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June 12, 2014

Via Hand Delivery

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

JUN 12 2014

S.C. Supreme Court

RE: Timothy J. Wilson v. State of South Carolina
Appellate Case No: 2013-002473

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Petition for Writ of Certiorari and two copies of the appendix in the above matter for filing in your office. By copy of this letter I am serving opposing counsel with this petition today.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No: 8729

JBA/ab
Enclosures

cc: Tricia A. Blanchette, Esquire

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
The Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Trial Court Case No. 2011-CP-32-0402
Appellate Case No. 2013-002473

Timothy J. Wilson,..... Respondent/Petitioner,

v.

State Of South Carolina,..... Petitioner/Respondent.

PETITION FOR WRIT OF CERTIORARI

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RESPONDENT

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QUESTIONS PRESENTED

- I. **Did the post-conviction relief court err in finding trial counsel rendered ineffective assistance for failing to object to testimony of Dr. Alicia Benedetto and Heather Smith as improper vouching where: (1) counsel articulated a valid defense strategy of offering evidence of a pertinent trait of character of the victim as being a liar; (2) the testimony of Dr. Benedetto and Smith would have been admissible in reply to rebut Respondent/Petitioner's character evidence pursuant to Rule 404(a)(2) of the South Carolina Rules of Evidence; and (3) counsel effectively minimized the impact of Smith and Dr. Benedetto's testimony by allowing it to be presented during the case in chief rather than waiting for it to be elicited on reply?**

- II. **Even if counsel's performance was deficient for failing to object to testimony from Dr. Benedetto and Smith as improper vouching, did the post-conviction relief court err in concluding counsel's failure to object prejudiced Respondent/Petitioner where, because of the overwhelming evidence of guilt, there is no reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different?**

STATEMENT OF THE CASE

Respondent/Petitioner (Wilson) was indicted at the March, 2008 term of the grand jury for Lexington County for four counts of first degree criminal sexual conduct (CSC) with a minor (Indictment Nos.: 2008-GS-32-789, -790, -791, & -792). He was subsequently indicted at the July, 2008 term of the grand jury for one count of lewd act on a minor under the age of sixteen (Lewd Act) (Indictment No.: 2008-GS-32-2293). On July 29, 2008, a jury trial was commenced at the Lexington County Courthouse in front of the Honorable William P. Keesley. Wilson was present and was represented by Assistant Public Defenders Casey Cornwell, Esquire, and Bennett Casto, Esquire. Petitioner-Respondent (the State) was represented by Assistant Solicitors David M. Stumbo and Ola Johnson of the Eleventh Circuit Solicitor's Office. (App.p.56). The jury found Wilson guilty as indicted. (App.p.731, line 21-p.735, line 25). On August 1, 2008, the Honorable William P. Keesley sentenced Wilson to imprisonment for concurrent terms of fifteen (15) years for Lewd Act (Indictment No.: 2008-GS-32-2293), thirty (30) years for CSC, 1st Degree (2008-GS-32-789), thirty (30) years for CSC, 1st Degree (2008-GS-32-791), fifteen (15) years for CSC, 1st Degree (Indictment No.: 2008-GS-32-792), and a consecutive term of fifteen (15) years for CSC, 1st Degree (Indictment No.: 2008-GS-32-790), for an aggregate sentence of forty-five (45) years' imprisonment. (App.p.13-p.47; p.746, line 20-p.748, line 7). A timely Notice of Appeal was filed on Wilson's behalf and an appeal was perfected by Wanda H. Carter, Esquire, of the South Carolina Office of Appellate Defense. The South Carolina Court of Appeals dismissed Wilson's appeal and affirmed his convictions "after a thorough review of the record and counsel's brief pursuant to Anders v. California . . . and State v. Williams." State v. Wilson, Op. No. 2010-UP-472 (S.C. Ct. App. filed October 28, 2010). The Remittitur was issued on November 17, 2010. (App.p.758-p.781).

On February 1, 2011, Wilson filed an application for post-conviction relief (PCR) alleging ineffective assistance of trial counsel. (2011-CP-32-0402). (App.p.1-p.8). On September 7, 2011, the State submitted a Return requesting an evidentiary hearing to resolve Wilson's claims. (App.p.48-p.52). On March 23, 2012, Tricia A. Blanchette, Esquire, was substituted as Wilson's counsel. On December 21, 2012, Wilson submitted an Amendment to his Application for PCR alleging fourteen (14) specific allegations of ineffective assistance of trial counsel and/or appellate counsel:

1. Ineffective assistance of trial counsel for failure to properly prepare and investigate prior to trial. Specifically, but not limited to, failure to review the discovery with Respondent-Petitioner, failure to prepare defense witnesses for trial, failure to investigate the allegations and potential defenses.
2. Ineffective assistance of trial counsel regarding the failure to obtain and/or utilize expert witnesses and failure to make a timely request for a continuance to procure necessary experts.
3. Ineffective assistance of trial counsel for failure to raise an objection to the juror shortage. Transcript pp. 7, 50.
4. Ineffective assistance of trial counsel for agreeing to admit the video of the forensic interview of the victim.
5. Ineffective assistance of trial counsel for failure to protect Respondent-Petitioner's confrontation rights during the testimony of the victim.
6. Ineffective assistance of trial counsel for putting forth an unreasonable defense strategy.
7. Ineffective assistance of trial counsel for failing to fully cross-examine the State's witnesses, including but not limited to Dr. Robinson, Alicia Benedetto, Christalyn Thompson and Heather Smith.
8. Ineffective assistance of trial counsel for failure to object to hearsay and bolstering / vouching testimony of the State's experts. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994), State v. Dempsey, 340 S.C. 565, 532 S.E.2d 306 (Ct. App. 2000), State v. Dawkins, 346 S.C. 151, 551 S.E.2d 260 (2001), Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010), State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011), State v. McKerley, 397 S.C. 461, 725 S.E.2d 139 (2012).

9. Ineffective assistance of trial counsel for failure to address possible bias expressed by the trial court stemming from a prior case. Transcript pp. 209-10.
10. Ineffective assistance of trial counsel for failure to make a directed verdict argument on all charges.
11. Ineffective assistance of trial counsel for failure to object to pitting of witnesses by the State, as pointed out by the trial court.
12. Ineffective assistance of trial counsel for opening the door to testimony during the cross-examination of Jessica Wilson and the State's reply witnesses regarding a completely unrelated allegation of sexual abuse involving Jessica Wilson's father.
13. Ineffective assistance of trial counsel for failure to advise Respondent-Petitioner regarding "Jessica's Law" and the changes to the jury charge and applicable sentencing range.
14. Ineffective assistance of appellate counsel for failure to raise the motion for continuance on appeal.

(App.p.9-p.12).

On January 29, 2013, an evidentiary hearing was held in the Lexington County Courthouse before the Honorable R. Lawton McIntosh. Wilson was present and was represented by Tricia A. Blanchette, Esquire. The State was represented by Assistant Attorney General J. Benjamin Aplin. (App.p.815). During the hearing, Wilson testified on his own behalf. Wilson also called Gaye Allen-Cook, Donna Schwartz-Watts, Gregory Robinson and Casey Cornwell, Esquire to the stand and introduced a number of exhibits. The PCR court was also provided a copy of the PCR Application, the State's Return, Wilson's Amendment, the records of the Lexington County Clerk of Court concerning the subject convictions, the trial transcript, and Wilson's records from the South Carolina Department of Corrections.

At the end of the hearing, the PCR court took the matter under advisement and subsequently asked Wilson's counsel to submit a proposed order granting PCR solely on the basis of ineffective assistance of trial counsel for failure to object to bolstering/vouching

testimony from the State's expert witnesses. (App.p.1069, line 24-p.1070, line 21). In an order dated September 24, 2013, filed October 9, 2013, and received by the State on October 18, 2013, Judge McIntosh granted Wilson's Application for PCR. (App.p.782-p.811). Neither party submitted a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCF. On November 15, 2013, the State filed a notice of appeal with this Court and on November 19, 2013, Wilson filed a notice of cross-appeal. (App.p.812-p.815).¹ This Petition for Writ of Certiorari on behalf of the State follows.

¹ On February 25, 2014, Wilson submitted a "Petition for Appeal Bond" with attachments, requesting bail pending appellate review pursuant to Rule 243(k), SCACR. On March 7, 2014, the State submitted a Return opposing bail. In an order dated May 7, 2014, this Court denied Wilson's request.

STANDARD OF REVIEW

In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision. Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011); Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000) (citing Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996) (“[A] PCR judge's findings should not be upheld if there is no probative evidence to support them”). In a PCR proceeding, an Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “In order to receive relief for ineffective assistance of counsel, a defendant must make two showings. First, he must show that his trial counsel's performance was deficient, meaning that “counsel” made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment. Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable.” Edwards, 392 S.C. at 456, 710 S.E.2d at 64. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)); See also Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Where the application alleges ineffective assistance of counsel as a ground for relief, an Applicant must prove that “counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686 (1984); Butler, *supra*.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. An Applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

ARGUMENT

I.

The post-conviction relief court erred in finding trial counsel rendered ineffective assistance for failing to object to testimony of Dr. Alicia Benedetto and Heather Smith as improper vouching where: (1) counsel articulated a valid defense strategy of offering evidence of a pertinent trait of character of the victim as being a liar; (2) the testimony of Smith and Dr. Benedetto would have been admissible in reply to rebut Respondent/Petitioner's character evidence pursuant to Rule 404(a)(2) of the South Carolina Rules of Evidence; and (3) counsel effectively minimized the impact of Smith and Dr. Benedetto's testimony by allowing it to be presented during the State's case in chief rather than waiting for it to be elicited on reply.

The post-conviction relief court erred in its grant of post-conviction relief to Wilson on grounds of ineffective assistance of counsel because Wilson failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, an Applicant must first prove that counsel's performance was deficient as measured by "reasonableness under professional norms." Id. Wilson failed to carry his burden in regards to this first prong of Strickland. There was no evidence of probative value that trial counsel's performance was deficient for failing to object to vouching where: (1) counsel articulated a valid defense strategy of offering evidence of a pertinent trait of character of the victim as being a liar; (2) the testimony of Smith and Dr. Benedetto would have been admissible in reply pursuant to Rule 404(a)(2) of the South Carolina Rules of Evidence to rebut Respondent/Petitioner's introduction of character evidence; and (3) counsel effectively minimized the impact of Smith and Dr. Benedetto's testimony by allowing the State to present that testimony during its case in chief rather than on reply. This is particularly true in light of counsel's effective cross-examination of Dr. Benedetto and Smith on their opinion that the victim made a "compelling" disclosure.

Trial

At trial, after the jury was sworn, the judge gave preliminary jury instructions on the burden of proof and the respective roles of the judge and the jury. He explained the jury was the sole judge of the facts including whether evidence is believable and the weight to be given to that evidence. (App.p.272, line 12-p.279, line 8). Next, the solicitor made an opening statement which included the comment: “So I want you to listen closely to the witnesses because that’s what this case is going to be about, credibility of the witnesses.” (App.p.286, lines 15-19). Counsel then made an opening statement on Wilson’s behalf and said: “This case is going to be about he said/she said. And you’re going to have to make a decision who you believe. Some of that testimony we believe is going to contradict itself, but you make the ultimate decision on whether or not somebody’s telling the truth or somebody’s telling a lie.” (App.p.287, lines 19-24) (emphasis added).

The State’s first witness was the victim. She described the sexual abuse committed by Wilson and identified the videotape of her forensic interview with Dr. Benedetto. The victim explained she had reviewed the video with Heather Smith before trial and testified it showed what happened during the interview. She testified the things she told Dr. Benedetto, the things she drew, and the things she demonstrated using the dolls during the interview really happened and were the truth. (App.p.291, line 12-p.313, line 9). On cross-examination, counsel was able to get the victim to admit she has “fibbed” before.

Later, the State called Dr. Benedetto to the stand and qualified her as an expert in forensic evaluation of child sexual abuse. She identified the video of her forensic interview of the victim and testified it was a fair and accurate representation of the complete interview. The DVD was admitted as State’s Exhibit #1 and it was published to the jury in its entirety. Several drawings

made by the victim during the interview were then admitted into evidence over Counsel's objection. Dr. Benedetto proceeded to describe the forensic interview and explained some of the interactions it depicted. She testified the victim "demonstrated full competence" and was told it was important to make sure she got everything right. Dr. Benedetto testified the use of drawings was to seek "clarity" from the victim, and said the pattern in which the victim described the abuse and the idiosyncratic details she gave "had a ring of truth that a child was actually there and experienced it as opposed to learned it through some other means." Dr. Benedetto explained that she looked for alternative hypotheses and fantastical or implausible details during the interview to make sure she was crystal clear about what the victim was trying to communicate. She testified she "found it to be a compelling interview" and that "less than a third of the interviews are actually ruled compelling for abuse." (App.p.386, line 14-p.413, line 17).

Next, Counsel conducted extensive cross-examination, focusing his attack on Dr. Benedetto's opinion that the victim made a "compelling" disclosure. She admitted that just because a child knows the difference between a truth and a lie does not guarantee the child is actually telling the truth. She also admitted that a "compelling" disclosure is not a statement on the credibility of the person making the disclosure, and that a child can contradict herself and still be deemed compelling. Counsel was able to demonstrate the inherent difficulties with such a claim. Dr. Benedetto acknowledged that one reason a child may be consistent and stick with an initial false accusation of sexual abuse is a fear of punishment from having told a fib. (App.p.416, line 7-p.435, line 24). Despite a question from the solicitor on re-direct, Dr. Benedetto would not opine as to whether she thought the victim was telling the truth, instead explaining that when she concluded the disclosure was "compelling for abuse" she had simply

looked at all the data and found the disclosure was generally coherent and consistent. (App.p.445, line 16-p.446, line 7).

The final witness called by the State was Heather Smith, the treatment services coordinator and a forensic interviewer at the Assessment and Resource Center. She was qualified as an expert in the field of child sexual abuse and treatment. Smith testified she provided mental health therapy for the victim following the interview with Dr. Benedetto and met with the victim at least sixty times from 2006 to 2008. Smith explained the phenomenon of delayed disclosure and gave and testified the disclosures made by the victim were compelling and consistent with a child who has undergone sexual trauma. (App.p.502, line 11-p.526, line 7). On cross-examination counsel got Smith to admit children are capable of telling realistic lies. (App.p.532, lines 5-10).

After the State rested, counsel called four witnesses to testify in Wilson's defense, each of whom attacked the victim's character for truthfulness by describing her as a stubborn liar. First, Wilson denied the victim's allegations and testified he never touched her inappropriately or asked her to touch him. He then gave an example of an occasion the victim told a lie and claimed it was a common problem for her to fib. Wilson testified the victim's biggest problem was lying, and that when she told a lie and was confronted she would dig-in and not come out with a straightforward answer. (App.p.551, line 6-p.569, line 23). Timothy Steven Wilson, the victim's grandfather, testified he recalled times the victim told a fib and claimed that when she fibbed she would stick with her story. (App.p.584, line 8-p.589, line 4). Cathy Arbogast, the victim's grandmother, testified the victim has problems with honesty and that when she is caught in a lie she does not come clean. She described a particular incident where the victim told a lie and then described how long the victim held-out before admitting it was a lie. Arbogast said: "it

was hard to get her to tell the truth.” (App.p.596, line 7-p.600, line 23). Finally, counsel called the victim’s mother, Jessica Marie Wilson, to the stand. She testified the victim has a problem with honesty and then shared a specific incident where the victim lied. Jessica Wilson agreed with Counsel that the victim usually had to be confronted with her lies before she would admit something, and lamented she had been prohibited from talking to the victim about the allegations because she feels she would have been able to get the victim to tell the truth – that Wilson did not sexually abuse her. (App.p.617, line 11-p.624, line 4).

During closing arguments, Counsel said the number one question the jury needed to answer was: “why would this little girl make this up? Why would she do that?” He argued the victim has a problem with honesty and that her family members knew her well enough to decide she is not telling the truth. Counsel pointed out inconsistencies in the victim’s story and argued it was typical for children who lie to hold onto the lie and they usually have a harder time coming clean the longer they let the lie continue. (App.p.670, line 18-p.684, line 6).

PCR Evidentiary Hearing

In the order granting relief, the PCR improperly found “trial counsel rendered ineffective assistance of counsel that prejudiced Applicant when he failed to object to the testimony of Heather Smith and Alicia Benedetto.” This finding was unsupported by the evidence presented by Wilson at the PCR evidentiary hearing. At that hearing, Wilson identified certain documents trial counsel received from the State during discovery, including a medical document regarding the victim’s allegedly unsubstantiated claim that she had previously sustained a broken leg. Wilson was asked if he remembered both sides at his trial arguing “this case boils down to issues of credibility” and responded, “Yes, ma’am.” Wilson testified he believed counsel should have used the medical document to attack the victim’s credibility. (App.p.927, line 2-p.929, line 4).

Later, while Wilson was still on the stand, the court allowed PCR counsel to recite a list of citations from the trial testimony of Heather Smith and Dr. Alicia Benedetto that Wilson submitted were objectionable either as improper hearsay or improper bolstering/vouching. (App.p.967, line 25-p.972, line 11).² Wilson again acknowledged the entire case was about credibility, and testified his defense essentially boiled down to attacking the credibility of his daughter, the victim. Wilson explained “all my witnesses were asked at some point or another if she was a liar. So, yeah, I mean, it was all – it all seemed like it was we were trying to attack her credibility.” (App.p.992, line 15-23) (emphasis added).

On cross-examination, Wilson confirmed for a third time that in working with trial counsel on preparing a defense, the entire issue in his case was credibility. (App.p.993, line 17-p.994, line 1). He testified he believed counsel could have used the medical report about the alleged injury to the victim’s leg to “prove that she’s not telling the truth” and “to show that she was inconsistent and that she told lies.” (App.p.996, line 16-p.999, line 7). Wilson admitted trial counsel seemed to be executing a strategy of putting the victim’s character trait of being a liar into evidence by calling witnesses to show she was not a truthful person. He said: “I think, yeah, [trial counsel] was trying to point that out.” (App.p.1005, line 4-p.1006, line 13).

Next, Wilson called trial counsel to the stand. Counsel acknowledged he could have attempted to object to portions of the trial testimony given by Smith and Dr. Benedetto on grounds of improper bolstering or vouching, but testified he chose not to object based on his both his personal trial experience and his knowledge of other trials handled by his office where he learned he would have been overruled if he objected on these grounds. (App.p.1021, line 8-

² The list provided to the PCR court was as follows: Trial Transcript pp. 332, Ins. 12-14, 346, Ins. 1-11, 348, Ins. 7-10, 349, Ins. 4-16, 350, Ins. 19-20, 352, Ins. 6-25, 353, Ins. 10-25, 354, 357, Ins. 7-13, 379, Ins. 6-22, 381, Ins. 10-25, 387, Ins. 16-25, 388, Ins. 11-12, 389, Ins. 6-25, 390-91, 392, Ins. 24-25, 393, 394, Ins. 5-11, 396, Ins. 10-16, 399, Ins. 21-22, 402, Ins. 10-11, 455, Ins. 24-25, 456, Ins. 1-7, 461-62, 464, Ins. 4-7, 466-68, 469, Ins. 8-11, 471-72, 476, 479, Ins. 11-14.

p.1022, line 23). Counsel explained that he felt he did a decent job at trial but also felt like he could have done more. He said he wished he had been more aggressive with his objections at trial in order to preserve issues for appeal, but testified that of all the issues discussed at the PCR hearing, he felt Wilson's strongest issue for appeal would still have been the denial of his request for a continuance. (App.p.1027, line 13-p.1029, line 4).

During cross-examination, counsel again testified that he thought he did a decent job at trial but in retrospect felt he probably could have done better. (App.p.1038, lines 5-10). He then confirmed his trial strategy as previously explained by Wilson, that he wanted to show the victim was not credible. Counsel explained he called four witnesses in Wilson's defense primarily for the purpose of showing the victim fibbed a lot. He testified he wasn't sure if "character trait" was the right word, but acknowledged he wanted to show the victim was prone to fibbing and was stubborn and willing to stick with a lie. (App.p.1040, line 5-p.1041, line 11).

At the conclusion of the PCR hearing, the State also argued that based on the testimony presented, trial counsel was not ineffective in the first place for failing to object to bolstering/vouching testimony from the State's experts because evidence of the victim's truthfulness was admissible pursuant to Rule 404(a)(2), SCRE, as evidence of a pertinent character trait of the victim offered by the prosecution to rebut the Applicant's attempts to depict her as having an untruthful character. (App.p.1059, line 7-p.1065, line 7). The PCR judge ultimately rejected these arguments.

Discussion / Analysis

In the order granting relief, the PCR court found counsel did not provide a reasonable strategic reason for not objecting; however, it failed to conduct any analysis of counsel's clearly articulated defense strategy of offering evidence of the victim character for being untruthful, or

how that strategy would inevitably impact the admissibility of rebuttal evidence from the State. The court held that because: “the appellate courts have made it clear that the exact testimony offered in this case has no place in a trial” and “trial counsel admittedly failed to object to it” counsel was ineffective per se, regardless of his trial strategy. (App.p.??). This was error. There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). “[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an ‘objective standard of reasonableness.’” Edwards v. State, 392 S.C. at 456-57, 710 S.E.2d at 64 (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that “every effort be made to eliminate the distorting effects of hindsight” and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; Edwards, 392 S.C. at 456-57, 710 S.E.2d at 64. There are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. Strickland, 466 U.S. at 689.

Here, both Wilson and trial counsel clearly articulated their defense strategy of offering evidence of the victim’s character for being untruthful in an attempt to attack her credibility and convince the jury her allegations of sexual abuse were not true. This strategy permeates the trial as reflected in counsel’s opening statement, cross-examination of State’s witnesses, presentation of defense witnesses, and closing argument. Viewed under an objective standard of reasonableness, this strategy was certainly valid in this case, where the victim’s credibility was the central issue.

Furthermore, pursuant to the South Carolina Rules of Evidence, when the accused offers evidence of a pertinent trait of character of the victim, the prosecution may offer evidence to rebut. Rule 404(a)(2), SCRE. The State submits character for truthfulness or untruthfulness is certainly a pertinent character trait of a minor victim of an alleged sexual assault where there is no physical evidence to support the allegation. Indeed, the character trait in question would make a fact of consequence to the determination of the case more or less probable than it would be without evidence of the trait. Additionally, once the victim's credibility as a witness was challenged, the State would certainly have been permitted to present evidence of the victim's character for truthfulness to rebut the challenge. See State v. Mizell, 332 S.C. 273, 275-82, 504 S.E.2d 338, 340-43 (1998) (finding no error in the trial court's exclusion of the proffered testimony relating to Mizell's character for truth and veracity where Mizell did not testify in his own defense and it was not pertinent in light of the crimes with which he was charged); State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989) (holding the trial court erred in limiting Hallman's proffered character trait evidence to reputation for truth and veracity where Hallman's credibility as a witness had been challenged); State v. Weaverling, 337 S.C. 460, 472-73, 523 S.E.2d 787, 793 (Ct. App. 1999) (noting that evidence of a defendant's truthful character can become admissible when his character for truthfulness has been attacked).

Once admissible, character evidence "may be made by testimony as to reputation or by testimony in the form of an opinion." Rule 405(a), SCRE (emphasis added). Wilson's primary complaint in this PCR action was the admission, without objection, of opinion testimony from Dr. Benedetto and Heather Smith regarding the credibility of the victim because it constituted improper vouching. However, as explained above, the rules demonstrate this otherwise objectionable opinion testimony could have been offered by the State in reply, and would have

been admissible. Thus, the objectionable testimony was merely a predictable byproduct of counsel's valid trial strategy. As noted by this Court, "A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions, even if that witness is a co-defendant." Edwards, 392 S.C. at 458, 710 S.E.2d at 65. The State submits similarly an attorney cannot be said to be deficient if there is evidence to support his decision to attack the credibility of a minor victim with serious credibility questions, even if it opens the door to rebuttal.

Finally, although it was not specifically articulated as part of his trial strategy, counsel was effective in minimizing the impact of Smith and Dr. Benedetto's opinion testimony by allowing the State to present that testimony during its case in chief rather than on reply. Even if counsel objected and was successful in preventing the opinion testimony during the State's case in chief, it would likely have been offered and admitted on reply, where it would have had a more immediate and potentially greater impact on the jury. This further demonstrates the objective reasonableness of counsel's strategy, particularly in light of counsel's belief his objections would be futile, and his effective cross-examination of Dr. Benedetto's and Smith's testimony that the victim gave a "compelling" disclosure. Counsel attacked the validity of the opinions by pointing out the inconsistencies in the victim's account and eliciting an admission that "compelling" simply does not equal "credible." See Bullock v. Carver, 297 F.3d 1036 (10th Cir. 2002) (finding trial counsel's failure to object to molestation victim's statements and hearsay was not ineffective where he believed the objection would be futile and where the statements served the interest of showing allegedly suggestive interview techniques).

Based on the foregoing, the State submits the PCR court erred in finding Wilson met his burden of establishing that Counsel was deficient for failing to object to the opinion testimony offered by Dr. Benedetto and Smith in regard to the victim's character for truthfulness. Wilson simply failed to establish counsel's performance fell below a standard of "reasonableness under professional norms." Strickland, 466 U.S. 668. It was reasonable for Counsel to make the strategic decision to put the victim's character trait in issue, and the PCR court should be reversed.

II.

Even if counsel's performance was deficient for failing to object to the opinion testimony from Dr. Benedetto and Smith as improper vouching, the PCR court erred in concluding counsel's failure to object prejudiced Respondent/Petitioner where, because of the overwhelming evidence of guilt, there is no reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

The PCR court erred in its grant of post-conviction relief to Wilson because Wilson failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984). To establish the requisite prejudice necessary to prove a claim of ineffective assistance of counsel, a PCR Applicant must demonstrate that his attorney's errors had an effect on the judgment against him. See Strickland, 466 U.S. at 691. The Applicant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. In other words, he must show that "the factfinder would have had a reasonable doubt respecting guilt." Id. at 695; Edwards, 392 S.C. at 459-60, 710 S.E.2d at 65-66.

At the PCR hearing the State argued that even if counsel was ineffective for failing to object to the alleged vouching testimony, the Applicant was not entitled to a new trial because he failed to prove prejudice in light of the admission of the video tape of the forensic interview. The State contended any error in admission of Dr. Benedetto and Smith's testimony was harmless in light of the overwhelming evidence contained in the videotape; therefore, there was no reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. (Tr.p.245, line 7-p.247, line 6). In the order granting relief, the PCR court found it was "not convinced of the State's harmless error argument." The court concluded "it is inconceivable that counsel's admitted error was harmless and did not affect the outcome of Applicant's trial when the testimony at issue clearly bolstered the credibility of the victim." (App.p.??). The State submits this finding is not supported by the evidence and should be reversed.

Initially, the State submits the PCR court's ruling regarding prejudice effectively ignores counsel's valid trial strategy of attacking the victim's credibility. If this strategy constituted deficient performance, then any analysis of the resulting prejudice from admission of the vouching testimony must be balanced against the positive effects achieved by calling four witnesses who were able to testify that the victim was a stubborn liar. The PCR court conducted no balancing whatsoever, and instead concluded that any testimony which bolstered the credibility of the victim must have affected the outcome of the trial, without considering the defense evidence which undermined that credibility, and which effectively opened the door to the vouching testimony in the first place. This was error.

Furthermore, the State submits the victim's trial testimony combined with the videotape of the entire forensic interview and the remainder of the admissible evidence constituted

overwhelming evidence of Wilson's guilt. In State v. McKerley, the Court of Appeals found the admission of similar vouching testimony was not harmless because it could not conclude the testimony did not contribute to the jury's decision. 397 S.C. 461, 467, 725 S.E.2d 139, 143 (Ct. App. 2012). However in McKerley, the evidence consisted of the victim's live testimony and the improper comments, not the videotaped forensic interview. Here, the videotape was compelling. The State submits Wilson did not make the requisite showing to the PCR court that "the factfinder would have had a reasonable doubt respecting guilt" if it had not been exposed to the vouching testimony. Since there is no probative evidence to support the PCR court's conclusion that Wilson was prejudiced by counsel's deficient performance, the PCR court should be reversed.

CONCLUSION

For the reasons stated above, this State submits this Court should grant the Petition for Writ of Certiorari and reverse the post-conviction relief court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

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June 12, 2014.

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
In The Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Trial Court Case No. 2011-CP-32-0402
Appellate Case No. 2013-002473

TIMOTHY J. WILSON

Respondent/Petitioner,


v.

STATE OF SOUTH CAROLINA,

Petitioner/Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and Appendix has been served upon opposing counsel, by mailing two (2) copies in an envelope properly addressed with postage prepaid to Tricia A. Blanchette, Esquire, P.O. Box 12725, Columbia, SC 29211 this 12th day of December, 2014.



Angela Bennett
Administrative Assistant