STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr. , Circuit Court Judge

Appellate Case No. 2015-000136

KEVIN C. BRADLEY, 339031,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the lower court erred in finding knowingly and voluntarily waived his right to a direct appeal?

II.

Did the lower court err in finding that Trial Counsel was not ineffective in his representation of Petitioner on all the *Batson* related claims raised in this PCR action ?

III

Did the lower court err in ruling that Trial Counsel was not ineffective for failing to request a continuance after a material amendment to Petitioner 's indictment where the new indictment was presented to the Grand Jury days before the Petitioner's trial, and where he was not made aware of the more serious charge brought in the new indictment until immediately before his trial.

IV.

Was Trial Counsel ineffective for failing to fully articulate the Petitioner's objection to the testimony of State witness Barbara Gregg, RN, for failing to present appropriate authority in support of the Petitioner's objection to this testimony and for failing to object to hearsay testimony from State witnesses Trina Hamlet and Robin Tyler Griggs, where said testimony was clearly hearsay and as such violated Petitioner's right to fully confront his accusers?

V.

Was Trial Counsel ineffective for failing to object to testimony from forensic interviewer Robin Tyler Griggs in which she was allowed to offer expert opinion concerning the Victim's competency at the time of her taped interview where said testimony went beyond the scope of the expertise for which she was qualified as a witness and improperly bolstered the Victim's testimony?

STATEMENT OF ISSUES ON APPEAL
PURSUANT TO RULE 243 (i)(2), SCACR

1. The trial court erred, and thereby violated Petitioner's right to due process of law, by granting the State's *Batson* Motion where the record reflects that Petitioner set forth race neutral explanations for his use of a peremptory challenge to remove each of the jurors at issue in the State's motion.

2. The trial court erred, and thereby violated Petitioner's Confrontation Clause of the United States Constitution, by permitting State Witness, Barbara Gregg, to testify to statements made to her by the Victim concerning who the person responsible for her pregnancy was.

3. The trial court erred in allowing the State to introduce hearsay testimony through Nurse Practitioner, Barbara Gregg, and thereby violated Petitioner's rights pursuant to the Confrontation Clause of the Sixth Amendment of the United States Constitution, in which she was allowed to testify that the Victim told her "Kevin" had been having sex with her since she was ten years old.

4. The trial court erred, and thereby violated Petitioner's right to due process of law, by denying his motion for a directed verdict of acquittal on the charge of First Degree Criminal Sexual Conduct with a Minor where the State failed to present any direct evidence, or substantial circumstantial evidence, that a sexual battery involving penetration occurred before the Victim's eleventh (11^{th}) birthday.

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to the orders of commitment of the Williamsburg County Clerk of Court. The Petitioner was originally indicted for Second Degree Criminal Sexual Conduct with a Minor on Indictment No. 2009-GS-45-249. The State subsequently sought an amendment to the original indictment to add a count of First Degree Criminal Sexual Conduct with a Minor involving the same Victim as the original indictment for Second Degree Criminal Sexual Conduct with a Minor. The amended indictment, charging Petitioner with both first degree CSC with a minor and second degree CSC with a minor, was true billed by the Grand Jury on January 21, 2010, and retained the original indictment number of 2009-GS-45-249. Petitioner was represented in the Court of General Sessions by retained counsel, Richard Strobel, Esquire.

Petitioner was also indicted for a separate count of Criminal Sexual Conduct with a Minor Second Degree involving a different Victim in Indictment No. 2010-GS-45-30. Petitioner was represented on that charge by Assistant Public Defender, Legrand Carraway. On January 25, 2010, Petitioner appeared before the Honorable Clifton Newman, presiding circuit court judge, for a guilty plea proceeding at which he was expected to enter pleas to one count of Criminal Sexual Conduct with a Minor 1st Degree from Amended Indictment No. 2009-GS-45-249 and one count of Second Degree Criminal Sexual Conduct with a Minor on Indictment No. 2010-GS-45-30. The record of that proceeding confirms that the State had agreed to dismiss count two of Amended Indictment No. 2009-GS-45-249 which charged Petitioner with Second Degree CSC with a Minor involving the same minor as referenced in Count One of that indictment. At that proceeding, Petitioner was anticipated to waive Grand Jury presentment on Indictment No. 2010-GS-45-30. That plea proceeding was terminated before the Court accepted Petitioner's pleas after he advised the Court that he did not "want to give up [his] rights." Plea

Hearing, 1.25.2010, Tr. p. 7, ll. 1-9. Attorney Carraway, spoke once on the record during this plea proceeding. Plea Hearing, 1.25.2010, Tr. p. 4, ll. 15 – 18. Likewise, Attorney Strobel spoke out only once during this proceeding and that was when he introduced an affidavit prepared by him in anticipation of the pleas. Plea Hearing, 1.25.2010, Tr. p. 4, ll. 12 – 14.

Petitioner proceeded to trial by jury before the Honorable Clifton Newman on Indictment No. 2009-GS-45-249 later in the same day as the attempted plea proceeding; January 25, 2010. Petitioner was found guilty as charged on both counts of Indictment No. 2009-GS-45-249. Sentencing was deferred on these two judgments until January 27, 2010, at which time Petitioner was sentenced by Judge Newman to twenty-five (25) years incarceration for First Degree CSC with a Minor, and twenty (20) years for Second Degree CSC with a Minor. Said sentences were expressly ordered to be served concurrently. No direct appeal from these judgments and sentences was perfected on behalf of Petitioner.

On January 27, 2010, immediately after the Court imposed sentences on both counts of Indictment No. 2009-GS-45-249, Judge Newman reminded Petitioner that he was looking at a mandatory life without parole sentence if he was ultimately convicted on the other pending charge against him. App. p.307, ll. 4 – 11. Petitioner then asked if he could just go ahead and plead guilty, be sentenced on his other outstanding charge and be sentenced concurrently. While Petitioner stated that he did not want to plead guilty, because he knew he was not guilty of that crime, he indicated a desire to just plead and "get it over with" and receive concurrent sentences. He reminded the Court that he had reached a plea agreement with the State on these charges before his trial. App. p. 307, ll. 12 – 18. At that juncture, Judge Newman informed Petitioner that;

> Well, I don't accept guilty pleas from people who are not guilty. I only take guilty pleas from people who are guilty. They have to convince me, just as the Solicitor has to convince the jury that you are guilty in this case, you've got to convince me that you are guilty in that other case before I can accept a guilty plea.

We'll give you overnight to think about that.

App. p. 307, ll. 19 – 25.

Petitioner originally filed an Application for Post-Conviction Relief on September 29, 2010. The State made Return to said application on September 7, 2011. In said application, docketed at 2010-CP-45-389, Petitioner raised allegations concerning the judgments and sentences imposed against him following his jury trial on Indictment No. 2009-GS-45-0249, as well as allegations addressing the judgment and sentence imposed following his plea of guilty on Indictment No. 2010-GS-45-030. Pursuant to agreement with the State, Petitioner subsequently filed a separate application separating his claims concerning his guilty plea on Indictment No. 2010-GS-45-030 from the allegations addressing his jury trial. That Application was docketed at 2013-CP-45-00098.

An evidentiary hearing was convened in this matter at the Sumter County Courthouse on May 27, 2014. Petitioner was present for this proceeding and was represented by Tara Dawn Shurling, of the Richland County Bar. The Respondent was represented by Daniel Gourley, Assistant Attorney General.

In his Application for Post-Conviction Relief filed September 29, 2010, the Petitioner alleged that he was being held in custody unlawfully for the following reasons:

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

1. Plea Counsel failed to provide client effective assistance of counsel prior to and during his plea proceeding. The Applicant's plea of were coerced by Counsels failure to provide adequate representation. Trial Counsel failed to file a direct appeal for the Applicant and the Applicant did not

knowingly waive his right to a direct appeal.

2. The Applicant's plea of guilty was not voluntarily and intelligently entered. The judgment and sentence against the Applicant were entered in violation of his rights to due process of law and effective assistance of counsel.

In his Second Amended Application for Post-Conviction Relief, filed on May 21, 2014, the Applicant raised the following additional specific allegations:

1. Trial Counsel was ineffective for failing to sufficiently argue the validity of the race neutral explanations given by the Applicant for striking jurors during the selection of the first jury selected in his case.

2. Trial Counsel was ineffective for failing to fully argue against the selection of a second jury panel in the Applicant's case where the reasons given by the Applicant for striking the jurors in question during the State's ***Batson*** challenge were sufficiently race neutral pursuant to known precedent in South Carolina at the time of the Applicant's trial.

3. Trial Counsel was ineffective for failing to repeat and fully articulate for the record the Applicant's reasons for striking each of the jurors in dispute at his trial during the ***Batson*** hearing held pursuant to motion by the State.

4. Trial Counsel was ineffective for failing to explain to the Applicant that all of his reasons for striking each juror against whom he exercised a peremptory strike had to be fully stated for the record ***as to each juror*** when the strike used against that particular juror was addressed during the ***Batson*** hearing held pursuant to the State's motion.

5. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to advise the Applicant, who being allowed by Trial Counsel to participate in decisions concerning the use of preemptory strikes in the selection of his jury, that in order to preserve a record for appeal from the trial court's ruling on a potential ***Batson*** motion by the State, he needed to be prepared fully articulate his reasons for using strikes against each juror.

6. Trial Counsel failed to provide the Applicant with reasonable professional assistance of counsel in that he failed to restate for each juror addressed during the Batson hearing the Applicant's reasons for using strikes against each juror as articulated in Trial Counsel's general response to the State's ***Batson*** motion..

7. Trial Counsel was ineffective for neglecting to exercise a peremptory strikes to remove five (5) jurors from the Applicant's jury who had been previously struck by the Applicant in the selection of his first jury where the

explanations given by the Applicant for the use of a strike against each of these jurors, if properly articulated, provided a race neutral justification for the use of a peremptory strike against each of these jurors.

8. Trial Counsel was ineffective for characterizing the Applicant's reason for striking Juror number 96, Kenneth Lancaster, as an excuse, where this statement supported the prosecution's position that the reasons proffered by the Applicant for striking this juror were pretextural.

9. Trial Counsel was ineffective for failing to fully articulate the Applicant's objection to the testimony of State witness Barbara Greggs and for failing to present appropriate authority in support of the Applicant's objection to this testimony.

10. Trial Counsel was ineffective for failing to research and present potential character witnesses to testify in the Applicant's behalf at trial; specifically Sgt. Robert McClary, Debra Black, Manager at Skyes in Kingstree, South Carolina, Sgt. Staggers, employed with the 1052nd Transportation Company Army National Guard, and Frederick Davis of the Kingstree Police Department.

11. Trial Counsel was ineffective for failing to present testimony from Sgt. Robert McClary, Army National Guard, who would have been able to present alibi evidence for some of the dates the Applicant was accused of committing sexual battery upon the victim, Shataria G. and where said witness could have presented character testimony for the Applicant.

12. Trial Counsel was ineffective for failing to request a continuance after a material amendment to Applicant's indictment where the new indictment was presented to the Grand Jury days before the Applicant's trial, and where he was not made aware of the more serious charge brought in the new indictment until immediately before his trial.

During the evidentiary hearing held in this matter, PCR Counsel moved to amend the Petitioner's allegation to include the following additional issues which were developed during the testimony and arguments presented during that proceeding:

13. Trial Counsel was ineffective for failing to object to hearsay testimony from State witness Trina Hamlet, where said testimony was clearly hearsay and as such violated Applicant 's right to fully confront his accuser and where said testimony prejudiced Applicant by allowing the prosecution to improperly bolter the credibility of the Victim in this case.

14. Trial Counsel was ineffective for failing to object to hearsay testimony from State witness Robin Tyler Griggs, where said testimony was clearly hearsay and as such violated Applicant 's right to fully

confront his accuser and where said testimony prejudiced Applicant by allowing the prosecution to improperly bolter the credibility of the Victim in this case.

15. Trial Counsel was ineffective for failing to object to testimony from forensic interviewer Robin Tyler Griggs in which she was allowed to offer expert opinion concerning the Victim's competency at the time of her taped interview where said testimony went beyond the scope of the expertise for which she was qualified as a witness and improperly bolstered the Victim's testimony.

In deciding this case, the lower court had before it a transcript of the pre-trial hearing held on January 25, 2010, the sentencing portion of the trial record dated January 25 -27, 2010, a transcript of the January 28, 2010 guilty plea proceeding, a transcript of the PCR hearing held on May 27, 2014, the exhibits introduced during the PCR proceeding, the Petitioner's records from the South Carolina Department of Corrections and the records of the Williamsburg County Clerk of Court regarding the subject conviction and sentence.

An Order of Dismissal denying the Petitioner's Post-Conviction Relief Application was filed on August 25, 2014. Petitioner served opposing counsel and the presiding PCR judge with a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, on October 8, 2014. Said motion was filed on October 15, 2014. In this motion, Petitioner noted that, although Respondent had objected the amendments made by Petitioner during his PCR hearing, the lower court had chosen to rule on one of those issues (Allegation 13) while failing to mention two other issues (Allegations 14 and 15). The lower court issued an Amended Order on December 5, 2014, which included rulings unfavorable to Petitioner on Allegations 14 and 15 which had not been addressed in the original Order and denied reconsideration on all other matters addressed in Petitioner's Motion to Alter of Amend. Petitioner's Notice of Appeal from both orders issued on his Application for PCR docketed at 2010-CP-45-389 was filed with this Honorable Court on January 22, 2015.

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

ARGUMENT

Standard of Review

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Petitioner in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000). In a Post-Conviction Relief proceedings, the Petitioner has the burden of proof to establish that he is entitled to relief by a preponderance of the evidence. Rule 71.1(e), S.C.R.Civ.P.

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

On the one hand, where Defense Counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel.

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

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

Relevant Testimony

During the PCR hearing held in this case, Trial Counsel's responses to most questions were vague: He acknowledged that he was retained to represent Petitioner. When asked how long he had represented Petitioner before this case went to trial he responded, ***"Seemed like for years. These instances took place sometime before the trial."*** App. p. 369, l. 21- p. 370, l. 2.

He testified that he ***"could not recall"*** whether his file contained any indication of when he was retained. App. p. 370, ll. 3-5.

When asked what charge Petitioner was charged with right up until days before Petitioner's trial, he responded, ***"He was charged with raping a 10 year old child. She gave birth to a baby when she was 11. They did D.N.A. testing of the baby, and it turned out that he was the father, and he alleged that he raped her when she was 11, not 10. So basically that was the issue: when was she raped?"*** App. p. 371, ll. 1-5.

Trial Counsel could not recall that Petitioner was originally only charged with second degree criminal sexual conduct with a minor. App. p. 371, ll. 6-9. Ultimately he acknowledged that the amended indictment charging Petitioner with First Degree Criminal Sexual Conduct with a Minor was not true billed until January 21, 2010; just days before Petitioner's trial began on

January 25, 2010. He could not recall, however, how long before January 25, 2010, he was aware that the more serious charge of First Degree Criminal Sexual Conduct with a Minor had been added against Petitioner. App. p. 371 , l. 16- p. 379, l. 18. It is apparent that he had to know the additional charge had been made prior to the attempted plea hearing on January 25, 2010 because when they went to Court that day he obviously was aware Petitioner was going to plead guilty to the more serious charge of First Degree Criminal Sexual Conduct with a Minor. App. 372, ll. 15-21; Plea Hearing, 1.25.2010, App. p. 4, ll. 6 – 14.

During an attempted guilty plea before Judge Newman prior to Petitioner 's trial on Indictment No. 2010-GS-45-30, the Court was informed that Petitioner was pleading to the First Degree CSC with a Minor count charged in Indictment No. 2009-GS-45-249 *and* the one count of Second Degree Criminal Sexual Conduct with a Minor found in Indictment No. 2010-GS-45-30. Plea Hearing, 1.25.2010, App. p. 3, ll. 1 – 18. Trial Counsel's PCR testimony indicates that he wasn't at all familiar with the charge Petitioner was supposed to plead to on Indictment No. 2010-GS-45-30. His PCR testimony indicates that he did not even recall Legrand Carraway, who represented Petitioner on Indictment No. 2010-GS-45-30, being in the Courtroom on January 25, 2010, when the plea hearing was held. PCR Hearing, App. p. 375, l. 23 – p. 377, l. 16. During the January 25, 2010 hearing, Petitioner indicated that he did not wish to waive his right to a jury trial. Plea Hearing, 1.25.2010, App. p. 7, ll. 1 – 7. Trial Counsel indicated that he didn't understand what was going on when Petitioner declined to waive his right to a jury trial. He never considered asking for a brief recess to determine which charge(s) he wanted a jury trial on. Trial Counsel was further confounded by the fact that Petitioner had executed an affidavit acknowledging his guilt before he spoke up demanding a jury trial. Plea Hearing, 1.25.2010, App. p. 16, l. 16 - p. 17, l. 23. Following jury selection at Petitioner's jury trial the State interjected a *Batson* challenge concerning the jurors struck by the defense App. p

29, l. 9 - 24. In response to this challenge Trial Counsel stated the following;

> Your Honor, my client says that he didn't strike under the Batson – he didn't strike anybody because of race or gender. He struck by the way they answered the questioned and the way that they looked at him in particular.

App. p 31, ll. 3-8.

The State then asked that the defense be required to state for the record its specific reason for exercising peremptory strikes against numerous jurors. App. p. 32, ll. 5-22. With regard to Juror No. 96, Trial Counsel stated, ***"The same excuse, no different."*** App. p. 33, ll. 21-22. With regard to Juror No. 81, Linda Horton, Trial Counsel stated, ***"he did not fully understand her explanation of employment and where she worked."*** App. p. 33, l. 23 – p. 34, l. 5. As to juror No. 196, Sandra Wilson, Trial Counsel explained that Petitioner, ***"did not like the way she presented herself."*** App. p. 34, ll. 6 – 9. Trial Counsel stated that Petitioner struck Juror No. 66, Celeste Gatlin, for the same reason. App. p. 26, ll. 10 – 12. On Juror No. 131, T. Murray, Trial Counsel explained that Petitioner had struck her because he did not fully understand where she worked. App. p. 34, ll. 13 – 16. Trial Counsel explained that he had a major role in striking Juror No. 104. He explained that he is always leery of people who sit on the front row during jury selection and felt as though this juror acted ***"very excited, very into it, and the way she was looking at them, I felt as if she was already pro-Solicitor's Office before she even got here to be qualified on the jury."*** App. p. 34, l. 17 – p. 35, l. 5. With regard to Juror No. 201, R. Martin, Trial Counsel explained that Petitioner did not like that she was a school teacher at Johsonville School, was anxious about the number of deputy sheriffs associated with the school system and further, he ***"didn't like the way she presented herself."*** App. p. 35, ll. 6 – 13. As to Juror No. 16, K. Brown, Trial Counsel explained that Petitioner struck this juror because he worked for the fire department, and Petitioner was afraid he would be pro-law enforcement because of his affiliation with the fire department. App. p. 35, ll. 14 – 21. Following these

explanations, the State noted that there had been two additional strikes used by the defense that had not be App. p en explained. With reference to Juror No. 80, the prosecution noted that Trial Counsel had explained that this juror worked for the Department of Special Needs and that ***"he was concerned that there may be some sort of bias or affiliation with the Department of Social Services."*** Trial Tr. p. 236, ll. 4 – 8. The State then required that the defense explain the reason for striking Juror No. 2. App. p. 36, ll. 8 – 11. In response to this inquiry, Trial Counsel stated, ***"He didn't have a reason for Patricia Chandler; he just didn't want her to serve on his jury. He gave no reason."*** App. p. 36, ll. 12 – 16. After the State articulated its reasons for believing their *Batson* motion should be granted, App. p.36, l. 18 – p. 37, l. 9, Trial Counsel offered no argument in reply to the State's position. App. p. 37, ll. 10 – 11. After lengthy analysis on the record, the presiding judge granted the State's *Batson* motion and expressly ruled that none of the jurors struck from the first panel could ***" be discriminated against in any future jury selection in this case."*** App. p. 37, l. 23 – p. 41, l. 17.

Trial Counsel's PCR testimony indicated that he was not familiar with the contemporaneous objection rule adhered to in South Carolina. App. p. 383, ll. 19-22. He added that he saw nothing to object to with regard to the selection of the Petitioner's second jury. PCR App. p.383, l. 23- p. 384, l. 4. Trial Counsel testified that he was not concerned that his characterization of Petitioner 's reason for exercising a strike on juror No. 96 as an ***"excuse"*** could be equated with the State's argument that the reason for the strike was pretextural. PCR App. p. 384, ll. 5-24.

Trial Counsel's PCR testimony illustrates a basic lack of understanding of the issues inherent in the State's *Batson* challenge. His responses to questions on this subject reflect that Trial Counsel had no understanding of the necessity to fully present his client's race neutral explanation for striking each juror he utilized a peremptory strike to remove from his jury panel.

App. p. 384, ll. 1-15. Trial Counsel went so far as to testify that he didn't see any reason to object to the first panel being quashed. App. p. 384, ll. 1-4. App. p.384, l. 25- p. 385 l. 9, App. p.386, ll. 11-25. This was his position, notwithstanding the fact that he indicated that at least one of the strikes was utilized for reasons of his own. He went so far as to blame his failure to fully articulate the reasons for a strike on Petitioner, arguing he wasn't asked to. App. p. 386, ll. 2-24

In his original indictment, Petitioner was indicted for Second Degree Criminal Sexual Conduct with a Minor involving the young girl involved in this case. On January 21, 2010 Petitioner was charged with First Degree Criminal Sexual Conduct with a Minor in an amended indictment true billed just days before the Petitioner's trial. Trial Counsel testified that he saw no reason to ask for a continuance after this development. App. p. 388, ll. 18-25. He admitted that he never even discussed the reasons for the last minute escalations of the charges with the State. He testified that he considered himself fully prepared to challenge the State's new assertion that the Victim was younger than eleven (11) when the first sexual battery occurred. App. p. 389, ll. 1-25.

At trial, Trial Counsel initially objected to hearsay testimony from State witness, Barbara Griggs, a registered nurse who examined the Victim in August, when the child was eleven (11) years old. In his PCR testimony, he could not recall whether he ever considered objecting to her testimony on the ground that it exceeded a report of the time and place of the event. He admitted that he never considered objecting to this testimony indirectly allowing this nurse to testify not only to what the Victim said, but the grandmother as well. App. p. 389, l. 25-p.393, l. 9.

Trial Counsel's PCR testimony claimed that he didn't need more time to develop a defense to the new claim by the State that this child was ten (10) years old at the time of the first sexual battery by Petitioner because ***"I don't do that."*** App. p. 393, l. 23- p. 394, l. 2. After

extensive questioning about the fact that the trial record did in fact reveal that he cross-examined the Victim at length about her recollection as to timing issues, Trial Counsel stated, ***"I go with what the record says."*** During his PCR testimony on this crucial point Trial Counsel actually testified that, ***"Well, it was trial strategy for me to stick with what the child – what she testified to."*** He expressed concern about the fact that her medical records showed that she had a discharge at age 10. App. p. 394, l. 3- p. 396, l. 23. At trial the testimony of the doctor who treated the Victim indicated that she was approximately thirteen and six-sevenths weeks pregnant when an ultrasound was performed on August 26, 2009. App. p. 145, ll. 13 – 17; App. p. 146, ll. 2 – 10, Trial Tr. p. 140, ll. 4 - 21 and Trial Tr. p. 142, ll. 6 – 14. Dr. Luberoff estimated that this information put the date of conception at ***early May***. Trial Tr. p. 142, ll. 17 – 20. [1]

At trial the Victim claimed Petitioner began molesting her in the summer of 2008 when she was ten (10) years old. Trial Tr. p.115, ll. 1 – 12. As noted above, the testimony of Dr. Susan Luberoff put the date of conception at approximately May, 2009. When asked why he did not question the Victim concerning how long the sexual relationship had been going on when she got pregnant, Trial Counsel repeated his position that he wasn't about to question her memory as to the timing of the onset of the sexual relationship. The record of this trial, however, clearly reflects that he did cross-examine the child concerning her recollection concerning the timing of the events. He simply did not question her concerning the timing of the first sexual encounter as it related to the pregnancy and subsequent abortion. Trial Tr. p. 124, l. 15 – p. 132, l. 7. Petitioner admitted having sex with this young girl and testified to as much at trial. He denied that the acts occurred before the girl's eleventh birthday. Trial Tr. p. 236, ll. 1 – 14. On cross-examination, Petitioner admitted that he did not know the Victim's date of birth until his trial.

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[1] Counting back 14 weeks from August 26th would actually place the date of conception near the middle of the month of May. Thus, the approximate date of conception would more accurately be placed at nearly *the third week in May*, not early May as testified to by this witness.

He asserted, however, that he was certain he never had sex with the Victim in 2008. He acknowledged that he had visited Dasheia's apartment in 2008, but was firm about the fact that he never stayed in her house during 2008. Trial Tr. p. 237, l. 2 – p. 238, l. 8. The Victim claimed she could recall that the first time she had sex with Petitioner occurred in the summer of 2008 when she was ten (10) years old. Trial Tr. p. 115, l.1 – 12.

Shataria G. never actually testified that Petitioner had sexual intercourse with her in the summer of 2008. She testified that Petitioner "***started touching me and feeling me and stuff.***" When asked where Petitioner touched her, she responded by pointing and answering yes when the prosecution asked if she was indicating her chest and breast area as well as her vagina. App. p. 124, l 4- p. 125, l. 9. She stated Petitioner ***"did it to it."*** App. p. 125, ll. 2-12. The Prosecution prompted Victim by asking, ***"he put his what in your what?"*** Only then did the Victim say Petitioner, ***"put his thing in my crotch."*** App. p. 125, l. 16. The Victim testified that she wasn't sure how many times ***"it"*** happened, but claimed the first time was in June, 2008, and the last was the Fourth of July, 2009. App. p. 125, l. 22- p. 126, l. 8.

The only person to state that ***"he placed his penis in your vagina"*** was the prosecutor. Even that reference was not in connection with the summer of 2008. The prosecutor asked the Victim how many time ***"he placed his penis in your vagina."*** The Victim responded affirmatively when asked if it happened more than five times. App. p. 126, l. 25- p. 127, l. 4. The prosecution also asked the victim if it ever hurt when Petitioner ***"would do those things to you"*** and questioned whether she was ***"ever bleeding."*** Although the Victim answered these questions affirmatively, her responses did not when those occurrences took place. App. p. 128, l. 8- p. 129, l. 4.

During Trial Counsel's PCR testimony he recalled that Petitioner admitted having sex with this girl multiple times. He acknowledged, however, that Petitioner never admitted that the

sex acts occurred when she was ten (10) years old. He testified that Petitioner never admitted any specific timing of these sexual encounters with the girl. Trial Counsel confirmed that the Petitioner himself was only approximately eighteen (18) years old at the time of the alleged conduct. App. p. 396, l. 3- p. 401, l. 21. In his PCR testimony Trial Counsel actually denied that Petitioner disputed the claim that the sexual contact with the Victim was initiated when she was ten (10) years old. App. p. 401, l. 22-p. 402, l. 11. As previously noted, the trial record clearly refutes this position.

During his PCR testimony Trial Counsel denied any recollection of testimony from a forensic interviewer named Robin Tyler Griggs. App. p. 404, ll. 3-6. He did not recall anyone being qualified as an expert in the field of ***"forensic interviewing and child abuse assessment."*** App. p. 404, ll. 7-14. Trial Counsel testified that he never considered objecting to this witness's testimony despite the fact that portions of it went beyond reports of the time and place of the sexual battery. App. p. 405, l. 18- p. 44, l. 21. When questioned about other hearsay testimony from this witness that was not objected to at trial, Trial Counsel answered, ***"strategy."*** When asked what that "strategy" was he asserted only ***"to win"*** without any explanation as to why his failure to object could in any way of operated to Petitioner's advantage. App. p. 406, l. 22- p. 407, l. 14. Likewise, Trial Counsel offered no explanation for his failure to object to further hearsay from this witness concerning the Victim's statements concerning a desire to harm herself or the examiner opinion that she needed immediate counseling. App. p. 407, l. 15- p. 408, l. 11. Neither did he offer any reason for failing to object to this witness's testimony directed toward the Victim's competency, and her ability to ascertain right from wrong. App. p. 408, l. 12- p. 409, l. 23. He testified that he never considered objecting to this testimony as exceeding the field in which she had been qualified as an expert. App. p. 409, l. 21- p. 410, l. 6.

Trial Counsel was expressly asked why he didn't object to a question put to Officer Trina

Hamlet regarding what the Victim told her. In response to this line of inquiry by the State, this witness testified that the Victim said Petitioner, whom she named, had ***"forced having sex with her."*** In his PCR testimony Trial Counsel asserted he didn't object to this line of testimony because the child had already testified to that fact. App. p. 411, l. 10- p. 412, l. 12; App. p. 178, l. 25- p. 179, l. 1.

In his PCR testimony, Trial Counsel admitted that he never discussed *any* possible ***defenses with Petitioner***. App. p. 413, ll. 16-17. Trial Counsel expressed the view that ***"with the blood results"*** there were no possible defenses to the charges. After prompting by a question from Respondent, he agreed that it was correct that there were no defenses ***"other than the fact that he alleged that he did not have sexual intercourse with [Victim] at the age of 10."*** App. p. 413, ll. 16-23. Trial Counsel's PCR testimony reflected his belief that he had no basis, as an attorney, for striking the jurors that were the subject of the State's *Batson* challenge ***"outside of the defendant's request to strike them."*** App. p.416, ll. 2-10. He saw no reason to strike the contested jurors when some of them came back up for the second panel. He believed he had fully developed, and argued, Petitioner's reasons for striking these jurors from the first panel. He expressed the view that Petitioner had a fair and impartial jury. App. p. 416, l. 11-p. 417. l. 4. With regard to witness Barbara Griggs, Trial Counsel testified that he felt he had argued his objection to hearsay testimony introduced through her to the best of his abilities. App. p. 417, ll. 5-12.

During his PCR testimony, Trial Counsel agreed with Respondent that the Victim's testimony that sexual intercourse began in June, 2008, was corroborated by testimony that Victim was taken to the doctor for a ***"discharge"*** when ***"she was around with the boy..."***. PCR Tr. p App. p. 418, l. 12- p. 419, l. 1. During another portion of his PCR testimony, PCR Counsel erroneously argued that the portion of the trial record which reflected that the Victim had tested

positive to these STDs did not clearly indicate at which doctor's appointment, the Victim tested positive for these diseases. App. p. 433, l. 12- p. 434, l. 2.

Trial testimony actually revealed the following about the Victim's June, 2008 and August, 2009 doctor visits.

- Nurse Barbara Gregg testified that the Victim was brought to the doctor's office on June 24, 2008 by her Grandmother, Sadie McBride. App. p. 64, ll. 1 – 7;
- The grandmother reported that she had caught her granddaughter with a boy, that the child had a discharge and that she was concerned that the girl had some kind of sexual disease; App. p. 64, ll. 10 – 13;
- Nurse Gregg reported that the girl was tested for various venereal diseases and all the test results were negative. She did not indicate that she conducted a physical exam on the girl during the June, 2008 examination. App. p. 64, ll. 14– 18;
- Nurse Gregg testified that the girl was brought in for a check-up on August 14, 2009. Nurse Gregg specifically does mention conducting a physical examination on the girl during the August visit. During that visit, a pregnancy test was done and the test results were positive. App. p. 64, l. 19 – p.65, l. 9;
- When questioned about the testimony concerning her having caught her granddaughter with a boy in June, 2008, the grandmother verified having heard the testimony to that effect from Nurse Gregg. When she was asked who the boy was, however, she denied having ever caught her granddaughter with a boy App. p. 93, ll. 2 – 11;
- Dr. Susan Greeland Luberoff testified to conducting a "good head-to-toe" physical examination of this girl on August 26, 2009. She described finds which included a tear in her hymen which had healed and an enlarged uterus. App. p. 144, l. 5 – p. 147, l. 19.

Trial Counsel admitted that he never discussed filing an appeal with Petitioner . App. p . 419, ll. 8-12. He then claimed that following Petitioner's conviction he ***"very quickly"*** told Petitioner about his right to appeal and advised him that ***"it must be done or I must be notified within 10 days of today."*** He initially unequivocally testified that Petitioner ***"didn't tell me he wanted to appeal, but he did not tell me I do not want to appeal."*** After specifically testifying *twice* that Petitioner never told him he didn't want to appeal, Trial Counsel claimed that when he

asked Petitioner if he wanted him ***"to appeal"***, Petitioner said, ***"no"***. App. p. 420, l. 1 – p. 421, l. 11. He confirmed that he did not file an appeal on Petitioner's behalf. App. p.421, ll. 12-13.

Trial Counsel admitted that he never questioned Petitioner concerning whether he had ever tested positive for any of the STDs the Victim tested negative for in June, 2008, and positive for the following August, 2009. He never asked his client if he had ever had these diseases. He testified that he did not believe proof that Petitioner had never had the diseases in question would have been valuable to the defense despite the fact that the girl's credibility regarding the timing of the onset of her sexual relationship with Petitioner was crucial to the charge of First Degree Criminal Sexual Conduct with a Minor. App. p. 424, l. 10- p. 428, l. 5. During the *Batson* hearing held during Petitioner's trial, the presiding judge's ruling indicated that where Petitioner struck jurors in question because he didn't like the way they looked, the reasons given were ***"pretextural."*** App. p. 37, l. 23- p. 40, l. 13. Trial Counsel admitted that he did not consider objecting to this ruling not fully and accurately reflect Petitioner's race neutral explanations for striking the jurors at issue. App. p. 429, l. 22- p. 430, l. 22. He asserted that he explained the need to preserve his position on the *Batson* issues for a potential appeal, but claimed that Petitioner just didn't want to preserve that. App. p. 429, ll. 13-21. Trial Counsel actually claimed in his PCR testimony that Petitioner had admitted having sex with the Victim when she was 10 years old. App. p. 431, ll. 3-8. He directly contradicted this assertion in other portions of his PCR testimony summarized herein.

Petitioner's initial PCR testimony indicates that he was not certain whether he discovered that he had been charged with First Degree Criminal Sexual Conduct with a Minor charge involving Shataria G. in addition to the original charge of Second Degree Criminal Sexual Conduct with a Minor involving this same Victim on the Thursday before his trial or the day of the trial. App. p. 436, ll. 4-24. He stated that he never knew he had actually been indicted for

that additional charge. App.p.437, ll. 3-22. After further question, however, he recalled that on the day of his trial before his jury trial began, there was a hearing at which he thought he was pleading to Second Degree Criminal Sexual Conduct with a Minor with regard to Shataria G.; the Victim in this case. App. p.438, l. 11-p. 439, l. 12. He testified that prior to the Solicitor putting the charges he was pleading to on the record, he wasn't aware he was being charged with First Degree Criminal Sexual Conduct with a Minor. App. p. 437, l. 6-p. 439, l. 19. Once he realized his "deal" was to plead to First Degree Criminal Sexual Conduct with a Minor with regard to Shataria G, he advised the Court that he did not wish to waive his right to a jury trial. App. p. 439, l. 20- p. 440, l. 1.; Plea Hearing , 1.25.2010, App. p.7, ll. 2 – 9. Petitioner noted that he admitted his guilt regarding having had sex with Shataria G., but had always asserted that it didn't happen until after February 5, 2009. He disputed his guilt concerning the Second Degree Criminal Sexual Conduct with a Minor charge, involving a different Victim. He was represented on that charge by Public Defender, William LaGrand Carraway, whose name appears on the transcript of the plea hearing held on January 25, 2010. App. p . 438, l. 11- p.440, l. 9.

Petitioner testified that when they met the Thursday before his trial, he and Mr. Strobel were preparing for a guilty plea as opposed to a jury trial. Trial Counsel never told him that if the plea did not go through for any reason he would be going to trial on that charge that Monday. App. p. 440, ll. 10-20.

In his PCR testimony, Petitioner articulated his reasons for striking the jurors involved in the State's *Batson* challenge at trial. His testimony reflects his belief that Trial Counsel failed to fully articulate Petitioner's race neutral reasons for striking the jurors at issue. App. p. 440, l. 21-p. 441, l. 21. Petitioner's PCR testimony indicates that he questioned Trial Counsel about raising an objection to jurors who were previously struck being seated on the second panel, but Trial Counsel chose to seat them without raising the issue. One juror previous struck by Petitioner

actually ended up being selected as the foreperson for the second panel. App. p. 441, l. 22-p.444, l. 3. Petitioner testified that he asked Trial Counsel to strike these jurors from the second panel. App. p.444, l. 4- p. 445, l. 14.

Petitioner testified that once he stated he did not want to waive his rights during the plea hearing on January 25, 2010 there were no side bar conferences or recesses during which there was any further discussion about why the plea fell apart. App. p. 445, ll. 16-25. Trial Counsel never discussed the possibility of requesting a continuance with Petitioner despite the fact that Petitioner was not indicted for First Degree Criminal Sexual Conduct with a Minor until January 21, 2010, the Thursday before Petitioner's trial began on Monday the 25th of January, 2010. He asserted that he would have wanted Trial Counsel to ask for a continuance had he known such a request was possible. App. p. 446, ll. 1-11.

Petitioner's PCR testimony reflects his position that witness Griggs' hearsay testimony prejudiced him because it bolstered the Victim's testimony. App. p. 446, ll. 12-24. In his PCR testimony, Petitioner asserted that his attorney never discussed his right to a direct appeal with him. His testimony asserted that he wanted a direct appeal. App. p. 446, l. 25- p. 447, l. 6.

Petitioner's PCR testimony reflected his belief that Trial Counsel was "very non-chalant" about presenting his position concerning the reasons why he wanted certain jurors struck from the first jury selected. He recalled that his lawyer reflected a ***"didn't care attitude"*** when responding to the State's *Batson* motion. App. p. 447, l. 18- p. 448, l. 23. Petitioner's PCR testimony reflects that the sole reasons he went to trial in this case was the fact that he contested that the sexual intercourse with the Victim happened before she turned eleven (11) years old. App. p. 449, ll. 2-5.

Petitioner testified that he would have wanted Trial Counsel to object to the testimony of the forensic interviewer presented as a State witness during his trial had he known there was a

basis for doing so. App. p. 449, ll. 6-11.

Petitioner testified that he would have wanted Trial Counsel to use the approximate date when the Victim became pregnant, Summer of 2009, as established through the trial testimony of Dr. Susan Luberoff, to challenge the Victim's claim that she began having sex with Petitioner the summer of 2008. PCR Tr. p. 88, ll. 1-19. Likewise, Petitioner testified that he had never tested positive for either gonorrhea or chlamydia. He stated that he would have been willing to be tested for those STDs prior to his trial and would still be willing to be tested. App. p. 450, l. 20-p. 451, l. 8.

Question

I

Did the lower court erred in finding Petitioner knowingly and voluntarily waived his right to a direct appeal.

Allegation 1, Original Application and First Amended Application

Petitioner respectfully submits that the lower court erred in finding that Petitioner failed to meet his burden of proof with regard to his claim that Trial Counsel provided him ineffective assistance of Counsel in that he failed to preserve Petitioner's right to a direct appeal following his jury trial. The testimony of Trial Counsel at best indicates that there was some rushed discussion of Petitioner's right to a direct appeal following the verdict at trial. The record before the lower court did not support a finding that Petitioner made a knowing and voluntary waiver of his right to a direct appeal from his convictions and sentences. Petitioner asserts that the lower court erred in failing to find that he was entitled to a belated review of his substantive claims under the guidelines and procedures set forth by our Supreme Court in *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974); *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).

Trial Counsel's PCR testimony regarding this issue was inconsistent to the point of

totaling lacking credibility. He initially admitted that he never discussed filing an appeal with Petitioner . App.p. 419, ll. 8-12. He then changed his story and claimed that following Petitioner's conviction he ***"very quickly"*** told Petitioner about his right to appeal and advised him that ***"it must be done or I must be notified within 10 days of today."*** He unequivocally testified that Petitioner ***"didn't tell me he wanted to appeal, but he did not tell me I do not want to appeal."*** After specifically testifying *twice* that Petitioner never told him he didn't want to appeal, however, Trial Counsel claimed that when he asked Petitioner if he wanted him ***"to appeal"***, Petitioner said, ***"no"***. App. p. 420, l. 1 – p. 421, l. 11. He confirmed that he did not file an appeal on Petitioner's behalf. App. p. 421, ll. 12-13. In his PCR testimony, Petitioner very clearly testified that he wanted a direct appeal. He asserted that Trial Counsel never even discussed a direct appeal with him. It was his testimony that he did not realize at the time that Trial Counsel did not file an appeal on his behalf. He further identified at least two of the issues he would have wanted argued on his behalf in a direct appeal. App.p. 446, l. 25 - p. 447, l. 17.

In light of the testimony heard during the PCR hearing, Petitioner asserts that the lower court erred in finding that he knowingly and voluntarily waived his right to a direct appeal from his judgments and sentences. Petitioner asks that he be granted a belated direct appeal of his substantive claims pursuant to the guidelines and procedures set forth by this Honorable Court in *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974) and *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986). In accordance with Rule 243 (i)(2), SCACR, Petitioner has set forth herein a list of the grounds that he would have wanted to present on direst appeal which were preserved for appellate review during the course of his jury trial.

II

Did the lower court err in finding that Trial Counsel was not ineffective in his representation of Petitioner on all the *Batson* related claims raised in this PCR action ?

Allegations 1 – 8 Second Amended Application

Batson Related Claims

The record below indicates that Trial Counsel failed to fully articulate Petitioner's explanations for striking each of the jurors who were eliminated from jury service through the use of a preemptory strike by the defense. Although Trial Counsel generally set forth Petitioner's explanation for his use of the strikes in question when the challenge was first raised by the State, he did not set forth that explanation in detail with regard to each juror in question during the *Batson* hearing that followed. It is equally apparent that Trial Counsel made no effort to argue Petitioner's position in response to the State's challenge. Likewise he made no effort to place legal arguments on the record which would have refuted the lower court's position that Petitioner's justification for striking these jurors was pretextural. Trial Counsel's own characterization of Petitioner's reasons for striking the jurors in question as an ***"excuse"*** argued against his client's position when there existed South Carolina precedent for the adequacy of the reasons asserted by Petitioner as sufficient to withstand a ***Batson***[2] challenge.

It has long been well established that the reasons offered for use of a peremptory strike do not have to be clear, reasonably specific, or even legitimate, they simply must be race neutral. *Purkett v. Elam*, 514 U.S. 765, 115 S.Ct. 1769 (1995); *State v. Adams*, 322 S.C. 114, 123, 470 S.E.2d 366, 371(1996); *State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006). "The burden of persuading the court that a ***Batson*** violation has occurred remains at all times on the opponent of the strike." *State v. Haigler*, 334 S.C. 623, 629,515 S.E.2d 88, 91

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[2] *Batson v. Kentucky*, 476 U.S. 78 (1986).

(1999). In order for the opponent of strikes to show that the reasons offered for their use, even if facially race-neutral, were pretextural they must demonstrate that the reasons were actually mere pretext for engaging in purposeful racial discrimination. *Cochran*, 369 S.C at 315, 631 S.E.2d at 298. If the trial court erroneously grants a *Batson* motion made by the State, but none of the jurors at issue serve on the subsequently selected jury, the error is harmless. *State v. Edwards*, 384 S.C. 504, 509 682 S.E.2d 820, 823 (2009). On the other hand where, as in Petitioner case, one or more of the jurors in question is seated on the new jury panel prejudice is assumed and the error will never be harmless. *State v. Rayfield*, 369 S.C. 106,114, 631 S.E.2d 244, 248 (2006); *Edwards*, 384 S.C. at 509, 682 S.E.2d at 823.

The court record reflects that *Petitioner struck four black females* from the first jury; No. 128, Foyola D. Murphy, No.131, Teresa G. Murray, No. 196, Sandra Wilson[3] and No. 80, Yara Hilton. Jurors number 131 and No. 80 were struck for reasons having to do with their employment or Petitioner's understanding of their employment. App. p. 34, ll. 13 – 16 and App. p. 36, ll. 4 – 8. The record reflects that the reason given for striking juror No. 128, a black female, was that, ***"he didn't like the way she presented herself as a juror."*** App.p. 33, ll. 5 – 11. With regard to juror No. 196, Sandra Wilson, Petitioner stated that ***"he did not like the way she presented herself."*** App. p. 34, ll. 6 – 9.

Out of twelve peremptory strikes (counting those used on alternates) , Petitioner , an African American, used four to strike members of his own race. Of the remaining eight strikes, four were used to strike jurors due to employment issues. (Juror No, 81) App. p. 33, l.23 – p. 34, l. 5; (Juror No. 131), App.p. 35, ll. 6-13; (Juror No. 201); (Juror No. 16) App. p. 35, ll. 14 – 21. Of those four, one juror was excused due to employment concerns as well as, how she presented herself. The defense used a strike to excuse Juror No. 104, Teresa McCants. The record reflects

[3] The Court Reporter's juror form indicated that this juror was seated on the first panel. App. p. 13, however, the trial record reflects that Applicant used a strike to remove this juror. App. p. 25, ll. 21 – 24.

that the decision to strike this juror was made by Trial Counsel who indicated that he was always leery of jurors who sat on the front row during *voir dire*. He expressed the view that this juror appeared very excited and ***"into it"*** and felt that she was looking at "them" in a way that indicated that she was already pro-Solicitor's office before she even got up to be qualified. (Juror No. 104) App.p. 34, l. 17 – p. 35, l. 5. In the final analysis, only three white juror were actually struck based upon Trial Counsel's original assertion that Petitioner had used his strikes on prospective jurors, "by the way they presented themselves to him and the way they answered the questions and the way they looked at him in particular." App. p. 31, ll. 5 – 8. As previously noted, two black jurors were struck for the exact same reason. Despite his original explanation for why the defense had used strikes to remove all of the jurors at issue, when called upon to explain why Petitioner had used a strike to remove juror number 29 from service, Trial Counsel stated, ***"He didn't have any reason for Patricia Chandler; he just didn't want her to serve on his jury. He gave no reason."*** App.p. 36, ll. 12- 16. This juror went on to serve on Petitioner's second jury. App.p. 14.

On the facts of this case, Petitioner urges this Honorable Court to find that Trial Counsel failed to provide Petitioner with reasonable professional assistance of counsel in that he failed to fully articulate the Petitioner's reasons for striking each of the jurors against whom he utilized a peremptory strike. Counsel further failed to meet his duty to Petitioner when he characterized the explanations given by Petitioner in response to the State's *Batson* challenge as excuses. In addition, the trial court dismissed Petitioner's explanations for having struck several jurors as *per se* pretexural. In so ruling, the lower court found that the reasons advanced for the strikes were ***"so fundamentally implausible.....that those strikes were done in a discriminatory manner."*** App.p. 32, ll. 2 – 13. It is clear from the record below that Trial Counsel did not object to this finding in the absence of any showing by the State that the reasons given were pretext for

purposeful discrimination. Trial Counsel was ineffective for failing to point out that Petitioner had used four peremptory strikes to remove jurors of his own race, and that two of those jurors were excused by the defense for the very same reason as the explanation found by the Court to evidence purposeful discrimination. Likewise, Trial Counsel made no effort to advocate for his client's position by arguing existing authority which would have supported his position that his explanations were sufficiently race neutral and not pretextural. Where five of the jurors removed by peremptory strikes exercised by Petitioner ultimately served on the jury that determined his fate, Petitioner would be likely to win a new trial on this issue if it had been fully argued and preserved at trial. For that reason, this Court finds that Petitioner has met his burden of proof that Trial Counsel was deficient with regard to his representation during jury selection and the subsequent *Batson* challenge and that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Petitioner argues that the potential prejudice to him arising from Trial Counsel's ineffective representation during the jury selection process was exacerbated by the fact that three jurors struck by him on the first jury, Jurors No. 128, 82 and 96, were seated on the jury that ultimately decided his fate. App.pp. 13 - 14.

III.

Did the lower court err in ruling that Trial Counsel was not ineffective for failing to request a continuance after a material amendment to Petitioner 's indictment where the new indictment was presented to the Grand Jury days before the Petitioner 's trial, and where he was not made aware of the more serious charge brought in the new indictment until immediately before his trial.

Allegation No. 12, Second Amended Application

The records of the Clerk of Court confirm that Petitioner was not indicted for First Degree Criminal Sexual Conduct with a Minor until January 21, 2010, the Thursday before his trial began on Monday, January 25, 2010. The testimony at Petitioner's trial reveals that he

forthrightly admitted his guilt of having sexual intercourse with the Victim beginning in February, 2009 when she was eleven (11) and he was nineteen (19). *See*, App.p. 244, ll. 1 – 14 and SCDC Records confirming Petitioner 's date of birth as 7/17/1989. It is clear from Petitioner's trial testimony and his PCR testimony that the sole issue that he disputed was the timing of him having sexual intercourse with the girl for the first time. The testimony from the PCR hearing strongly indicates that Counsel simply did not comprehend the significance of the State's amended indictment nor did he understand the need to prepare Petitioner's defense with an eye toward this one crucial issue.

As repugnant as any of us might find Petitioner's behavior with Victim, the fact remains that there was a substantial difference in Petitioner's exposure if the onset of this sexual relationship began after the girl turn eleven rather then before as the State suddenly claimed, one business day before Petitioner's trial. Counsel's failure to be adequately prepared to defend on this crucial issue is evident by numerous factors at trial. For example,

- This young Victim acknowledged a sexual relationship with Petitioner that spanned a period of months;
- She initially referenced Petitioner putting his penis in her crouch, not in her vagina. While she was ultimately lead into stating that it hurt at times and that she bleed twice, she *did not* testify to when the act of intercourse itself began. Trial Counsel never explored what type of sexual contact began in the summer of 2008 and whether that contact may not have escalated to involve intercourse, or other conduct that would qualify as a sexual battery, until much later. There is no indication as to when the acts which hurt and caused her to bleed happened;
- The Victim became pregnant by Petitioner. That undisputed fact was established through medical testimony that also placed the date conception in 2009 at approximately the same time of year the Victim claimed the "sex" began, but a year later than the state claimed. Notwithstanding this fact, no one, including Trial Counsel bothered to explore with this girl how long she had been intimate with Petitioner before she became pregnant;
- Trial Counsel apparently failed to understand the need to fully prepare for this crucial issue once the indictment against his client was amended.

Indeed, Trial Counsel apparently did not even explore why the State had for the first time added this more serious charge just days before trial;

- The nurse who saw this young girl in June of 2008 did not mention a physical examination of the girl during the office visit which occurred that summer. The physician who did examine the girl in late August, 2009 noted that she had a tear in her hymen that had healed. Trial Counsel did not bother to explore how long it would typically take for a hymen tear to heal, but rather allowed the witness to reference the injury as an "old" injury without any insight as to how recently it may have occurred and still have healed to the degree she found in August 2009;
- The girl involved in this case tested positive for two STDs in August, 2009. Trial Counsel was not prepared to introduce any evidence with regard to his client's medical history regarding these diseases;
- The nurse who saw this girl in June 2008 testified that the grandmother had reported that she had caught the girl with a boy and wanted her tested for STDs. In her trial testimony the grandmother denied telling the medical personnel this fact. Trial Counsel did not explore the possibility that the girl may have been reporting her sexual encounter with Petitioner as occurring earlier than it did in order to protect someone else who had been with her earlier than the Petitioner.

Based upon the totality of the record below, Petitioner asserts that it is apparent that Trial Counsel was not prepared to respond to the material change in the charges against his client as a result of the Amended Indictment obtained by the State on Thursday before Petitioner 's trial the following Monday. The record supports Petitioner's claim that Trial Counsel was ineffective for failing to request a continuance based upon that material change in the case against his Client. The record supports Petitioner's claim that Trial Counsel was not adequately prepared to respond to this major change in the State's theory of the case and should have sought a continuance. Given this last minute amendment to the indictment against Petitioner, there is every reason to believe the lower court would have responded favorably to such a motion. The Petitioner therefore argues that the lower court erred in failing to grant him a new trial on this issue as well.

IV.

Was Trial Counsel ineffective for failing to fully articulate the Petitioner's objection to the testimony of State witness Barbara Gregg, RN, for failing to present appropriate authority in support of the Petitioner's objection to this testimony and for failing to object to hearsay testimony from State witnesses

Trina Hamlet and Robin Tyler Griggs, where said testimony was clearly hearsay and as such violated Petitioner 's right to fully confront his accusers?

Allegation No. 9 from Second Amended Application

Allegations No. 13 and 14 as Developed during PCR Hearing

While Trial Counsel did make a motion to exclude the testimony of Nurse Gregg, he failed to fully develop his objection and failed to argue authority in support of his objection. The testimony of this witness clearly exceeded the scope of hearsay testimony permissible to establish that a Victim reported the place and time of a sexual battery. Petitioner asserts that the lower court erred in failing to find that Trial Counsel was ineffective for failing to fully articulate all the available legal arguments for the exclusion of this evidence. In addition, Petitioner has demonstrated that Trial Counsel neglected to argue that some of the testimony elicited from this witness appears to in fact be hearsay on hearsay in that it repeated what the grandmother claimed she had been told by the girl. In addition, portions of this testimony were highly inflammatory and were designed to appeal to the passions and prejudices of this jury. Trial Counsel failed to argue that any probative value this testimony may have had was far outweighed by its tendency to appeal to the passions and prejudices of the jury. Trial Counsel failed to object the first and every time this witness testified to what she was told by the Victim and her grandmother.

Likewise, Officer Trina Hamlet, was allowed to testify, without objection, to statements made by the Victim to her that went far beyond statements concerning time and place of a sexual battery. She was allowed to repeat statements by the girl concerning who she had sex with and that the sexual intercourse was forced. App.p. 178, l. 11 – p. 179, l. 1.

Forensic Interviewer Robin Tyler Griggs was permitted to testify at length concerning her interview with the Victim and to repeat statements made to her by the girl that went far beyond a simple report of an assault and the time and place it occurred. Trial Counsel once again failed to

articulate a legal basis for his few objections beyond noting that the testimony was hearsay. The record below establishes that at one point he was even invited by the Trial Court to give a legal basis for his objections and failed to do so. App. p. 165, ll. 4 – 16.

During his PCR testimony Trial Counsel denied any recollection of testimony from a forensic interviewer named Robin Tyler Griggs. App. p. 404, ll. 3-6. He did not recall anyone being qualified as an expert in the field of ***"forensic interviewing and child abuse assessment."*** App. p. 404, ll. 7-14. Trial Counsel testified that he never considered objecting to hearsay testimony introduced through this witness despite the fact that portions of it went beyond reports of the time and place of the sexual battery. App. p. 405, l. 18- p. 44, l. 21. As previously noted, when questioned about other hearsay testimony from this witness that was not objected to at trial, Trial Counsel answered, ***"strategy."*** When asked to explain what that ***"strategy"*** was, Trial Counsel stated, without explanation, ***"to win".*** App. p. 406, l. 22- p. 407, l. 14. As addressed in the summary of the PCR testimony presented above, Trial Counsel offered no explanation his failure to object to hearsay testimony from this witness concerning the Victim's statements about her alleged desire to harm herself. App. p. 407, l. 15- p. 46, l. 11.

Although Petitioner admitted having had sexual intercourse with the Victim in this case, he expressly denied doing so while the girl was under eleven (11) years old. This distinction potentially made the difference between Petitioner being found guilty of the charge of First Degree Criminal Sexual Assault with a Minor and the lesser charge of Second Degree Criminal Sexual Conduct versus, Second Degree CSC with a Minor alone. Petitioner asserts that the lower court erred in failing to find that Trial Counsel was deficient for failing to raise proper objections to this testimony. Given how crucial the credibility and reliability of the Victim's testimony was at trial, any hearsay testimony which tended to bolster her testimony was prejudicial to Petitioner. As in the case of *Vail v. State*, 402 S.C. 77, 738 S.E.2d 503 (Ct. App.

2013), the testimony introduced through these two witnesses far exceeded the limited testimony which is admissible under Rule 801(d)(1)(B) and (D), SCRE. While the *Vail* appeal had not been decided at the time of this trial, the precedents upon which it was rooted had been. It was already well established the time of Petitioner's trial that,

> [i]n a CSC case, the testimony of a witness regarding the Victim's out-of-court statement is not hearsay when: "The declarant testifies at trial...and is subject to cross-examination concerning the statement, and the statement is ...consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged Victim and the statement is limited to the time and place of the incident."

Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631-32 (2010) (quoting Rule 801(d)(1)(D), SCRE). Precedents in place well before Petitioner's trial made it clear that, "any other details or particulars, including the perpetrator's identity, must be excluded." *Watson v. State*, 370 S.C. 68, 71-72, 634 S.E.2d 642, 644 (2006); *Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262-63 (2001). The testimony in question, was utilized by the prosecution to improperly bolter the credibility of the Victim in this case and therefore, was highly prejudicial to Petitioner.

Petitioner now respectfully asserts that the lower court erred in failing to grant him a new trial on these allegations as well as other addressed herein.

V.

> Was Trial Counsel ineffective for failing to object to testimony from forensic interviewer Robin Tyler Griggs in which she was allowed to offer expert opinion concerning the Victim's competency at the time of her taped interview where said testimony went beyond the scope of the expertise for which she was qualified as a witness and improperly bolstered the Victim's testimony?

Allegation No. 15 as Developed during PCR Hearing

As demonstrated by the PCR testimony summarized herein, Trial Counsel did not offer any reason for failing to object to this witness's testimony offering her expert opinion as to the

Victim's competency, and her ability to ascertain right from wrong. App. p. 408, l. 12- p. 409, l. 23. He testified that he never considered objecting to this testimony as exceeding the field in which she had been qualified as an expert. App. p. 409, l. 21- p. 410, l. 6.

During this witness's testimony she not only testified to statements made by the Victim during her interview of the girl, which went beyond reports of the time and place of the alleged sexual battery, she also offered her opinion as to whether the girl was competent at the time she conducted the forensic interview. App.p. 170, ll. 3 – 12. This witness was qualified, without objection by Trial Counsel, as an expert in "forensic interviewing and child abuse assessment." App. p. 153, l. 23 – p. 154, l. 2. This witness testified that in addition to working for DSS for nineteen and a half years, she had taken two courses "on interviewing kids" and had participated in other yearly training which she did not even describe. App. p. 152, l.22 – p. 153, l. 9.

There is nothing in the credentials of this witness, as presented during this trial, which indicates she had the education or training to be considered an expert in child psychology or any other whether that would give her the expertise necessary to determine the competency a child witness. Our Courts have recognized that it is improper for a "forensic interviewers" to testify concerning their opinion about the credibility or believability of a child witness. *Smith*, 386 S.C. at 564 – 65, 689 S.E.2d at 631.[4] There is no evidence that this witness had any particular expertise that would qualify her to determine the competency of this Victim. In addition, Petitioner argues that there exists too great a risk that a jury would equate an assessment of competence with an opinion as to credibility which is clearly prohibited under law that was well established at the time of Petitioner 's trial. Accordingly, Petitioner asks this Honorable Court to find that Trial Counsel was ineffective for failing to object to this line of testimony. Inasmuch as portions of the interview conducted by this witness went directly to the question of the timing

[4] In the case of *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), this Court made it very clear that testimony from such "forensic interviewers" should be narrowly restricted.

of the onset of Petitioner's sexual intercourse with this Victim, Petitioner asserts that he was clearly prejudiced by this error. He submits that the lower court erred in failing to grant him a new trial on this ground.

CONCLUSION

Based upon all the arguments and authorities presented herein, as well as those advanced during his PCR hearing, Petitioner asks this Honorable Court to dispense with further briefing and grant him a new trial. Alternatively, he asks that the Court grant the writ and allow full briefing of the issues summarized herein.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

This 6th day of July, 2015.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2015-000136

KEVIN C. BRADLEY, 339031,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above-entitled case have been served upon opposing counsel this the 6th day of July, 2015, by depositing in the U.S. Mail, postage prepaid, one (1) copy properly addressed to:

Daniel Gourley
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

Tara D. Shurling

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

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 6th day of July, 2015.

Sharon McCollister (L.S.)
Notary Public for South Carolina
My Commission Expires: Jan. 16, 2017

LAW OFFICE OF

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July 6, 2015

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Kevin C. Bradley, 339031 v. State of South Carolina;
Appellate Case No.: 2015-000136

Dear Mr. Shearouse:

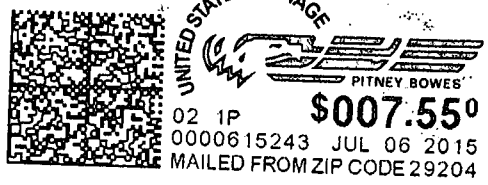
Enclosed for filing please find the original and six copies of the Petition for Writ of Certiorari, the original and 1 bound copy of the Appendix, and the Certificate of Service in the above-captioned case. I have also enclosed two (2) extra copies of the Petition for Writ of Certiorari, the cover pages only for the two volume Appendix, and a copy of the Certificate of Service and would appreciate having them clocked and returned in the enclosed self-addressed envelope. Thank you for your assistance in this matter. I remain,

Sincerely yours,

Tara D. Shurling

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sm
Enclosures
cc: Daniel Gourley, Assistant Attorney General (w/enclosures)
Kevin Bradley, 339031 (w/enclosures)
Carol Bradley (w/out enclosures)



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TO: The Honorable
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K. Bradley 1 of 3