

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Beaufort County  
The Honorable Perry M. Buckner, Circuit Court Judge

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Appellate Case No. 2013-1885

**RECEIVED**

JUL 28 2014

**S.C. Supreme Court**

SUSAN TAPPEINER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

\_\_\_\_\_  
**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to develop and employ a clear theory of defense?
- II. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to present evidence concerning what prescription medications the Petitioner was taking during the time of the incident?
- III. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to introduce testimony from Dr. Nolan during the defense's case in chief?
- IV. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failure to hire Dr. Martin, or an expert of equal credentials, to testify on behalf of the defense regarding the Petitioner's drug and alcohol abuse?
- V. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Petitioner's trial?
- VI. Whether there is probative evidence to support the PCR court's ruling that trial counsel's performance was deficient, but no prejudice resulted from counsel's failure to object to references throughout trial to the fact that the Petitioner was arrested and charged after a two-hour police interview?
- VII. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped at age 8?
- VIII. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to discuss use of character witnesses with the Petitioner and failing to produce such witnesses at trial?
- IX. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to fully discuss with the Petitioner the potential risks and benefits of testifying at trial?
- X. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving 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 Petitioner's home?

- XI. Whether the PCR court properly refused to allow the Petitioner to introduce a video recording of the interior of the house where the sexual assault occurred in this case during the Petitioner's evidentiary hearing?
- XII. Whether there is probative evidence to support the PCR court's ruling that trial counsel's performance was deficient, but no prejudice resulted from counsel's failure to object to repeated references to hearsay statements from the victim which went beyond a report of time and place of the alleged assault?
- XIII. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to object to repeated references to the victim as being 13 years old at the time of the alleged assault where the victim was two months away from his 14<sup>th</sup> birthday at the time of the alleged assault?
- XIV. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to establish his client's height and weight at trial?
- XV. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to provide the Petitioner effective assistance of counsel when he called the Petitioner's husband as a witness, and questioned him concerning an incident when the victim had asked the Petitioner to help him get a camera battery, without ascertaining whether the husband had an accurate recollection of the time of that request?
- XVI. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving 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?
- XVII. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective when he failed to adequately question the Petitioner's husband on the witness stand concerning his observations concerning the Petitioner's coordination and general physical condition when she mixed alcohol with her prescription medications?
- XVIII. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to fully discuss with the Petitioner 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?
- XIX. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to object to a jury charge concerning expert opinion testimony?

- XX. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to request a jury charge relating to consent and competence as those concepts applied to the Petitioner as opposed to the victim?
- XXI. Whether there is probative evidence to support the PCR court's ruling that trial counsel's performance was deficient, but no prejudice resulted from counsel's failure to object to statements made by the State in closing arguments?
- XXII. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to adequately cross-examine the victim concerning inconsistencies between his statements pre-trial and his testimony at trial?
- XXIII. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to produce testimony to show the victim's frequent presence in the Petitioner's home when neither she nor her husband were home?
- XXIV. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel should have introduced testimony from neutral witnesses concerning the reaction of the Petitioner's dogs to any activity in the Petitioner's home?
- XXV. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to argue in closing that it would be Criminal Sexual Conduct by the Petitioner if the complaining witness in fact assaulted her while she was incompetent to consent?
- XXVI. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving 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?
- XXVII. Whether there is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to adequately cross-examine the State's expert witness concerning the known reasons for delayed reporting of sexual assaults?

## STATEMENT OF THE CASE

The Petitioner was indicted at the March 2009 term of the Beaufort County Grand Jury for criminal sexual conduct with a minor- second degree (2009-CP-07-0703). The Petitioner was represented by Charles Macloskie, Esquire. The Petitioner proceeded to trial before a jury and was found guilty. On November 16, 2009, the Petitioner was sentenced by the Honorable Carmen T. Mullen to ten (10) years imprisonment, provided upon the service of five (5) years, the balance is suspended to three (3) years probation.

A Notice of Appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. Desa Ballard, Esquire, and Tara Dawn Shurling, Esquire, represented the Petitioner on appeal. The Petitioner withdrew her appeal via an Affidavit of Support of Motion to Withdraw Direct Appeal. The appeal was dismissed by the Court of Appeals on May 11, 2010.

The Petitioner filed an Application for post-conviction relief on May 17, 2010. The Respondent made its Return on August 25, 2010. On April 4, 2013, the Petitioner filed a first amended application and second amended application. An evidentiary hearing on the matter was convened on April 4, 2013 at the Beaufort County Courthouse. The Petitioner was represented by Tara Dawn Shurling, Esquire. The Respondent was represented by Ashleigh R. Wilson, Esquire, of the South Carolina Attorney General's Office. Present and testifying at the Petitioner's evidentiary hearing were the Petitioner, Charles Macloskie, Esquire, Desa Ballard, Esquire, Mike Tappeiner, Elizabeth Sanders, Todd Oomens, Dave Sanders, Jim Perkins, and Dr. Tom Martin.

The Court accepted proposed orders from both parties and denied and dismissed the Petitioner's post-conviction relief application by Order filed on June 18, 2013. On June 27, 2013, the Respondent filed a Motion to Alter and Amend pursuant to Rule 59(e). On July 8, 2014, the

Petitioner filed a Motion to Alter and Amend pursuant to Rule 59(e). On August 2, 2013, the Court amended its Order of Dismissal. The Petitioner then filed a second Motion to Alter and Amend pursuant to Rule 59(e). On September 9, 2013, the Court filed an Order denying the Petitioner's second Motion to Alter and Amend. The Petitioner filed a timely Notice of Appeal. The Respondent filed a Notice of Cross-Appeal. By Order dated October 17, 2013, this Court dismissed the Respondent appeal as improper since the Respondent was not an aggrieved party. The Remittitur was issued as to the Respondent's cross-appeal on November 4, 2013.

## ARGUMENT

The Petitioner alleges the post-conviction relief (PCR) court improperly denied and dismissed the Petitioner's application for post-conviction relief. The PCR court held the Petitioner failed to carry her burden of proving trial counsel provided ineffective assistance of counsel. The Respondent submits this Court should affirm the denial and dismissal of the Petitioner's application for post-conviction relief.

In a post-conviction relief action, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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 v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Petitioner must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits the Petitioner did not satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

**I. There is probative evidence to support the PCR court's ruling that counsel was not ineffective for failing to develop and employ a clear theory of defense when counsel articulated a valid defense theory and argued his theory to the jury during trial.**

The Petitioner asserts the PCR court erred by finding the Petitioner failed to carry her burden of proving counsel was ineffective for failing to develop and employ a clear theory of defense during the Petitioner's trial. The Respondent submits there is probative evidence to support the PCR court's finding. The record reflects trial counsel stated during the Petitioner's evidentiary hearing that the defense's theory was to challenge the credibility of the victim's allegations against the Petitioner and to suggest that the incident "might have been completely different than the allegations in the indictment; that truly, this young boy was the one who made the advance, not Mrs. Tappeiner." (App. 489:4-9. 490:5-10).

The Respondent submits it is also clear from trial counsel's opening statement that during the Petitioner's trial he intended to employ the theory of defense he articulated at the Petitioner's evidentiary hearing. In his opening statement, counsel argued the following in support of the Petitioner's theory of defense:

"So there's two phases to it, I would suggest to you. One of them: did it happen at all? And if you answer that, again, negatively, that is, no, it didn't happen, that's the end of it. You come back and you find Susan Tappeiner not guilty. On the other hand, if you say, yes, it did happen, then you have to go to phase two. And that is, who is truly the vulnerable thing here? And you might wind up with a conclusion that we're in the wrong court trying the wrong person for the wrong thing." (App. 151:5-14).

Counsel articulated a clear theory of defense at the Petitioner's evidentiary hearing and his intention to employ this theory at trial is reflected in his opening argument to the jury. The Respondent submits the Petitioner should not be allowed to second-guess trial counsel's defense theory solely based on its unsuccess at trial. This Court should affirm the lower court's finding that the Petitioner failed to carry his burden of proving counsel was ineffective for failing to employ a clear theory of defense.

**II. There is probative evidence to support the PCR court's ruling that counsel was not ineffective for failing to present evidence concerning what prescription medications the Petitioner was taking at the time of the incident when counsel elicited testimony regarding the Petitioner's drug and alcohol abuse to the jury at trial and voluntary intoxication is not a defense to criminal sexual conduct with a minor.**

The Petitioner asserts the PCR court erred by finding counsel was not ineffective for failing to present evidence concerning what prescription medications the Petitioner was taking during the time of the incident. The Respondent submits counsel presented testimony regarding the Petitioner's alcohol and drug abuse on the night of the incident to support the defense theory that the Petitioner could have been the victim of abuse based on her incapacitation the night of the incident. The record reflects the Petitioner's husband was called to testify about the victim's drug use and alcohol abuse. Mr. Tappeiner testified at trial the Petitioner had been drinking the night of the incident. (App. 293:20-21). Mr. Tappeiner also testified his wife told him "she didn't remember and she was not in a very good frame of mind from drinking and probably taking her, you know, sleeping pills or Clonipin or whatever." (App. 307:15-24). The Respondent submits additional testimony about the Petitioner's substance abuse would have been cumulative.

The Petitioner has also failed to show how presenting the jury with additional testimony regarding the Petitioner's alcohol and drug abuse would have affected the outcome of the

Petitioner's trial. The Respondent submits voluntary intoxication is not a defense to criminal sexual conduct with a minor. Voluntary intoxication, where it has not produced permanent insanity, is never an excuse for a defense to crime. State v. Vaughn, 268 S.C. 119, 125-26, 232 S.E.2d 328, 330-31 (1977). Reason requires that a man who voluntarily renders himself intoxicated be no less responsible for his acts while in such condition. Id. To grant immunity for crimes committed while the perpetrator is in such a voluntary state would not only mean that many offenders would go unpunished but would also transgress the principle of personal accountability which is the bedrock of all law. Id. The Respondent submits the Petitioner has failed to show prejudice resulted from counsel's performance. This Court should affirm the PCR court's finding that counsel was not ineffective in this regard.

**III. There is probative evidence to support the PCR court's ruling that counsel was not ineffective for failing to present Dr. Nolan as a witness in the defense's case to testify regarding the effect of the combination of alcohol and prescription drugs when Dr. Nolan's testimony was not presented at the Petitioner's evidentiary hearing.**

The Petitioner asserts trial counsel erred by finding counsel was not ineffective for failing to introduce testimony from Dr. Nolan in the defense's case regarding the effect of combining alcohol and prescription drugs on the Petitioner. The Respondent submits the Petitioner failed to present the substance of Dr. Nolan's testimony on the effect combining alcohol and prescription drugs had on the Petitioner at the Petitioner's evidentiary hearing, therefore she has failed to carry her burden of proving counsel was ineffective for failing to present Dr. Nolan's testimony. This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). The applicant's mere speculation what the

witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Id.

While Dr. Nolan testified for the defense during the Petitioner's Jackson v. Denno hearing regarding the voluntariness of the Petitioner's statement, the substance of his testimony had he been presented as a witness during the defense's case in chief was never presented to the PCR court for consideration. It is unlikely Dr. Nolan would have given the same testimony during trial that he gave during the Petitioner's Jackson v. Denno hearing. The Respondent submits this Court should not speculate as to the substance of Dr. Nolan's testimony in the defense's case in chief since it was never presented to the PCR court for consideration. This Court should affirm the lower court's ruling that the Petitioner failed to carry his burden of proving counsel was not ineffective for failing to present the testimony of Dr. Nolan in the case for the defense.

**IV. There is probative evidence to support the PCR court's ruling that counsel was not ineffective for failing to hire Dr. Martin, or an expert of equal credentials, to testify during the defense's case in chief when counsel presented testimony regarding the Petitioner's drug and alcohol abuse and Dr. Martin's testimony would have been cumulative to testimony already presented.**

The Petitioner asserts trial counsel should have called Dr. Martin or an expert of similar credentials to testify at trial to establish the dire consequences of mixing alcohol with prescription medications. The Respondent submits evidence of the effect of the mixing of alcohol and drug use on the Petitioner was presented by the defense through the testimony of the Petitioner's husband. Mr. Tappeiner testified at trial the Petitioner had been drinking the night of the incident. (App. 293:20-21). Mr. Tappeiner also testified his wife told him "she didn't remember and she was not in a very good frame of mind from drinking and probably taking her, you know, sleeping pills or Clonipin or whatever." (App. 307:15-24). Through Mr. Tappeiner's

testimony, the jury was made aware of the Petitioner's foggy state of mind and loss of memory after mixing alcohol and prescription drugs.

The Respondent also submits the Petitioner was not prejudiced by counsel's failure to present Dr. Martin's testimony since his testimony would have been cumulative to that elicited by counsel from Mr. Tappeiner. The Respondent submits it is also unlikely Dr. Martin's testimony would have resulted in a different outcome at trial since it is common knowledge that the mixing of alcohol and prescription drugs may result in a person's impairment and it is unlikely counsel needed to point out that common fact to the jury. Mr. Tappeiner's testimony was sufficient to apprise the jury of the effect mixing alcohol and prescription drugs had on the Petitioner the night of the incident. This Court should affirm the lower court's ruling that counsel was not ineffective for failing to present the testimony of Dr. Martin in the defense case in chief.

**V. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to adequately prepare Dr. Martin for his role in the sentencing phase of the Petitioner's trial when the record reflects counsel discussed with Dr. Martin the purpose of his testimony prior to sentencing and Dr. Martin's testimony during the Petitioner's sentencing proceeding reflected an understanding of role in the Petitioner's sentencing and likely affected the sentence imposed by the Court.**

The Petitioner asserts trial counsel was ineffective for failing to advise Dr. Martin of the purpose of his testimony prior to calling him to testify during the Petitioner's sentencing proceeding. The Respondent submits Dr. Martin was well aware of the purpose of his testimony and the purpose of his testimony is reflected in his comments to the Court during sentencing. Dr. Martin provided credible testimony during the evidentiary hearing that the purpose of his testimony during the Petitioner's sentencing proceeding was to show the Petitioner's psychiatric diagnoses, whether or not she would be a risk to the community as a convicted sex offender, if she needed treatment, and if the treatment she needed was available in prison. (App. 573:2-17).

Desa Ballard, counsel for the Petitioner testified she represented the Petitioner during her sentencing proceeding. Ballard also testified she and trial counsel spoke with Dr. Martin prior to sentencing to discuss his testimony. (App. 55:10-18).

The Respondent submits it is unlikely Dr. Martin would have been able to give such thorough testimony at the Petitioner's sentencing proceeding without knowing the purpose of his testimony. The record is also clear the Court considered Dr. Martin's testimony when sentencing the Petitioner. (App. 421:1-9). The Respondent submits this claim is without merit and the Petitioner has failed to show what additional preparation of Dr. Martin by counsel would have yielded during the Petitioner's sentencing proceeding. This Court should affirm the lower court's ruling that the Petitioner failed to carry her burden of proving counsel was not ineffective for failing to adequately prepare Dr. Martin for his role in the sentencing phase of the Petitioner's trial.

**VI. There is probative evidence to support the lower court's ruling that the Petitioner failed to carry her burden of proving counsel was not ineffective for failing to object to testimony regarding the fact that the Petitioner was arrested after a two-hour police interview when the Petitioner failed to prove prejudice resulted. As an additional sustaining ground, counsel's performance was not deficient for failing to object to references to the two-hour police interview when the testimony made no reference to the fact that the Petitioner made a statement or the contents of the Petitioner's inadmissible statements.**

The PCR court found counsel's performance was deficient when he failed to object to references made during trial to the fact that the Petitioner was arrested after a two-hour interview with police.<sup>1</sup> However, the PCR court found the Petitioner failed to carry her burden of proving counsel's performance affected the outcome of the Petitioner's proceeding. (App. 688). The Respondent submits the PCR court correctly held the Petitioner failed to carry her burden of

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The Respondent notes the Petitioner argues counsel should have objected to **repeated references** throughout trial to the fact that the Petitioner was arrested after a two-hour interview by police, but in her brief fails to identify the location of these repeated references in the record.

proving counsel's performance affected the outcome of her proceeding. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id. The Respondent submits it is unlikely Officer Gonzales' testimony had such an affect on the Petitioner's trial that counsel's failure to object undermined the reliability in the Petitioner's trial proceeding.

As an additional sustaining ground, the Respondent submits the PCR court erred by finding counsel's performance was deficient. At the conclusion of the Petitioner's Jackson v. Denno hearing, the Court concluded the Petitioner's statement to police was not voluntary and was inadmissible. (App. 138:3-8). The State elicited the following testimony from Officer Gonzales at trial regarding the Petitioner's arrest:

Q: Okay. And how long of 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.

Q: How is that you were able to charge her with that in particular?

A: Based on the statements from [victim] and witnessing the Hope Haven interview, I placed her under arrest for criminal sexual conduct due to the fact that she is 42 years old and he is a 13 year old boy. (App. 280:21-281:8).

The Respondent submits the Petitioner failed to carry her burden of proving Officer Gonzales testimony was objectionable. His testimony in no way referenced the Petitioner's statement to police. Officer Gonzales testimony also does not suggest to the jury that he arrested the Petitioner after the interview because she made incriminating statements. He explicitly stated

during his testimony he charged her with the offense “based on the statements from [victim] and witnessing the Hope Haven interview.” (App. 281:1-8). The Petitioner has failed to provide a legal basis for counsel’s objection to Officer Gonzales testimony. The record is void of any indication the State was trying to elicit testimony regarding the substance of the Petitioner’s inadmissible statement. This Court should affirm the PCR court’s finding the Petitioner failed to carry her burden of proving counsel provided ineffective assistance of counsel in this regard.

**VII. There is probative evidence to support the PCR court’s ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to seek introduction of evidence showing the victim had previously reported being raped at age 8 when such evidence would have been inadmissible pursuant to the Rape Shield Law and the Petitioner has failed to present any exception that would have allowed the introduction of such evidence at trial.**

The Petitioner asserts trial counsel should have tried to introduce evidence that the victim reported being sexually abused at the age of 8. The Respondent submits this counsel’s performance was not deficient since introduction of prior sexual abuse by the victim would not have been admissible under the Rape Shield Law. The Rape Shield Law states:

“Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible in prosecutions under Sections 16-3-615 and 16-3-652 to 16-3-656; however, evidence of the victim's sexual conduct with the defendant or evidence of specific instances of sexual activity with persons other than the defendant introduced to show source or origin of semen, pregnancy, or disease about which evidence has been introduced previously at trial is admissible.” S.C. Code Ann. § 16-3-659.1(1) (1977).

Testimony regarding prior allegations of abuse by the victim would have been excluded at trial as a specific instance of the victim’s sexual conduct. The Petitioner has failed to identify any specific exception which would have allowed counsel to circumvent the restrictions outline in the Rape Shield Law. The Respondent also submits the Petitioner has presented no testimony of false reporting or fabrication by the victim regarding the prior sexual abuse which would

make the evidence material or relevant to the Petitioner's defense. This Court should affirm the lower court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to present evidence that the victim reported being sexually abused at the age of 8.

**VIII. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to discuss the use of character witnesses with the Petitioner and failing to produce such witnesses at trial when the Petitioner's character was not at issue during the trial and had the Petitioner's character become an issue character testimony regarding her truth and veracity would not have been admissible.**

The Petitioner asserts counsel should have discussed with the Petitioner the use of character witnesses and produced character witnesses at trial. The Petitioner presented several witnesses at the evidentiary hearing who testified as to the Petitioner's reputation for truthfulness. The Respondent submits counsel's performance was not deficient since the Petitioner never took the stand and her character was never attacked by the State during trial. "A defendant does not have an automatic right to introduce evidence of his character for truthfulness simply because he testified in his defense. Evidence of a defendant's truthful character becomes admissible when his character for truthfulness has been attacked. State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999) (citing State v. Mizell 332 S.C. 273, 504 S.E.2d 338 (Ct. App. 1998), see also SCRE 404(a)(1) (1995)). The record reflects the Petitioner never took the stand and the State never attacked the Petitioner's character, therefore, any testimony regarding the Petitioner's character presented by the defense at trial would have been inadmissible. (App. 288:21-22).

The Respondent submits even if the Petitioner had taken the stand and her character was attacked by the State, the character testimony regarding the Petitioner's reputation for

truthfulness presented by the Petitioner at the evidentiary hearing would not have been inadmissible. In State v. Mizell, the Court of Appeals held a defendant's reputation for truth and veracity is not a "pertinent trait of character" for the charge of criminal sexual conduct with a minor. 332 S.C. 273, 504 S.E.2d 338 (Ct. App. 1998). This Court should affirm the PCR court's ruling that counsel was not ineffective for failing to discuss the use of character witnesses with the Petitioner and for failing to produce character witnesses at trial.

**IX. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to fully discuss with the Petitioner the potential risks and benefits of testifying at trial when both trial counsel and the court advised the Petitioner of the risks and benefits of testifying at trial.**

The Petitioner asserts trial counsel misadvised the Petitioner regarding the risks and benefits of testifying at trial. The Respondent submits both counsel and the trial court correctly advised the Petitioner regarding the risks and benefits of taking the stand at trial. The record reflects counsel discussed with the Petitioner the benefits and risks of testifying at trial. The record also reflects counsel advised the Petitioner not to take the stand since she did not have any recollection of the night of the incident and he had concerns that evidence that had previously been excluded would be allowed in if the Petitioner testified contrary to her statement. (App. 507:20-508:3, 509:21-510:2). While it is unlikely, the State would have been able to impeach the Petitioner on her excluded statement, counsel's concerns regarding what an individual judge would consider opening the door to allowing in testimony regarding the Petitioner's excluded statement were valid and his advice to the Petitioner with regard to taking the stand to testify at trial was sound. (App. 536:21-537:9).

The record also reflects the trial court advised the Petitioner of the risks and benefit of the taking the stand to testify. The Petitioner was advised by the trial court that she had the right to remain silent, she could be impeached with prior convictions, the jury would not be able to

consider her silence in their deliberations, and that the decision to testify was solely up to her. (App. 287:3-288:8). The Petitioner indicated to the Court she understood her right to remain silent and that she had discussed with counsel whether she should take the stand at trial. (App. 288:4-22). The Respondent submits and the record reflects the Petitioner was made aware of the risks and benefits of taking the stand at trial prior to exercising her right to remain silent at trial.

The Respondent also submits the Petitioner has failed to show how any additional talks with the Petitioner regarding her right to testify would have affected the outcome of the Petitioner's trial. It is unlikely her testimony would have aided the defense in light of her inability to recollect the events of the night. This Court should affirmed the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to fully discuss the potential risks and benefits of testifying at trial.

**X. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving 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 Petitioner's home when the Petitioner failed to show how a jury view of the scene was necessary to a jury decision and evidence regarding the size and layout of the Petitioner's home was presented by the defense at trial.**

The Petitioner asserts trial counsel should have requested a jury view of the Petitioner's home or in the alternative to introduce evidence demonstrating the size and layout of the Petitioner's home. The Respondent submits the Petitioner has failed to show that a view of the Petitioner's home was necessary to a jury decision. The jury's view of the scene of the crime is governed by S.C Code Ann. § 14-7-1320 (1976). This statute reads:

“The jury in any case may, at the request of either party, be taken to view the place or premises in question or any property, matter or thing relating to the controversy between the parties when it appears to the court that such view is necessary to a just decision, if the party making the motion advances a sum sufficient to pay the actual expenses of the jury and the officers who attend them in taking the view, which shall be afterwards taxed like other legal costs if the party who advanced them prevails in the suit.”

The Respondent submits the Petitioner has failed to carry her burden of proving that a jury view of the scene was necessary to the jury's decision and it is likely counsel's request for a jury view of the scene would have been futile.

The Respondent also submits the Petitioner was not prejudiced by counsel's failure to request a jury view of the Petitioner's home or present demonstrative evidence showing the size of the Petitioner's home since at trial the defense presented the testimony of the Petitioner's husband to describe the layout and size of their home. The Petitioner's husband testified at trial "our house is not that big. It's a 4 bedroom house, there's 3 bedrooms upstairs, a living room, a kitchen, and 1 bedroom downstairs. But it's fairly compact." (App. 295:2-18). Counsel also reiterated the modest size of the Applicant's home during his closing argument. (App. 331:1-2). The jury was made aware of the size and layout of the Petitioner's home at trial and it is unlikely any additional evidence about the size of the Petitioner's home would have affected the outcome of the Petitioner's proceeding. This Court should affirm the PCR court's finding that counsel was not ineffective for failing to request a jury view of the scene and failing to present demonstrative evidence to show the size of the Petitioner's home.

**XI. The PCR court did not abuse its discretion by refusing to allow the Petitioner to introduce a video tape of the interior of the house where the sexual assault occurred in this case when the Court exclusion of the video in no way affected the Petitioner's ability to present its claims to the Court.**

The Petitioner asserts the PCR court erred by refusing to allow the Petitioner to introduce a video recording of the inside of the Petitioner's home to support her claim that counsel should have used demonstratives to show the jury the modest size of the Petitioner's home. The Respondent submits the PCR court did not abuse its discretion. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citations omitted). "An abuse of

discretion occurs when the trial court's ruling is based on an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

During the Petitioner’s evidentiary hearing, the Petitioner sought to introduce a video recording of the inside of the Petitioner’s home. (App. 526:6-594:11). Having never seen the contents of the video recording prior to the hearing, the Respondent objected based on relevance. The Court viewed the recording and sustained the Respondent’s objection. The video was labeled Applicant’s Exhibit 6 for identification only. The Respondent submits the PCR court did not err by ruling the video inadmissible based on relevance. The video was not necessary to support the Petitioner’s claim that counsel should have presented demonstrative evidence to the jury regarding the Petitioner’s modest sized home. Prior to the video being ruled inadmissible, the Petitioner presented Applicant’s Exhibit 5 which was identified as the floor plan and dimensions of the Petitioner’s home. (App. 590:1-15). The Respondent submits the court did not abuse its discretion when refusing to allow the Petitioner to introduce the video recording of the Petitioner’s home.

**XII. There is probative evidence to support the lower court’s finding that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to object to hearsay statement’s made during the course of the Petitioner’s trial. As an additional sustaining ground, counsel was not deficient for failing to object to the hearsay statements.**

The PCR court found counsel’s performance was deficient when he failed to object to hearsay statements from the victim which went beyond a report of time and place of the alleged assault. (App. 669). However, the PCR court found the Petitioner failed to show that but for counsel’s deficiency the result of her trial would have been different. (App. 670). The Respondent submits as an additional sustaining ground, the PCR court erred by finding counsel’s performance was deficient in this regard. The Respondent submits counsel was not deficient

since the testimony alleged by the Petitioner to be inadmissible and objectionable based on SCRE 801(d)(1)(D) is not hearsay because it was offered for the limited purpose of explaining why a government investigation was undertaken. "Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003).

The Respondent submits the trial testimony of Officers Creason, Tubbs, and Gonzales regarding statements made to them by the victim was not offered for the truth of the matter asserted, but rather to explain why certain steps in the government investigation of the victim's allegations were undertaken. Officer Creason's testimony about the victim's statement was offered to explain why he contacted his supervisor Lieutenant Tubbs and requested that he come to investigate the victim's allegation. (App. 155:17-25). Officer Tubbs' testimony about the victim's statement was offered to explain how he became involved in questioning the Applicant at the police station. (App. 258:10-15). Officer Gonzales' testimony about the victim's statement was offered to explain why he obtained a search warrant for the Applicant's home. (App. 276:21-25). The Respondent submits further, the PCR court properly found the Petitioner failed to carry her burden of proving counsel's performance resulted in prejudice. This Court should affirm the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to object to these statements during trial.

**XIII. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to object to references to the victim being 13 years old at the time of the assault when the victim was indeed 13 years old at the time of the assault.**

The Petitioner asserts trial counsel should have objected to the State's references to the victim being 13 years old at the time of the incident when the victim was actually 13 years and

10 months old. The Respondent submits the State's references to the victim as 13 years old at the time of the incident were not objectionable. At trial, counsel challenged the accuracy of the victim's age in the indictment. (App. 285:11-18). His challenge was withdrawn after the State confirmed the victim's birthday was October 15 which confirmed he had not turned 14 at the time of the assault which took place in the month of August. (App. 285:19-24).

The Respondent also submits the Petitioner has failed to identify a valid legal basis for counsel's objection to the State referring to the victim as a 13 year old and it is likely any objection by counsel would have been futile. The fact that the victim was approximately two months away from his 14<sup>th</sup> birthday was not relevant or material to the Petitioner's guilt or innocence. S.C. Code Ann. § 16-3-655(b)(1) states "a person is guilty of criminal sexual conduct with a minor in the second degree if the actor engages in sexual battery with a victim who is fourteen years of age or less, but who is at least eleven year of age". (1976) (emphasis added). Even if the victim had been 14 years old at the time of the assault, the victim's age would have still been within the statutory range covered by criminal sexual conduct with a minor- second degree. The Petitioner has failed to show how counsel objecting to the State referring to the victim as 13 years old at the time of the incident would have affected the outcome of the Petitioner's trial. This Court should affirm the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective in this regard.

**XIV. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to establish the Petitioner's height and weight at trial when the Petitioner was present at her trial and the jury was able to view the Petitioner's weight and height at trial.**

The Petitioner asserts trial counsel should have presented evidence of the Petitioner weight and height at trial to support her claim that the victim could have possibly overpowered the Petitioner's will and assaulted the Petitioner. The Respondent submits this allegation is

wholly without merit. The Respondent submits there was no need for counsel to present testimony regarding the Petitioner weight and height when the Petitioner was present at trial and the jury was able to view her weight and height in the courtroom during trial. The Respondent submits the Petitioner has failed to show how any additional evidence of the Petitioner's height and weight would have affected the outcome of the Petitioner's trial. This Court should affirm the lower court's ruling that counsel was not ineffective in this regard.

**XV. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to determine whether the Petitioner's husband had a recollection of the victim asking him to borrow a camera battery before questioning him about the event during trial when Petitioner's husband testified at trial that he recalled the event.**

The Petitioner asserts trial counsel should have determined whether the Petitioner's husband recalled the victim asking to borrow a camera battery after the incident before questioning the Petitioner's husband at trial on the event. The Respondent submits counsel was not deficient in this regard since the record reflects that Petitioner's husband did recall the event and was able to answer counsel's questioned regarding the event at trial. At the Petitioner's trial, Mr. Tappeiner testified as follows:

Q: Now, after this event there was something about Josh wanting a battery for his camera. Do you recall that?

A: Yes. I think it was after-- this is a ways after. But Susan called me at work and said Josh had come to the door asking for a battery to a digital camera.

Q: Would that request have been after he reported this event on February the 23<sup>rd</sup> of this year?

A: I believe so.

Q: And in response to that request, what if anything did you do?

A: I-- I brought a battery home. (App. 297:20-298:5).

The Respondent also submits this allegation is without merit and the Petitioner has failed to show how counsel further ascertaining whether the Petitioner's husband recalled the event

would have affected the outcome of the Petitioner's proceeding. The Petitioner has also failed to show what additional testimony regarding the event Mr. Tappeiner would have given had counsel ascertained his recollection of the event prior to trial. This Court should affirm the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was deficient in this regard.

**XVI. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to question the Petitioner's husband regarding the victim's pattern of visitation in their home during the time period prior to the accusations by the victim when the record reflects counsel questioned Mr. Tappeiner at trial regarding the victim's frequent visitation to their home prior to the assault.**

The Petitioner asserts trial counsel failed to question Mr. Tappeiner regarding the victim's frequent visitation to the Petitioner's home prior to the assault. The Respondent submits this allegation is without merit and the record reflects counsel successfully elicited testimony from the Petitioner's husband regarding the victim's frequent visits to the home prior to the assault. The record reflects counsel elicited the following testimony from Mr. Tappeiner:

Q: Was he [victim] a frequent visitor in your home?

A: Yes, him and his sisters and another neighborhood child were coming over fairly regularly. His sister and another neighbor were hired as babysitters for our daughters. (App. 290:19-23)

Q: And it was primarily because of the abuse that these children, including [victim], were using your home when you weren't even there?

A: That's-- That's why it all came to an end because they were abusing access to the house. I mean, you know, one of the rules was that Josh was not allowed in the house at any time if we weren't there. And he was going in the house and also the girls when they shouldn't have been. So we changed—we ended this agreement with them babysitting and changed the locks. (App. 298:19-299:3).

The Respondent submits the Petitioner has failed to show how any additional testimony regarding the victim's visitation to the Petitioner's home would have affected the outcome of the

Petitioner's trial. This Court should affirm the lower court's ruling that the Petitioner failed to carry her burden of proving Petitioner was ineffective in this regard.

**XVII. There is probative evidence to support the PCR court's ruling that counsel was not ineffective for failing to question the Petitioner's husband regarding his observation of the Petitioner's coordination and physical condition when she mixed alcohol with her prescription medication when the Petitioner's husband testified as to the Petitioner's state of mind when she drank and abused prescription drugs.**

The Petitioner asserts trial counsel should have questioned Mr. Tappeiner regarding the Petitioner's coordination and condition when she mixed alcohol with her prescription medications. The Respondent submits this allegation is without merit and Mr. Tappeiner testified about the effect mixing alcohol and prescription drugs had on the Petitioner at trial. At trial, the Petitioner's husband testified the Petitioner had been drinking the night of the incident. (App. 293:20-21). Mr. Tappeiner also testified his wife told him "she didn't remember and she was not in a very good frame of mind from drinking and probably taking her, you know, sleeping pills or Clonipin or whatever." (App. 307:15-24). Through Mr. Tappeiner's testimony, the jury was made aware of the Petitioner's foggy state of mind and loss of memory after mixing alcohol and prescription drugs.

The Respondent also submits the Petitioner was not prejudiced by counsel's failure to elicit testimony from Mr. Tappeiner regarding the Petitioner's physical condition since it is common knowledge that the mixing of alcohol and prescription drugs may result in a person's impairment and it is unlikely counsel needed to point out that common fact to the jury. Mr. Tappeiner's testimony was sufficient to apprise the jury of the effect mixing alcohol and prescription drugs had on the Petitioner the night of the incident and it is unlikely any additional testimony would have affected the outcome of the Petitioner's trial.

**XVIII. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to fully discuss obtaining last argument with the Petitioner when the Petitioner failed to show how counsel's performance affected the outcome of her proceeding.**

The Petitioner asserts counsel should have discussed the preservation of last argument with the Petitioner prior to trial. The Respondent submits this allegation is without merit and the Petitioner has failed to present any evidence to show that had counsel discussed last argument with the Petitioner she would have decided not to present any witnesses at trial. A decision by the Petitioner not to present any witnesses at trial is particularly unlikely considering the Petitioner asserts counsel was ineffective for failing to call several witnesses and experts on the Petitioner's behalf at trial in her post-conviction relief application. This Court should affirm the lower court ruling that counsel was not ineffective in this regard.

**XIX. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to object to a jury charge concerning expert opinion testimony when Mary Beth Hefner was qualified as an expert in the area of forensic interviewing and the jury instruction given by the Court was proper.**

The Petitioner asserts counsel should have objected to the court's jury instruction regarding expert witness testimony on the basis that the State's expert witness did not provide any expert opinion. The Respondent submits this allegation is without merit and the jury instruction given the jury regarding expert testimony was proper. At trial, the State offered the testimony of Mary Beth Hefner as an expert in forensic interviewing. (App. 249:7 (App. 249:20-21). Hefner was qualified as an expert witness before the jury.

The Respondent submits the Petitioner has failed to provide a legal basis for counsel's objection to the expert witness instruction given to the jury. In State v. White, this Court held that after the trial court discharged of its gatekeeping role in assessing the credibility of the expert witnesses offered trial, the Court properly instructed the jury that "you are to give his

testimony such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify in this trial.” 382 S.C. 265, 676 S.E.2d 684 (2009). “Opinion testimony of an expert witness may be based upon facts within his own knowledge or upon hypothetical questions embracing facts supported by the evidence and relating to the particular matter upon which the expert opinion is sought.” Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978).

The Respondent submits the Court properly advised the jury that an expert witnesses may testify to opinion or conclusions and that an expert witness’ testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. The Petitioner has failed to carry her burden of proving the expert witness testimony given at trial was improper or objectionable. This Court should affirm the lower court’s ruling on this issue.

**XX. There is probative evidence to support the PCR court’s ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to request a jury instruction regarding the Petitioner’s consent and competence to engage in sexual acts with the victim when there was no evidence presented at trial to show the victim was the aggressor of the sexual assault and consent is not a defense to criminal sexual conduct with a minor.**

The Petitioner asserts counsel should have requested a jury instruction regarding the Petitioner’s consent and competence to engage in sexual acts with the victim. The Respondent submits this allegation is wholly without merit and this Court should deny and dismiss this allegation. No evidence was presented at trial or during the Petitioner’s evidentiary hearing to support a claim that the 13 year old victim was the aggressor in the incident and sexually assaulted the Petitioner. The Petitioner never testified that she was the victim of sexual assault at the hands of the victim

The Respondent also submits consent is not a defense to criminal sexual conduct with a minor. Even had the Petitioner presented testimony about her relationship with the 13 year old

victim being consensual, it would not have provided a defense to the sexual assault. This claim is also without merit since the trial court properly instructed the jury that a minor cannot consent to a sexual act. (App. 357:7-10).

Evidence presented at trial determines the law to be charged to the jury. State v. Niles, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012). If any evidence supports a jury charge, the circuit court should grant the request. Id. The Petitioner has presented no testimony or evidence that would have warranted a jury instruction on competence or consent at trial. She has also failed to present the post-conviction relief court with an example of any proposed jury charges for the Court to consider. The Respondent submits this allegation is wholly without merit and this Court should affirm the lower court's ruling on this issue.

**XXI. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel's performance was ineffective for failing to object to statements made by the State in closing argument when the Petitioner failed to show counsel's performance affected the outcome of her trial. As an additional sustaining ground, trial counsel's performance was not deficient.**

The PCR court found counsel's performance was deficient for failing to object to statements made by the State during closing argument that were "calculated to imply the Petitioner confessed where her statement had been ruled admissible." The PCR court also found the Petitioner failed to carry her burden of proving counsel's failure to object affected the outcome of her trial proceeding. "A closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. After all the evidence is in, counsel for the parties are in the position to present their respective versions of the case as a whole." Herring v. New York, 422 U.S. 853, 95 S.Ct. 2550 (1975). "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the

jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom.” Id. at 609–10, 602 S.E.2d at 744. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009).

The Respondent submits the PCR court properly found the Petitioner failed to carry her burden of proving counsel's performance affected the outcome of her trial proceeding. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id. The solicitor's comments don't in any way appear to have infected the trial with unfairness as to make the Petitioner's conviction a denial of due process. The Respondent also submits it is unlikely comments made by the solicitor in closing affected the outcome of the Petitioner's trial since the solicitor reminded the jury at the start of his argument that “You know, she said when we talked about opening arguments, these are my opinions -- the opinion of myself and Mr. Macloskie. Nothing that we say to you is evidence. Evidence is what was entered – and you have that to see and to review.” (App. 326:20-25).

The Respondent submits as an additional sustaining ground the PCR court erred by finding counsel's performance was deficient. The Respondent submits the State's reference during closing argument to the fact that the Petitioner was charged with criminal sexual conduct after police interviewed both the victim and the Petitioner was not objectionable or improper. During closing argument, the State argued as follows:

“She came down the testimony I think said around 2:00 o’clock in the afternoon and talk to the police. That was her face to face, eye to eye. Victim 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. 342:6-16):

The Respondent submits the solicitor’s comment was not an improper attempt to put before the jury the Petitioner’s inadmissible statement as the Petitioner claims, but rather the State’s version of the case as a whole. It does not appear the comments were made to arouse any of the jurors’ passions or prejudices. The Respondent submits this Court should affirm the lower court’s ruling that the Petitioner failed to carry her burden of proving counsel’s failure to objected affected the outcome of her trial.

**XXII. There is probative evidence to support the PCR court’s ruling that the Petitioner failed to carry her burden of proving trial counsel failed to adequately cross-examine the victim concerning inconsistencies in his statements when counsel adequately cross-examined the victim and the Petitioner failed to prove prejudice resulted from counsel’s performance.**

The Petitioner asserts counsel should have cross-examined the victim on inconsistencies in his statement about how the abuse by the Petitioner ended. The Respondent submits this allegation is without merit and counsel adequately cross-examined the victim at trial. The purpose of cross-examination at trial is “to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.” State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) aff’d as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

The record reflects counsel adequately cross examined the victim at trial and impeached him on the following: the victim’s frequent visits to the Petitioner’s home when the Petitioner was not there (App. 192:15-193:2, 193:20-194:4), the victim’s visit to the Petitioner’s home to

borrow a camera battery after reporting the assault (App. 193:3-19), the victim's height and weight at the time of the assault (App. 195:16-196:10), and the victim's claim that he screamed, hollered, and was frightened the night of the incident but was heard by no one in the home (App. 199-1-17). The Respondent submits the Petitioner has also failed to show what further cross-examination of the victim at trial would have yielded and that it would have affected the outcome of the Petitioner's proceeding. This Court should affirm the PCR court's finding that counsel was not ineffective in this regard.

**XXIII. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to produce testimony regarding the victim's frequent presence in the Petitioner's home when the Petitioner and her husband were not home when the record reflects counsel elicited this very testimony at trial.**

The Petitioner asserts counsel was ineffective for failing to elicit testimony regarding the victim's frequent visits to the Petitioner home when neither she nor her husband were present. The Respondent submits this allegation is wholly without merit and the record reflects counsel elicited testimony from the Petitioner's husband on the victim's frequent visits to their homes when the Petitioner and her husband were not present. Counsel elicited the following testimony from Petitioner's husband during the defense's case in chief:

Q: Was he [victim] a frequent visitor in your home?

A: Yes, him and his sisters and another neighborhood child were coming over fairly regularly. His sister and another neighbor were hired as babysitters for our daughters. (App. 290:19-23)

Q: And it was primarily because of the abuse that these children, including [victim], were using your home when you weren't even there?

A: That's-- That's why it all came to an end because they were abusing access to the house. I mean, you know, one of the rules was that Josh was not allowed in the house at any time if we weren't there. And he was going in the house and also the girls when they shouldn't have been. So we changed—we ended this agreement with them babysitting and changed the locks. (App. 298:19-299:3).

The Respondent submits counsel presented the very testimony the Petitioner claims he should have elicited at trial. This Court should affirm the lower court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective in this regard.

**XXIV. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel was ineffective for failing to introduce the testimony of a neutral witness regarding the reaction of the Petitioner's dogs to any activity in the Petitioner home when Petitioner's husband testified regarding the dogs reactions to noise and any additional testimony regarding the Petitioner's dogs would have been cumulative.**

The Petitioner asserts counsel was ineffective for failing to present the testimony of a family friend regarding the reaction of the Petitioner's dogs to activity in the Petitioner's home. The Respondent submits this allegation is without merit and counsel elicited testimony from the Petitioner's husband regarding the Petitioner's dogs. The record reflects the Applicant's husband was questioned about the dogs and testified "I heard nothing. And if -- if there was any yelling or shouting or anything, our dogs would have heard it too. One of our dogs is very protective and would have barked." (App. 295:16-18). The Respondent submits any additional testimony regarding the dog's reaction to activity would have been cumulative. The Respondent also submits the Petitioner has failed to show that any additional testimony regarding the Petitioner's dog's would have affected the outcome of the Petitioner's trial. This Court should affirm the lower court's finding that counsel was not ineffective in this regard.

**XXV. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to argue in closing that if the 13 years old victim assaulted the Petitioner while she was incompetent to consent he could be found guilty of criminal sexual conduct when there was no evidence in the record to support this argument by counsel.**

The Petitioner asserts counsel should have argued in closing that if the 13 year old victim assaulted the Petitioner while she was incompetent to consent he could be found guilty of criminal sexual conduct. The Respondent submits this allegation is without merit. There is

nothing in the record to indicate the Petitioner made any allegations of assault against the 13 years old victim. The Petitioner has also failed to show how counsel's failure to make this argument to the jury affected the outcome of her trial proceeding. The Respondent submits heavily suggesting to the jury that the 13 year old criminal sexual conduct victim may have assaulted the Petitioner with no evidence in support of that claim may have erred to the Petitioner's detriment in the eyes of the jury. This Court should affirm the PCR court's finding that the Petitioner failed to carry her burden of proving counsel was ineffective in this regard.

**XXVI. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel failed to request a jury instruction regarding the fact that South Carolina law allows minors under the age of 14 to be charged with criminal sexual conduct when there was not evidence in the record to support such a jury instruction and it is likely any request by counsel for such an instruction would have been futile.**

The Petitioner asserts trial counsel should have request a jury instruction regarding the fact that if the 13 year old victim had assault the Petitioner he could be charged with criminal sexual conduct in South Carolina. The Respondent submits this claim is wholly without merit as no evidence was presented by the Petitioner to support this jury instruction. Evidence presented at trial determines the law to be charged to the jury. State v. Niles, 400 S.C. 527, 735 S.E.2d 240 (Ct. App. 2012). If any evidence supports a jury charge, the circuit court should grant the request. Id. The jury was presented no evidence to suggest the Petitioner accused the 13 year old victim of sexual assault. The Respondent also submits it is unlikely counsel's performance affected the outcome of the Petitioner's proceeding since any request by counsel at trial for such jury instruction would have likely been futile. This Court should affirm the lower court's ruling on this issue.

**XXVII. There is probative evidence to support the PCR court's ruling that the Petitioner failed to carry her burden of proving trial counsel was ineffective for failing to adequately cross-examine the State's expert witness concerning the known reason for delayed**

**reporting of sexual assaults when the information was put before the jury during the State's direct examination of Hefner and the Petitioner has failed to show what additional questioning by counsel would have yielded.**

The Petitioner asserts counsel should have cross-examined the Petitioner on known reasons for delayed reporting by child sexual abuse victims. The Respondent submits the Petitioner has failed to show how she was prejudiced by counsel's failure to explore this line of questions with the State's expert witness at trial. The record reflects that trial counsel did not elicit testimony from Mary Beth Hefner regarding delayed reporting, but the information was put before the jury during the State's direct examination of Hefner. When asked why kids delay reporting sexual abuse, Hefner responded:

"They're reasons such as that we see that they have fear of unknown consequences. They also have fear of the alleged offender who might have threatened them overtly or covertly. They have fear that the parent's response will be negative. Also, they fear an unbelievable audience. In addition to that, there's emotional effects that can affect a child not disclosing, and that could be feeling shame, feeling guilty, feeling embarrassment, confusion. And the overriding emotion is fear. It's basically based on fear." (App. 253:9-18).

The Respondent also submits the Petitioner has failed to show the type of testimony any additional questioning of Hefner by trial counsel on delayed reporting would have yielded. This Court should affirm the PCR court's ruling that the Petitioner failed to carry her burden of proving counsel provided in effective assistance of counsel for failing to explore this line of questioning on cross-examination.

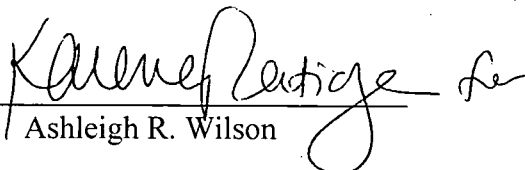
**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted this Court should affirm the PCR court's finding that the Petitioner failed to carry her burden of proving counsel's provided ineffective assistance of counsel and deny this petition for a writ of certiorari.

Respectfully submitted,

ALAN WILSON  
Attorney General

ASHLEIGH R. WILSON  
Assistant Attorney General

BY:    
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ATTORNEYS FOR RESPONDENT

July 28, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Beaufort County  
The Honorable Perry M. Buckner, Circuit Court Judge

SUSAN TAPPEINER

Petitioner,

v.

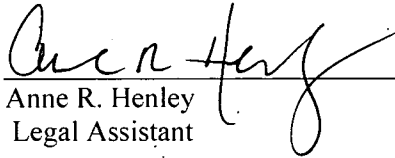
STATE OF SOUTH CAROLINA,

Respondent.

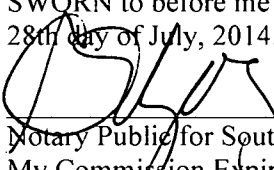
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari to The SC Supreme Court has been mailed to opposing counsel, Tara D. Shurling, Esquire this 28th day of July 2014.

Tara D. Shurling, Esquire  
3614 Landmark Drive, Ste A  
Columbia, SC 29204

  
Anne R. Henley  
Legal Assistant

SWORN to before me this  
28th day of July, 2014.

  
Notary Public for South Carolina.

(L.S.)

My Commission Expires: 12/28/2014