testimony which actually may have acted against Petitioner in that it erroneously solidified the validity of the finding of guilt reached by the jury. Given the wide latitude the trial judge had in sentencing in this case, it is impossible to know with any certainty what if any difference this misleading testimony may have made in the Trial Court's ultimate decision regarding the penalty to be imposed. While Petitioner asserts that a new trial should have been granted by the lower court on other grounds, she would respectfully submit that she should have been granted, at minimum, a new sentencing proceeding on this issue.

Question IV

Allegation 7

Did the lower court erred in finding that Trial Counsel's deficient performance, in failing to object to repeated references throughout trial to the fact that the decision to arrest the Petitioner was not made until after her two hour police interview where the statements made by the Petitioner had been ruled inadmissible, did not prejudice Petitioner's right to a fair trial?

As previously discussed, the trial judge ruled that the Petitioner's statement to the police was not knowingly, voluntarily or intelligently entered and excluded it from evidence at trial. Notwithstanding this ruling, the State repeatedly made reference to the fact that the Petitioner had been interviewed by law enforcement for 2 hours before she was arrested on the charge of Second

Degree Criminal Sexual Conduct. In the prosecution's closing arguments the Solicitor chose to emphasize this point to the jury. Defense Counsel has acknowledged that he should have objected to any such reference by the prosecution during this trial. The lower court agreed that Counsel's representation in this regard was deficient, however, the Court found that, **"that deficiency did not prejudice the defense in that this Court does not conclude from a preponderance f the evidence the result of the trial would have been different."** ***App. pgs. 668 – 669 (Emphasis added).*** In her first Motion to Alter or Amend, Petitioner specifically argued that the Order of Dismissal, provided "no basis for the Court's conclusion that the outcome of the Petitioner's trial would not have been different but for the errors and omissions of Trial Counsel recognized within the language of the Order." App. p. 680; Petitioner's first Rule 59(e) Motion.

As previously stated, an involuntary statement is inadmissible and may not be used for any purpose, even impeachment, at trial. Here, the trial judge could not have been clearer in her ruling. Nevertheless, the State repeatedly attempted to do through the back door what the trial judge had expressly blocked them from doing directly; tell the jury the Petitioner had confessed.[3] Where the Court had ruled that the statement in question was not voluntarily, knowingly and intelligently entered, the prosecution should not have been allowed to invite the jury to infer that the Petitioner had confessed by repeatedly implying as much through their questioning of law enforcement witnesses and in their closing argument. Defense Counsel clearly erred in failing to object to this line of questioning and argument.

The fact that the Petitioner was prejudiced by this improper line of testimony and argument is readily apparent. At this trial, there was no physical evidence proving the sexual battery alleged even happened. The Victim waited six months to make this allegation and did not do so until the

[3] Sadly, this improper use of the statement ruled by Judge Mullen to be unreliable and inadmissible, was further perpetuated by the PCR Judge. In this Order of Dismissal issued by the lower court, actually saw fit to make reference to the details of this so called confession in a footnote to his order in a manner which punctuated the most prejudicial details of the statement in question. See, Order of Dismissal; App.pgs. 687-688, fn. 1.

Petitioner had fired his sisters from her employment. The version of the facts told by the complaining witness may have been viewed by the jury as suspect on its face in light of these factors, as well as the size of the house where the assault allegedly occurred, the fact that no one else heard him cry out and the fact that the Petitioner was extremely thin and had been drinking.[4] Any reasonable doubt the jury may have had concerning the veracity of this adolescent's story may well have been negated by the Solicitor's questions and argument which implied that the Petitioner's statements to the police during her interview caused them to conclude she was guilty and place her under arrest. Defense Counsel's failure to object the first and every time the State offered this line of testimony and argument constituted ineffective assistance of counsel and warranted the grant of a new trial.

Argument V

Allegations 8 and 27

Did the lower court err in failing to grant Petitioner a new trial where she met her burden of proof with regard to her allegation that Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped where that evidence was material to the defense and where he failed to adequately cross-examine the State's expert witness concerning reasons why the complaining witness may have delayed reporting his alleged assault by the Petitioner?

As detailed in the factual summary above, after a lengthy debate at trial, in a rather prescient ruling by Judge Mullen[5], the testimony of State expert Mary Beth Hefner was significantly restricted at trial. This witness revealed *in camera* that the complaining witness had told her one of the reasons he waited to report the alleged assault was that he had previously reported another sexual assault against him and nothing was done about it. Ultimately the State was allowed to present testimony from this witness concerning various reasons why a child might delay

[4] As previously noted, the jury heard no evidence concerning the Applicant's prescription drug use. They did however hear testimony that the Applicant had been drinking on the night in question.

[5] ***

reporting a sexual assault. She did not testify concerning any interviews she conducted with the complaining witness nor did she opine as to why he waited six months to report his alleged assault by the Petitioner.

As noted above, Defense Counsel did not cross-examine this witness at all concerning other possible explanations for why a child might delay reporting such an incident including the one reason he had clearly provided this witness in her interview with him. Despite the fact the trial judge made it perfectly clear that the State was risking opening the door to testimony about the prior incident, Defense Counsel did not seek leave of Court to introduce evidence about the prior incident as an exception to the Rape Shield Law. In fact, Defense Counsel did not cross-examine this witness concerning *any* alternative explanations for why the young man may have waited six months to make these claims against the Petitioner. Defense Counsel's failure to seek leave to introduce testimony concerning the reason this young man gave for his delayed report of this incident resulted in the jury hearing only other explanations for the delayed report of a sexual assault which were more favorable to the prosecution. Despite the fact that this young man told this witness exactly why he didn't report the incident earlier, all the jury heard were hypothetical explanations for such behavior. In addition, Defense Counsel did not question this witness as to whether this young man's late allegations may have simply been motivated by his anger over the Petitioner having fired his sisters and upset his mother. He similarly didn't ask this witness whether the young man may have taken the offensive and reported his assault by the Petitioner out of fear that she would eventually remember what he had done to her and report him.

The provisions of the Rape Shield Law provide some much needed protections and serve a worthy purpose. On the facts of this case however, Defense Counsel clearly should have sought a ruling that the testimony of the State's expert witness necessitated a finding that testimony

concerning what reason this young man actually gave for the delayed report of this alleged assault was exempt from the prohibitions of the rape shield law.

In addition, Petitioner asserts that Defense Counsel was ineffective for neglecting to cross-examine this witness about other possible explanations for the delayed report in this case which were potentially more beneficial to the defense than those proposed by this witness. In addition, Defense Counsel was ineffective for failing to cross-examine this witness concerning her assertions of statistical data concerning the subject of delayed reporting where she provided no authority for the percentages she testified to. Defense Counsel also neglected to cross-examine this witness about her claim that boys more frequently delay reporting sexual assaults where she provided the Court no authority for that assertion.

In this case, the fact that this young man waited six months to raise these claims may have created reasonable doubt in the minds of the jury however, the State was allowed to explain away the delay with one sided testimony which failed to explore potential explanations for the delay that were not as innocent as those put forth by this witness. The failure of Defense Counsel to adequately cross-examine this witness allowed the State to deliberately omit *a known reason* for the delay in this case which had been asserted by the young man himself. Not only would this cross-examination have been beneficial in providing a reason for the delayed reporting that was not relevant to claims of Petitioner's guilt, but the information in question would have incidentally have provided the jury with an explanation, other than assault by Petitioner, for why one so young might be so sexually precocious. Where the Victim's delay in making these accusations was a factor which the defense could argue should be considered in evaluating the truthfulness of his claims, Defense Counsel's failure to sufficiently cross-examine this witness was prejudicial to the Petitioner. The lower court clearly erred in failing to grant Petitioner a new trial on this ground.

VI

Allegation 19

Did the lower court err in failing to find Trial Counsel ineffective for failing to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not permitted to provide an expert opinion at trial?

The Petitioner asserts that Defense Counsel should have objected to the jury charge given at the Petitioner's trial concerning expert opinion testimony where the State's sole expert witness in this case ultimately *did not present any opinion testimony.* She asserts that the effect of this instruction was to give undue weight to the testimony of this witness when she in fact had not presented expert opinion testimony which warranted the charge in question. As discussed above, the failure of Defense Counsel to adequately cross-examine this witness had already allowed the State to present very favorable, and one sided testimony, on the subject of delayed reporting of sexual abuse by a child. The jury charge in question would have tended to give that testimony undue weight and should have been objected to where the witness did not actually give opinion testimony tied to the facts in this case.

VII.

Allegation 12

Did the lower court err in concluding that Petitioner had failed to demonstrate prejudice arising from Trial Counsel's failure to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault?

Throughout the Petitioner's trial, the State was permitted to introduce hearsay testimony concerning details of the alleged sexual assault which went beyond the report of the time and place of the alleged incident. It is well established in South Carolina that the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter

asserted unless an exception to the rule applies. *Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991)*. Our Court's have recognized three exceptions to the rule against hearsay that allow prior consistent statements of a witness to be admitted. First, in criminal sexual conduct cases, when the victim testifies, evidence from other witnesses that she complained of the sexual assault is admissible in corroboration, limited to the time and place of the assault and excluding details or particulars. *Id. at 367, 401 S.E.2d at 143.* Second, the *res gestae* or excited utterance exception allows corroborative rape testimony without the time/place exception. *State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)*. Third, when a witness has been impeached by proof that the witness has made a prior inconsistent statement, proof is allowed that the witness made a prior consistent statement, provided that the prior consistent statement must have been made before the "existence of [the] relation of [the witness] to the cause." *Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960)*. *See, Jolly v. State, 314 S.C. 17, 20, 443 S.E.2d 566, 568 (1994).*

In her PCR action, Petitioner alleged that trial counsel was ineffective for failing to object to several instances of hearsay testimony. Since no objections to the testimony were actually levied at trial, the lower court and Petitioner were left to guess as to which hearsay exception the State would have argued that the testimony fell within. On the facts of this case, the error is clear. The complaining witness did not make the allegations in question until six months after the alleged incident and therefore, the statements would obviously not fall under the *res gestae* or excited utterance exception. This testimony was not offered as a prior consistent statement in response to impeachment on some aspect of the testimony of the alleged victim. And, in more than one instance, this testimony far exceeded a report of the incident limited to the time and place of the assault. See, App. p. 258, ll. 2 – 5; App. p. 275, ll. 6 – 24. While the lower court recognized that Trial Counsel's representation was deficient in this regard, the Court went on to state, without any findings of fact or specific rulings of law, that, ***"Based on a preponderance of***

the evidence, I find that but for counsel's deficiency, there is insufficient evidence to find that the result of the trial would have been different.*"** **App. pgs. 688 – 689; Order of Dismissal.** Once again, in her first 59(e) motion, Petitioner respectfully asked the lower court to make the specific findings of fact and rulings of law required, but the Court declined to do so. ***See, App. pgs. 844 – 845.

The inherent prejudice arising from such testimony was recently discussed by our Court of Appeals in the case of *Vail v. State, 402 S.C. 77, 738 S.E.2d 503 (Ct. App. 2013).* Petitioner urges this Honorable Court to find that Defense Counsel provided the Petitioner with ineffective assistance of counsel by neglecting to object the first and every time the State introduced hearsay testimony which exceeded the well established boundaries for such evidence and to recognize that he prejudice arising from this omission warrants a new trial.

VIII.

Allegation 16

Did the lower court err in failing to grant Petitioner a new trial where she met her burden of proof with regard to her allegation that Trial Counsel failed to provide the Petitioner effective assistance of counsel when he failed to question the Petitioner's husband, when he testified at trial, concerning the victim's pattern of visitation in their home during the time period prior to the accusations by the victim?

When the Petitioner's husband testified at the Petitioner's trial, he recalled an incident which occurred sometime after the evening when the Victim was allegedly assaulted by his wife. Specifically, he testified about getting a phone call from the Petitioner at the family camera shop asking him to bring a camera battery home for the young man in question. According to his testimony, the Petitioner told him that the boy had come to their door asking for their help in getting a battery for his camera. He remembered bringing the battery home for the young man but reported that he never came back by to get it. In response to this testimony, the prosecutor cross-examined

the husband about whether this incident occurred before or after the young man had made the allegations against his wife. The husband's testimony on this point was less than clear and opened the door for the prosecutor to argue in it's closing arguments that the husband's testimony was some kind of plan to try and help his wife and that the testimony had essentially backfired. App. p. 297, l. 20 – p. 298, l. 7; App. p. 299, l. 7 – p. 301, l. 4; App. p. 343, l. 25- p. 344, l. 12.

It is apparent from the PCR testimony of the husband that he wasn't sure what he was being called to testify concerning at trial. The incident with the camera battery was not discussed with him in advance of his testimony. Given the significance of any attempt to show that this young man continued to come to the Tappenier residence *even after the date of the alleged rape*, it was crucial that Defense Counsel know for certain what the husband's testimony on this point would be if he was called to testify for the defense. The obvious failure of Defense Counsel to interview this witness concerning his potential testimony at trial resulted in the presentation of testimony that appeared to be equivocal at best and manufactured at worst. Defense Counsel was ineffective for neglecting to adequately interview the husband in advance of his trial testimony. His failure to do so resulted in the presentation of his testimony in a manor which cast doubt on the credibility of the rest of his testimony. Given the fact that he was the only witness for the defense, this error was particularly prejudicial to Petitioner in that it cost her the opportunity to present the last argument to the jury.

IX.

Allegation 22

Was Trial Counsel ineffective for failing to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial?

As discussed in the summary of testimony set forth above, Defense Counsel neglected to use an incident report contained in the discovery materials in this case, as well as the Victim's

statement included in that report, to impeach the complaining witness concerning critical portions of his trial testimony. At trial he claimed the sex act forced upon him by Petitioner ended when he pushed the her off of him and fled the scene. In his statement to the police he says he fled the Tappeiner house *after the Petitioner left the room.* In the incident report the young man is quoted as claiming that the Petitioner got off of him after she was finished and that she told him she got off of him before he ejaculated because she did not want to get pregnant. ***See, Petitioner's Exhibit No. 1.*** Given how crucial the issue of the Victim's credibility was to the Petitioner's trial, this Court finds that Defense Counsel was ineffective for neglecting to use the information contained in the discovery materials to impeach him. A more thorough cross-examination of the complaining witness concerning these points may well have convinced the jury that his story was not truthful and therefore, Trial Counsel's failure to highlight the inconsistencies between the different versions of the event told by the complaining witness was prejudicial to Petitioner.

X.

Allegations 21 and 7

Did the lower court err in failing to grant Petitioner a new trial where she successfully demonstrated at her PCR hearing that Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments?

This Court is particularly concerned with Defense Counsel's failure to object to numerous improper and prejudicial statements made by the prosecution during the State's closing arguments to the jury. Defense Counsel has freely admitted that he failed to raise objections to several portions of the State's closing argument which were improper. Petitioner now respectfully argues that the lower court erred in finding that Petitioner was not prejudiced by Trial Counsel's failure to object to statements made by the prosecution in its closing arguments which were clearly calculated to imply that Petitioner was not arrested until after she

confessed to the police after lengthy interrogation. While the lower court recognized that Trial Counsel's representation was deficient as regarded his failure to object to this line of closing argument by the prosecution, however, the Court went on to rule, without findings of fact or conclusions of law, that, " That being said, this Court does not believe from the evidence presented there exists a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." ***App. p. 845; Order of Dismissal.*** Once again, Petitioner's effort to obtain a more precise ruling from the lower court was futile. ***See, Rule 59 (e) motion; App. p. 680.*** Petitioner now respectfully argues that the lower court clearly erred in failing to grant Petitioner a new trial on this ground.

As previously noted, in this trial the State repeatedly attempted to imply that the Petitioner had confessed by drawing attention to the fact that she was not arrested until after she was questioned by the police for approximately two hours. Where the trial court had excluded her statement to the police from evidence, questions designed to imply she had given an incriminating statement that resulted in her arrest were clearly improper. Likewise, the State's attempt to drive this point home during their closing arguments to the jury was equally improper. App. p. 341, l. 25 – p. 342, l. 16. The prejudice arising from this argument is obvious. In a case where the credibility of the Victim's story was crucial to the State's case, the implication that the Petitioner had actually implicated herself in her interviews with the police was highly prejudicial.

Petitioner's Allegation 21 in fact alleged that Trial Counsel was ineffective for failing to object to three improper arguments advanced by the prosecution during closing arguments. The lower court only ruled on Counsel's failure to object to two of the arguments addressed by Petitioner's allegation. In another portion of the State's closing argument the prosecutor

effectively vouched for the credibility of the complaining witness in a manner that was clearly improper. Defense Counsel's failure to object to this line of argument constituted ineffective assistance of counsel as well. In his closing argument to the jury the prosecutor talked about the 200 forensic interviews his expert witness had conducted in her career and then stated, ***"Folks, these are people who can detect when someone is making something up or if there is nothing there. Okay?"*** App. p. 341, ll. 19-22. In this portion of his closing argument the Solicitor essentially vouched for the credibility of the Victim based on the implied opinion of his expert witness that the Victim was being truthful. This line of argument was improper for two reasons. First, in her testimony before the jury, Ms. Hefner never stated that she had interviewed the Victim in this case. App. p. 254, l. 10 – p. 255, l. 25. Therefore, the prosecution was inviting the jury to draw an inference from matters not on record in this trial. A Solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816(1990).* He may not however, vouch for the credibility of a witness based on personal knowledge or other information outside the record; *State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001).* Secondly, this argument invited the jury to substitute the opinion of a State witness for their own on the crucial issue of the credibility of the Victim. It is improper for the State to assure the jury of a witness's credibility because it is the role of the jury to assess the credibility of the witnesses at trial. *Id.* Defense Counsel admitted in his PCR testimony that he should have objected to this argument. App. p. 519, ll. 15-20.

Defense Counsel likewise conceded that he should have objected to another portion of the State's closing in which the prosecution personally commented on the credibility of the sole witness offered for the defense. App. p. 343, l. 25- p. 344 l. 12. App. p 510, ll. 1-9. The prosecution also commented on Mr. Tappeiner's previous "***problems with alcohol.***" Defense

counsel has acknowledged that there had been no evidence supporting that argument and, that it should have been objected to. App. p. 345 ll. 9-10. App. p. 520, ll. 10-15. During the testimony of the Petitioner's husband he acknowledged having one prior DUI fifteen years earlier. App. p. 307, ll. 3 – 5. Once again, it is improper for the prosecution to personally comment on the credibility of any witness and he is confined to the record when advancing arguments in favor of the State.

During his closing argument the prosecutor also asked the jury to consider ***"the eye-to-eye, face-to-face, interviews that [the victim] has had with law enforcement and the experts."*** (Emphasis added) App. p. 346, ll. 17-19. As asserted by the Petitioner, the State only presented *one* expert witness at trial and ***that expert did not testify to having interviewed the Victim in this case.*** Defense Counsel admitted that he did not consider objecting to this portion of the prosecutor's closing argument. App. p. 520, ll. 16-24. This argument by the State was misleading and commented on facts not in evidence. These statements to the jury obviously sought to bolster the State's case by arguing that *multiple experts* had interviewed the complaining witness and found him to be credible. Even if interpreted by the jury to only apply to Ms. Hefner, this argument was improper where there was no evidence before the jury that this witness had ever interviewed the complaining witness. Defense Counsel clearly should have objected to this argument in which the State was once again arguing matters not in evidence to bolster the credibility of its key witness.

As previously observed, near the very end of the State's closing argument, the prosecutor made the following argument,

> ***I want you to also think in –in—in making that decision, would you let her babysit your kids? Your grand kids? Nieces and nephews? I think the answer to that is why you should find her guilty.*** App. p. 346, ll. 20 – 24.

In his PCR testimony, Defense Counsel testified that he should have objected to this

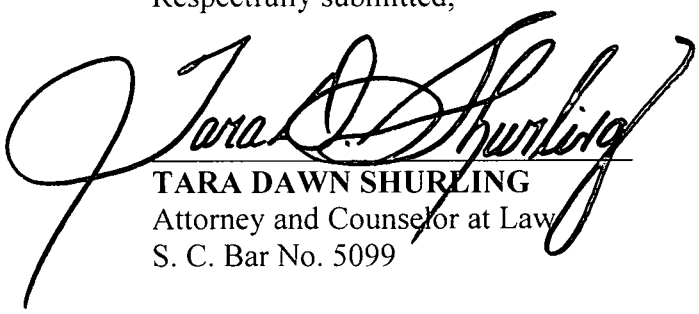
portion of the prosecutor's closing argument which he acknowledged, was improper because it "staked" the jury. App. p. 521, ll. 7-13. Once again, this argument should have been objected to by Trial Counsel and was not. As with the majority of the improper arguments advanced by the prosecution, the lower court failed to even rule on the failure of Trial Counsel to make proper objections to these arguments. Petitioner would submit that where the credibility of the complaining witness was the most crucial issue at Petitioner's trial, Counsel's failure to object to these arguments was very damaging to the defense and prejudiced Petitioner's ability to receive a fair trial.

In light of the above, the Petitioner has met her burden of proof with regard to her claim that Defense Counsel failed to provide her reasonable professional assistance of counsel when he failed to object to multiple improper arguments made during the prosecution's closing statement to the jury. The operative question in reviewing an argument by the prosecution which is allegedly improper is whether the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. *U.S.C.A. Cont. Amend 14.* Petitioner now prays for a finding by this Honorable Court that the arguments addressed herein were fundamentally unfair, prejudiced Petitioner and should have been objected to by Defense Counsel. *Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004).*

CONCLUSION

For the reasons stated, the Petitioner respectfully asks that this Honorable Court dispense with further briefing and grant her a new trial. Alternatively, asks that the writ be granted and that she be allowed full briefing of the issues summarized herein.

Respectfully submitted,



TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, South Carolina 29204
(803)738-8622
(803)738-1600 Fax
E-mail: tdslaw@shurlinglaw.com

ATTORNEY FOR PETITIONER

This 28th day of March, 2014.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2013-001885

SUSAN TAPPEINER, 338050,

PETITIONER,

v.

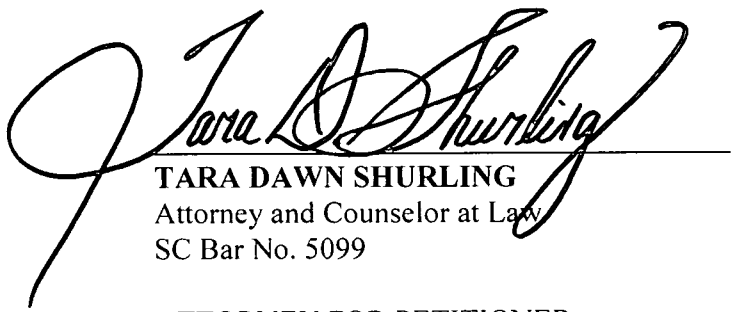
STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel this the 28th day of March, 2014, by mailing one (1) copy in a stamped envelope properly addressed to:

Ashleigh R. Wilson
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211



TARA DAWN SHURLING
Attorney and Counselor at Law
SC Bar No. 5099

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 28th day
of March, 2014.

Notary Public for South Carolina
My Commission Expires: 2/28/2024