

**STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas**

Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2013-001885

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S.C. Supreme Court

SUSAN TAPPEINER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF PETITIONER

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INDEX

Index2

Table of Authorities3

Questions Presented5

Statement of the Case6

Summary of Facts Adduced at Trial and in the PCR Proceeding11

Argument31

Standard of Review.....31

Question I.....32

Question II42

Question III44

Conclusion49

TABLE OF AUTHORITIES

CASES

Ard v. Catoe, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).....32

Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011)32

Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2007).....32

Holden v. State, 393 S.C. 565, 713 S.E.2d 611 (2011).....31

Jackson v. Denno, 378 U. S. 368, 84 S.Ct. 1774 (1964)12

Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997)31

Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008)32

Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)31

Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002)46

Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).....30

Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)32

State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).....46

State v. Hook, 348 S.C. 401, 416-417, 559 S.E.2d 856, 864 (S.Ct. 2001)37

State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001).....46

State v. Victor, 300 S.C. 220, 221, 387 S.E.2d 248, 249 (Sect. 1989)36

State v. White, 311 S.C. 289, 294, 428 S.E.2d 740, 743 (Ct. App. 1993)37

Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)32

Strickland v. Washington, 466 U.S. 668 (1984)31

Thompson v. State, 340 S.C. 112, 531 S.E.2d 294 (2000).....31

Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004)48

COURT RULES

Rule 243(e), SCRCP9

Rule 52(a), SCRCP30

Rule 71.1(e), SCRCP31

STATUTES

S.C. Code Ann. § 16-3-65441
S.C. Code §16-3-65941
S.C. Code Ann. §16-3-659.139
S.C. Code Ann. §17-27-8029

CONSTITUTIONAL PROVISIONS

S.C. Const. Art. I, §14.....6
U. S. Const. Amend. VI.....6, 7
U. S. Const. Amend. XIV6, 7, 48

QUESTIONS PRESENTED

I.

Certiorari Petition, Question I

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

II.

Certiorari Petition, Question IV

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

III.

Certiorari Petition, Question X

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

STATEMENT OF THE CASE

Petitioner, Susan Tappeiner, was indicted for Second Degree Criminal Sexual Conduct (CSC) with minor (2009-GS-07-703) in Beaufort County. A jury trial held October 26-28, 2009 in Beaufort County resulted in conviction. The sentencing took place on November 16, 2009. At that proceeding, the Honorable Carmen Mullen, presiding judge, imposed a ten (10) year, suspended upon the service of five (5) years plus three (3) years of probation. Petitioner has subsequently been released from the custody of the South Carolina Department of Corrections and is currently on supervised community release.

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

The Petitioner filed an Application for Post-Conviction Relief on May 27, 2010. An evidentiary hearing was convened on April 4, 2013 before the Honorable Perry M. Buckner, presiding judge. In her Applications for Post-Conviction Relief Petitioner raised the following allegations in support of her claim that she received ineffective assistance of counsel prior to and during her trial in violation of her right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. The Petitioner has alleged generally that she received ineffective assistance of counsel prior to and during her trial in violation of her rights pursuant to the Sixth and Fourteenth

Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim she has raised the following specific allegations:

1. Trial Counsel was ineffective in failing to develop and employ a clear theory of defense.
2. Trial Counsel was ineffective for failure to present evidence concerning what prescription medications the Petitioner was taking during time of incident.
3. Trial Counsel was ineffective for failing to introduce testimony from Dr. Nolan in case for defense.
4. Trial Counsel was ineffective for failure to hire Dr. Martin, or an expert of equal credentials, to testify during the case in chief.
5. Trial Counsel was ineffective for failing to adequately prepare Dr. Tom Martin for his role in the sentencing phase of the Petitioner's trial.
6. Trial Counsel was ineffective for failing to introduce evidence concerning the medications the Petitioner was taking during the operative time period, and the effect of those medications when combined with alcohol.
7. Trial Counsel was ineffective for failing to object to repeated references throughout trial to the fact that the decision to arrest the Petitioner was not made until after her two hour police interview where the statements made by the Petitioner had been ruled inadmissible.
8. Trial Counsel was ineffective for failing to seek introduction of evidence that the victim had previously reported being raped at age 8 where that evidence was material to the defense.
9. Trial Counsel was ineffective for failing to discuss use of character witnesses with the Petitioner and failed to produce such witnesses at trial.
10. Trial Counsel was ineffective for failing to fully discuss potential risks and benefits of testifying at trial.
11. Trial Counsel was ineffective for failing to request a jury view of the scene, or in the alternative, to introduce evidence demonstrating the size and layout of the Petitioner's home.
12. Trial Counsel was ineffective for failing to object to repeated references to hearsay statements from the victim which went beyond a report of the time and place of the alleged assault.
13. Trial Counsel failed to object to repeated references to the victim as 13 years old at the time of the alleged assault where the victim was two months away from his 14th birthday at the time of the alleged assault.

14. Trial Counsel failed to establish his client's height and weight at trial.
15. Trial Counsel failed to provide the 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 timing of that request.
16. 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.
17. 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.
18. 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.
19. Trial Counsel failed to object to a jury charge concerning expert opinion testimony where the sole expert witness proffered by the State was not asked to provide an expert opinion at trial.
20. Trial Counsel failed to request a jury charge relating to consent and competence as those concepts applied to the Petitioner as opposed to the victim.
21. Trial Counsel failed to object to numerous highly improper and inflammatory statements made by the State in closing arguments where said remarks;
 - a. personally vouched for credibility of Victim's testimony;
 - b. personally staked the jury in the outcome of this trial;
 - c. were calculated to imply the Petitioner had confessed where her statements had been ruled inadmissible.
22. Trial Counsel failed to adequately cross-examine the Victim concerning inconsistencies between his statements pre-trial and his testimony at trial.
23. Trial Counsel failed to produce testimony relevant to the Victim's frequent presence in the Petitioner's home when neither she nor her husband was home.
24. Trial Counsel failed to introduce from neutral witnesses evidence concerning the reaction of the Petitioner's dogs to any activity in her home.
25. Trial Counsel failed to argue in closing that it would not be Criminal Sexual Conduct by the Petitioner if the complaining witness in fact assaulted her while she was incompetent to consent.

26. Trial Counsel failed to request jury charge on the fact that South Carolina law allows minors under the age of 14 to be charged with Criminal Sexual Conduct.
27. Trial Counsel failed to adequately cross-examine the State's expert witness concerning the known reasons for delayed reporting of sexual assaults.

Following the submission of proposed orders by both sides, the lower court issued an Order of Dismissal which was filed on June 18, 2013. That Order of Dismissal addressed only a portion of the issues raised and argued by Petitioner in her applications for relief and at her evidentiary hearing. In the Order of Dismissal the lower court found Trial Counsel's representation to be deficient however, concluded that Petitioner had failed to meet her burden of proof with regard to demonstrating prejudice in connection with that deficient performance. The Respondent filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCF, on June 27, 2013. Petitioner served and filed her first Motion to Alter or Amend on July 9, 2013. Thereafter, the Respondent filed a second Motion to Alter or Amend on July 15, 2013. That motion, however, is obviously a duplicate filing of the previously filed Motion to Alter or Amend filed by the State on June 27, 2013 inasmuch as the two documents appear to be identical. The lower court entered an Amended Order of Dismissal on August 2, 2013. That Amended Order expressly mentioned the Rule 59(e) motion filed by Petitioner. App. p. 845, para.3. That Order does not mention the 59(e) filed by the Respondent. The records of the Beaufort County Clerk of Court do not reflect a separate ruling on Respondent's 59(e) motion.

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

August 29, 2013, received by Counsel on September 3, 2013 and was filed with the Beaufort County Clerk on September 9, 2013.

Petitioner's Notice of Appeal from all the orders issued by the Court of Common Pleas in reference to this matter was filed on September 5, 2013. The Petitioner filed her Petition for Writ of Certiorari on March 31, 2014. Petitioner filed a Motion to Enlarge Page Limitation set for Petitions for Writ of Certiorari by Rule 227 (e) (3), SCRAP, on March 31, 2014. Respondent filed a Motion to Strike Pursuant to Rule 243(e) on April 3, 2014. Petitioner filed a Reply to Respondent's Motion to Strike Pursuant to Rule 243(e) on July 30, 2014. The Court issued an Order on May 7, 2014, granting Petitioner's Motion to Exceed the Page Limit and denying the Respondent's Motion to Strike. Respondent filed a Return to Petition for Writ of Certiorari, as well as its own Motion to Exceed Page Limit pursuant to Rule 243(e), on July 28, 2014. That motion was granted by order of this Court dated August 6, 2014.

On March 5, 2015 this Honorable Court issued an Order Granting the Petition for Writ of Certiorari in this matter to review Petitioner's Questions I and denying the remaining Questions. On March 6, 2015 Petitioner filed a Petition for Rehearing requesting Court also grant the petition as to Petitioner's Question IV. On April 22, 2015, the Court issued its Order additionally granting review as to Petitioner's Question IV. Petitioner now asks that the rulings of the Court of Common Pleas with regard to the questions raised herein be reversed and that Petitioner's case be remanded to the Beaufort County Court of General Sessions for a new trial.

**SUMMARY OF RELEVANT TESTIMONY ADDUCED AT TRIAL
AND DURING PCR PROCEEDING**

Defense Counsel, Charles B. Macloskie¹, of the Beaufort County Bar, testified at the evidentiary hearing held in this matter. His testimony establishes the following. He was hired by Petitioner's father immediately after Petitioner was arrested. App. p. 486, l. 10. She was on bond pending trial. App. p. 487, l. 1. Prior to trial there were no serious plea negotiations in this case. Defense Counsel recalled that no offers that he could recommend were ever offered by the prosecutor handling the case. App. p. 487, l. 22. There were no last minute offers just before trial. App. p. 488, l. 22.

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

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

¹ Hereafter, Defense Counsel.

125 pounds. App. p. 492, l. 9-23. In the *Jackson v. Denno*² hearing held in this trial, App. p. 38, l. 16 – p. 134, l. 12, Defense Counsel presented testimony from a clinical psychologist, Dr. Yola Nolan, to establish the effect of drugs and alcohol on the Petitioner's ability to give a voluntary and reliable statement. App. p. 494, l. 6 - p. 495, l. 9. At the PCR hearing, Defense Counsel admitted that he never considered using, Dr. Nolan, or some other expert, to address what effect the prescription drugs the Petitioner was taking combined with alcohol, would have had on her capacity to consent. In his PCR testimony, Defense Counsel agreed that if an adult has sex with a child it is a crime regardless of whether the child consents or not. App. p. 495, ll. 10-20. He went on to acknowledge however, that whether or not the adult had any criminal culpability would be affected by whether the adult was incapacitated at the time of the sex act. He likewise admitted that if the adult was unconscious, or otherwise incapable of consenting or participating in the act, the sex act would be criminal with regard to the adolescent but not the adult. App. p. 495, l. 21 - p. 496, l. 19. Defense Counsel acknowledged that this was the premise set forth in his opening statement to the jury. App. p. 496, ll. 20 - 23. Despite this fact, he admitted that he introduced no witnesses, in the presence of the jury, to establish at the time of the alleged incident that the Petitioner was taking heavy doses of prescription medications and was drinking. He introduced no testimony concerning the Petitioner's pattern of mixing alcohol with prescription medication. App. p. 497, ll. 14 - 22.

Defense Counsel acknowledged that he introduced no evidence concerning what prescription medications his client was taking on the night of the alleged event. Defense Counsel admitted that absent such testimony, he established no foundation for the defense theory he advanced in opening arguments. He forthrightly conceded that he had no

² 378 U. S. 368, 84 S.Ct. 1774 (1964).

explanation for failing to introduce this evidence at trial. App. p. 497, l. 23- p. 498, l. 18. Defense Counsel testified that he never considered using Dr. Nolan, the expert he successfully used to support his position during the *Jackson v. Denno* hearing, or any other psychiatric or medical doctor, to present testimony concerning the question of the Petitioner's ability to consent to anything under the circumstances of the evening in question. During the *Jackson v. Denno* hearing, Sergeant Gonzales asserted that, at the time he interviewed the Petitioner, she did not smell of alcohol, she did not have slurred speech or "anything like that." He claimed that she had no trouble walking into the interview on her own. App. p. 41, ll. 5 -16. Sergeant Gonzales testified that at one point during the interview phase of his two hour meeting with the Petitioner she stated, "**maybe he did this to me.**" App. p. 50, ll. 5 - 13. Defense Counsel offered no explanation for his failure to introduce evidence, *in the presence of the jury*, that at the time of the alleged incident the Petitioner was under the combined influence of alcohol and her prescription medications.. Defense Counsel in no way claimed that this omission was a tactical or strategic decision. App. p. 499, l. 5-16. Following the *Jackson v. Denno* hearing, the Petitioner's pre-trial statements were excluded from evidence. App. p. 38, l. 16 - p. 125 l. 17.

In excluding the statement from evidence, the Trial Judge, after viewing the video of Petitioner's statement, specifically ruled that,

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

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

Throughout the trial however, the prosecutor made repeated references to the fact

that the Petitioner was not charged until after her two-hour interview with the police. During the direct examination of Sergeant Gonzales, the following colloquy took place without objection,

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

A. Approximately 2 hours.

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

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

App. p. 280, l. 14 – p. 281, l. 2.

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

Defense Counsel testified that he didn't want to put the Petitioner on the stand because he was afraid of opening the door for the statements that had been excluded from evidence coming to impeach her testimony. App. p. 507, l. 20 – p. 509, l. 20. He admitted that he may or may not have told the Petitioner that her statements, although excluded from evidence, could be used to impeach her. App. p. 509, ll. 11-20. Defense Counsel indicated that the other reason he didn't call the Petitioner as a witness in her

own defense was the fact that she had no recollection of any of the events of the evening in question. App. p. 509, l. 21 – p. 510, l. 2. He confirmed on cross-examination that he *“more likely than not advised pretty strongly against”* the Petitioner testifying at trial. He repeated his recollection that this advice was based upon the fear that her testimony might open the door to the introduction of statements which had previously been ruled inadmissible. App. p. 536, l. 21- p. 537, l. 9. On cross-examination, Defense Counsel also noted that one of the problems he had defending the Petitioner was that she did not recall the events with any degree of clarity. App. p. 535, ll. 14-19.

Defense Counsel acknowledged that he did not consider using testimony from the Petitioner to establish her pattern of mixing alcohol and drugs; nor did he think about using her to establish the history of her employment of the victim’s sisters or the fact that she wasn’t accused of these acts until after she fired the sisters. Neither did he consider using any other witnesses to establish these points. App. p. 510, ll. 3-21.

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

Throughout the Petitioner’s trial, references were made to statements the

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

Defense Counsel introduced no evidence to establish the Petitioner's height and weight. He testified that he could not recall considering the relevance of this information to the defense. App. p. 511 a, ll. 8-15. At the PCR proceeding, the Petitioner presented testimony from her twin sister, Elizabeth W. Auerback. Auerback testified that she weighed 108 pounds at the time of the hearing and that she is approximately a half inch shorter than the Petitioner. App. p. 597, l. 11 – p. 598, l. 2. As previously noted, the Petitioner weighed approximately 109 pounds at the time of the trial. App. p. 490, l. 21- p. 491, l. 1. On cross-examination, Defense Counsel once again admitted that at trial he did not make a significant issue of the Petitioner's weight at the time of the incident and he emphasized that at the time of the trial she *"was a lot lighter than she is now."* App. p. 534, ll. 3-21. On cross-examination, Defense Counsel acknowledged that he did not put before the jury the fact that this young man could have overpowered the Petitioner "to a sufficient degree." He further admitted that he didn't put up any evidence before the jury concerning her drinking and prescription drug use and acknowledged that such evidence would have been useful to the defense. App. p. 535, l. 24- p. 536, l. 11.

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

Petitioner that introducing her husband's testimony, or any evidence for that matter, would result in her losing the right to make the last argument to the jury. App. p. 512, ll. 15-18.

Defense Counsel did not consider introducing any non-familial witnesses to testify about the family dogs and their reaction to activity at the residence. He did not interview any friends or family members who might have presented testimony about the Petitioner's habits concerning drugs and alcohol or about the family dogs. App. p. 513, l. 13-24. Defense Counsel recalled the Petitioner's husband testifying that the Victim stayed at their home that night and that he fixed breakfast for him the next morning. He testified that in his trial testimony the husband described the young man as acting very calm, like nothing had happened. App. p. 513, ll. 6-9.

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

Mary Beth Hefner was initially offered as an expert in delayed reporting in child sexual assaults, at the Petitioner's trial. A lengthy *in camera* hearing was held concerning the State's intended use of this witness. Ms. Hefner testified, *in camera*, that the Victim told her that one of the reasons he didn't report this alleged incident for six months was the fact that he has been molested before, reported the assault and nothing was done about it. The Court found that if the State asked her for her expert opinion as to why the Victim waited to report this incident, the State would be opening the door to the Defense questioning her on cross-examination about the explanation offered by the boy in his

interview with Ms. Hefner. Ms. Hefner was ultimately qualified as an expert in forensic interviewing. App. p. 199, l. 25 – p. 249, l. 11. She subsequently testified concerning the fact that children often delay reporting sexual abuse and various reasons why children delay reporting such incidents. She did not offer an expert opinion as to why the Victim in this case delayed making the accessions which were the basis for the charges against the Petitioner. App. p. 250, l. 13 – p. 254, l. 4. She did not testify concerning her interview of the young man in question.

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

Defense Counsel agreed that the crux of the defenses' theory of the case was that Petitioner was incapacitated at the time of this incident and therefore, was not competent to knowingly and willfully have sex with the victim. His PCR testimony, like his opening

argument to the jury, essentially asserts the defense was that Petitioner, not the boy, was the victim on the night in question. Despite this fact, Defense Counsel admitted that he did not argue this position to the jury and he did not consider asking for a jury instruction supporting that defense. App. p. 516, l. 21- p. 517, l. 22. Defense Counsel then conceded that he had actually failed to introduce any testimony that would have laid a foundation for such a charge. App. p. 517, l. 22 – p. 518, l. 8. Defense Counsel acknowledged that, although neither consent (by the child) or diminished capacity are defenses to a charge of Criminal Sexual Conduct with a minor, a valid defense would arise if the adult was passed out, or sufficiently incapacitated, to a degree that they could not consent to sexual activity initiated by a minor. App. p. 541, ll. 7-21.

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

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

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

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

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

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

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

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

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

In the Bluffton Police Department incident report, which included a statement from the victim, the victim says "***when she left, I quickly ran out of the house and went straight to my house.***" In the Incident Report the Officer quoted the Victim as reporting that the Petitioner "***got off of him before he ejaculated.***" Defense Counsel acknowledged that this report was part of the discovery material he received from the

State. That report, with the Victim's statement, was introduced during the PCR proceeding as Petitioner's Exhibit No. 1, without objection. At trial the Victim testified that the sex act ended when he pushed the Petitioner off of him. App. p. 184, ll. 3 – 6. During the PCR hearing Defense Counsel stated that he had no reason for failing to question the Victim about this inconsistency at trial. App. p. 522, l. 10- p. 523, l. 20.

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

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

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

PCR testimony was taken from Desa Allen Ballard, Esquire, by telephone during

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

Dr. Thomas Victor Martin, a forensic psychiatrist, testified at the Petitioner's PCR hearing. During his testimony he was asked to clarify portions of his testimony during the sentencing proceeding in this case. For example, he recalled that at the sentencing proceeding he stated that Petitioner had "*come to grips with some of the horror of what has happened.*" App. p. 559, ll. 6-25. App. p. 387, ll. 13-16. In his PCR testimony he clarified that Petitioner had never admitted to any type of aggression towards anyone else. He explained that what she did tell him she had fragments of memory that included some sort of sexual contact with the Victim. App. p. 560, ll 8-13. At an earlier point in the sentencing proceeding, Dr. Martin advised the Court that the Petitioner "*acknowledged responsibility for inappropriate sexual behavior.*" App. p. 385, ll. 21-24. In this PCR proceeding Dr. Martin, explained that Petitioner never admitted being the aggressor in this incident, but rather felt responsible for what, in her fragmented memory, was some sexual activity that was inappropriate. He explained that she recognized that her use of alcohol and addictive drugs had compromised her ability to function properly as a parent and an adult on the night in question. App. p. 560, l. 14 – p. 561, l. 19. Dr. Martin's

PCR testimony confirmed that the Petitioner told him "*she hadn't done it*" and her memories of the evening, as reported to him did not substantiate that she had done anything wrong, except for perhaps, being inebriated." App. p. 574, ll. 15-18.

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

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

Dr. Martin explained that this patient had some memories of the activities at her home on the date in question from the earlier part of that night. He recalled that her memories become more fragmented when she tries to recall the events later in the evening. She conveyed a fragmented memory of the young man being on top of her. She expressed the feeling that the contact was sexual. Dr. Martin testified that "*she was very upset and distraught by the fact that she couldn't remember exactly what may have happened to her, and what he was actually doing with her. ... She could not confirm*

that anything that she had done would have enabled or aggressed towards this individual.” App. p. 563, l. 19- p. 565, l. 3.

During his PCR testimony Dr. Martin testified that in his evaluation of the Petitioner he reviewed copies of records from Walgreen's Pharmacy concerning the prescription record of the Petitioner from January, 2005 through August, 2009. He indicated that all the records he had available for review came from either Attorney Macloskie or Attorney Ballard.³ According to his PCR testimony, those records showed that Defendant was being prescribed an average of 90, one milligram, tablets of Klonopin a month in 2008. They also showed other sedatives prescribed to Petitioner including Lunesta and Ambien CR. According to these records, by 2009 she was being prescribed Xanax. App. p. 567, ll. 3-8. Dr. Martin described Klonopin as in the family of benzodiazepines, which are sedative hypnotics. App. p. 568, ll. 19-20. His PCR testimony indicates that the dosage of Klonopin taken by the Petitioner during the operative time period *“was at least a medium dose.”* He further provided that, *“She would, on occasion, take more than that.”* App. p. 570, ll. 10 -13. His testimony establishes that the combination of alcohol and Klonopin results in an exacerbation, or worsening of, the sedative, hypnotic effects of this medication. He described the effect of the combination as causing an exponential increase in intoxication. App. p. 570, ll. 14 - 21. He further provided that an individual impaired by the combination of these substances would experience disorientation, memory loss, inability to walk and impaired motor skills. App. p. 571, l. 15 - p. 572, l. 11. Petitioner's PCR testimony verified that from January, 2008 through the summer of 2008 she filled her prescriptions at the

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

Walgreen's on Simmonville Road near their home. App. p. 616, ll. 7 -13.

The testimony of Dr. Martin established that he would have been available as an expert witness *during* the Petitioner's trial had he been asked. App. p. 572, l. 13 - 20. Dr. Martin asserted on cross-examination that he did everything he was asked to do when he was hired. App. p. 572, l. 24 - p. 573, l. 17. The record of the sentencing proceeding failed to reveal any effort by Defense Counsel, or Attorney Ballard, to clarify statements made by Dr. Martin during the sentencing proceeding which, without the opportunity for explanations of the sort provided in his detailed PCR testimony, could be interpreted as highly damaging admissions by Petitioner.

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

Perkins additionally testified that he was familiar with Petitioner's dogs. He described them as hyper dogs that barked when he came into the home. He stated that the dogs became noisy in response to any disruption in the Tappeiner home. App. p. 581, ll.

1-12. Perkins also presented testimony concerning the Petitioner's positive reputation for veracity. App. p. 584, ll. 10-18. He indicated that he would have been willing to testify for the defense at trial had he been requested to do so. App. p. 584, ll. 19-24.

The Petitioner's father, Dave Sanders, testified at the PCR hearing. According to his PCR testimony, around the summer of 2008, he noticed a change in his daughter's behavior. She was not herself. He stated that he did not discover the problems she was having from mixing her prescription drugs and alcohol until after the incident that led to her charge. He testified that Defense Counsel did not discuss his observations concerning his daughter's problems with mixing drugs and alcohol with him in the course of his representation of Petitioner. App. p. 586, l. 22 - p. 588, l. 5. The Petitioner's father testified that he co-signed the note on the purchase of her house. During his PCR testimony he identified a floor plan of the house that he received during the closing of the purchase of that house. That floor plan contained the measurements of all the rooms in the house. It was introduced as Petitioner's Exhibit No. 5. App. p. 588, l. 15 - p. 590, l. 18.

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

As previously noted, the Petitioner's identical twin sister, Elizabeth W. Auerback,

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

The Petitioner testified that she fully understood all the risks associated with going forward with her PCR action. She also waived any claims she might have raised against her PCR counsel for her involvement in the Petitioner's decision to withdraw her direct appeal. App. p. 602, l. 12 - p. 606, l. 13. She recalled that Defense Counsel had initially advised her that her case was most likely not going to go to trial. She recalled that she was then notified on a Friday that her case was going to trial on the following Monday. App. p. 606, ll. 15 - 25.

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

The Petitioner testified that she discussed her recollections of that evening with Defense Counsel. She also met with Dr. Nolan prior to trial. Defense Counsel never discussed the possibility of using Dr. Nolan as a witness *before the jury*. App. p. 608, l. 21 - p. 609, l. 6. The Petitioner asserted however, that if Defense Counsel had told her it was necessary to establish her defense, she would have authorized him to introduce

evidence concerning her problems with prescription drugs and alcohol. App. p. 610, ll. 4-8. At her PCR hearing, the Petitioner testified that she currently weighed 138 pounds. She acknowledged she was about thirty (30) pounds lighter at the time of the incident. She admitted that in the summer of 2008 she was drinking three (3) to five (5) drinks a night. She recalled that sometimes she drank mixed drinks and sometimes she would drink a bottle of wine. She testified that she was taking Klonopin three times a day at the time of the alleged assault. In addition to the Klonopin she was taking sleeping medications including Ambien, Lunesta and over the counter sleeping medications or Tylenol PM. App. p. 610, l. 9 - p. 611, l. 2.

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

The Petitioner's PCR testimony established that during the summer of 2008 she was already employing the Victim's sisters as babysitters episodically. The sisters began providing regular after school care for her daughters in September, 2008, after the alleged incident with their brother; the Victim. The Petitioner fired the sisters in late October, 2008 around Halloween. App. p. 612, l. 2- p. 613, l. 20. The Petitioner testified that she had an altercation with the Victim's mother concerning her decision to terminate her daughters. Petitioner indicated that she had fired the girls because she had been told that the girls and their brother, the alleged Victim in this case, had been using their hide-a-key

to enter the house without permission. App. p. 613, l. 21- p. 614, l. 11.

The Petitioner's husband testified at her PCR hearing. Mike Tappeiner's testimony verifies that Defense Counsel never discussed with him whether he could verify exactly when the Victim came to their home asking for help getting a camera battery before he called him as a witness at his wife's trial. He couldn't recall Defense Counsel ever discussing the purpose behind calling him as a witness for the defense before he was actually called to the stand. App. p. 620, l. 3- p. 621, l. 6. In his PCR testimony, the Petitioner's husband verified that in the summer of 2008 she was drinking 3 to 5 drinks a night on top of her prescription medications. App. p. 621, l. 7- p. 622, l. 5. He expressed the opinion that the combination of alcohol and her prescription medications affected her ability to walk as well as her other motor skills and her decision making. He admitted that he had previously expressed concern about his wife's pattern of mixing alcohol with her medications. App. p. 622, ll. 3-5.

Preservation of Issues in the Lower Court

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

Petitioner fails to carry her burden in proving (1) that her counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that she was prejudiced by her counsel's ineffective performance. Further, even if this Court were to find a deficiency in Defense Counsel's representation, any such deficiency

did not prejudice the defense in that this Court does not conclude from reviewing the evidence by a preponderance of the evidence the result of the trial would have been different.

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

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

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

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

This Honorable Court has consistently declined to review issues on their merits in a Post- Conviction Relief appeal unless the Order of Dismissal contains the findings of fact and rulings of law required by section § 17-27-80 for the issue in question. The

requirement of a detailed Post-Conviction Relief Order was emphasized by this Court in *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007). Counsel for Petitioner expressly noted that she meant no disrespect to the lower Court when she argued that she could not fail to bring the insufficiency of the Orders of Dismissal to the Court's attention without risking a subsequent finding, by this Court, or the Court of Appeals, that Petitioner had waived her right to be heard on the merits of most of the issues raised during her circuit court Post-Conviction Relief action.

Petitioner now respectfully urges this Honorable Court to treat all of her issues as duly preserved for appellate review where she has made every effort to obtain an order adequately addressing each of the issues argued herein.

ARGUMENT

Standard of Review

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations raised in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000); *Holden v. State*, 393 S.C. 565, 713 S.E.2d 611 (2011), Rule 71.1(e), SCRPC. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that Defense Counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Applicant must show that, but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997);

Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008). 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); *Harris v. State*, 377 S.C. 66, 659 S.E.2d 140 (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.

See also, *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992); *Roseboro V. State*, 317 S.C. 292, 454 S.E.2d 312 (1995); *Edwards v. State*, 392 S.C. 449, 710 S.E.2d 60 (2011).

I.

Certiorari Petition, Question I

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

As summarized above, the evidence presented during Petitioner's PCR proceeding clearly met her burden of proof with regard to her claim that Defense Counsel failed to develop and employ a clear theory of defense at her trial. In addition, she has demonstrated that readily available evidence existed which could have been offered in support of her theory of defense. She has successfully shown that her decision not to testify in her own behalf was negatively impacted by erroneous legal advice from Defense

Counsel concerning the possible consequences of testifying at her trial. For these reasons, as discussed in further detail below, Petitioner now argues that the lower court erred in failing to grant her relief on these grounds. She respectfully submits that her judgment and sentence should be set aside and her case should be remanded to the Court of General Sessions for a new trial.

In his opening argument to the jury Defense Counsel gave the jury a preview of the Petitioner theory of defense; *that she was the victim of a sexual assault as opposed to the perpetrator*. Having set the stage for this defense, Defense Counsel did not prepare to present evidence at trial which would have supported that theory. Ironically, Defense Counsel did present evidence supporting the notion that the Petitioner's prescription medications negatively affected her ability to make a knowing, voluntary and intelligent statement to the police. Successfully using the testimony of expert witness Nolan, Defense Counsel was able to convince the trial judge that the Petitioner did not know what she was doing at the time she gave her statement to police. That strategy was effective even where the challenge was based purely upon the impact of her prescription medications on her ability to issue a reliable statement in the face of certain interview techniques. The Petitioner has demonstrated that Defense Counsel could have used the same expert he used in the *Jackson v. Denno* proceeding, or an expert of similar credentials such as Dr. Martin, to testify as to the effect the combination of alcohol with those same prescription medications would have had on the Petitioner on the evening when she allegedly pulled an unwilling young man of nearly 14 years of age up a flight of stairs to sexually molest him.

In the *Jackson v. Denno* hearing, Dr. Nolan relied exclusively on historical information concerning the Petitioner's prescription drug use during the time period when this statement was taken. Fortunately for Petitioner, after having viewed the video

recording of the statement in question, the Trial Court did not question the fact that there was no evidence before the Court to corroborate her claim that she was taking powerful prescription medications at the time her statement was taken approximately six months after the event that formed the basis for the charge in question. The Petitioner has now demonstrated that there was readily available evidence and testimony which could have established the prescription drugs she was taking at the time of this event, the frequency with which they were prescribed, and the dosages at which they were prescribed. *See, App. pgs 657 -661; Petitioner's Exhibit No. 3.* Likewise Petitioner has demonstrated that expert testimony from Dr. Martin, or another similarly qualified expert, could have established for the jury the dire consequences of mixing alcohol with these powerful medications. As the Petitioner has shown, testimony was available which would have established that the Petitioner had a pattern of mixing her prescription medications with alcohol during the operative time period. The testimony of Dr. Martin illustrated that the mixture of these prescription drugs with alcohol would have affected her motor skills, her balance, her ability to walk and her capacity to communicate effectively. The PCR testimony of her husband confirmed that Petitioner experienced such physical problems when she combined alcohol with her regular prescription medication. Testimony from her twin sister also supported the fact that the Petitioner had a problem with mixing alcohol with her prescription medications. This testimony could have been used to create reasonable doubt as to whether the Petitioner would have been physically and mentally capable of the acts alleged by the Victim. *See also, App. pgs. 662 – 664.* Indeed, this evidence would likely have created reasonable doubt as to whether Petitioner was in fact a criminal perpetrator or the victim herself of a sexually precocious adolescent who took advantage of her instead of the other way around. Evidence concerning the layout of the home and its size could have been used to create doubt as to the veracity of the

complaining witness's story by illustrating that only a victim too incapacitated to make a loud outcry could have gone unheard. In other words, if Petitioner was incapacitated due to the influence of prescription drugs and alcohol, it was more likely that she, not the boy, was the victim. Had the jury heard and seen all of the evidence presented by Petitioner during her PCR proceeding, there is a substantial likelihood they would have concluded that Petitioner would not have been capable of dragging the alleged victim up the stairs and that the sober adolescent would have been mindful not to make noise lest he be caught in the act of taking advantage of Petitioner's condition.

Likewise, the Petitioner has established that Defense Counsel could and should have developed testimony to establish the Petitioner's height and weight at the time of the incident. While it is true that the jury had the opportunity to see the Petitioner at trial, that opportunity for observation was no substitute for being advised of her shockingly low weight at the time of the incident. The jury had no way of knowing whether she had perhaps lost a significant amount of weight between the time of the incident and her trial. With a defendant faced with such a serious charge, such speculation would have been predictable. They might readily have speculated that she either lost weight due to stress, or more damaging, that she had deliberately lost weight to make herself look incapable of the crime charged. In addition, since the Petitioner did not testify, the jury's opportunity to view the Petitioner would have been limited to seeing her either sitting or standing behind a table in the courtroom. Her testimony at her PCR hearing established that she weighed 138 pounds at the time of the hearing, but that she had weighed about 30 pounds less than that at the time of the incident. The credibility of that assertion was highlighted by the appearance of her identical twin sister who, at the PCR hearing testified that she weighed 109 pounds and was around one-half inch shorter than the Petitioner.

The testimony proffered during the PCR hearing clearly could have been

presented to create reasonable doubt as to whether the Petitioner would have been physically capable of forcing the young man in question up a flight of stairs and violently forcing sex acts on an unwilling teenage boy who was, according to the police incident reports, approximately 17 pounds heavier than her. Certainly her size, and the impact her drug and alcohol ingestion would have had on her motor skills and balance, would have been likely to create reasonable doubt as to who was the true victim in this case; Petitioner or the adolescent. Having suggested the theory of defense to the jury that the Petitioner was the victim, not the perpetrator, trial counsel was ineffective for failing to develop this line of evidence which would clearly have supported that theory.

The Petitioner has alleged that Defense Counsel should have discussed the advantages and disadvantages of testifying with the Petitioner in more detail prior to this trial. On the unique facts of this case, Petitioner argues that this is particularly true. While the Petitioner's memories of the evening in question are admittedly sketchy, they are not damning and her testimony concerning them would have been consistent with the defense that the Petitioner was so under the influence of prescription medications and alcohol at the time of this event that she was not capable of the acts described by the complaining witness. This of course, would have been especially true if the jury had heard the testimony of a qualified expert concerning the impact of mixing alcohol with the prescription drugs taken by Petitioner. Once this trial was under way, Defense Counsel's concern that the Petitioner's testimony might "open the door" to the introduction of the statement which had been excluded from evidence by the trial Court, was unfounded. A confession is inadmissible *for all purposes* where it is involuntarily made. *State v. White*, 311 S.C. 289, 294, 428 S.E.2d 740, 743 (Ct. App. 1993). An involuntary, incriminating statement is inadmissible for any purpose including impeachment. *State v. Victor*, 300 S.C. 220, 221, 387 S.E.2d 248, 249 (Sect. 1989);

State v. Hook, 348 S.C. 401, 416-417, 559 S.E.2d 856, 864 (S.Ct. 2001). Petitioner would argue that this rule is particularly appropriate where, as here, the trial judge found that "her will was overborne. I think she would have agreed to just about anything by the end." App. p. 131, ll. 9-11. It is apparent that Defense Counsel should have accurately discussed with the Petitioner the possible pros and cons of calling her as a witness in her own defense once the Trial Court saw fit to suppress her statement to the police. Based on Defense Counsel's own PCR testimony, Petitioner asserts that it is clear that he gave his client erroneous advice on this crucial point, and therefore, was ineffective in his representation on this important decision.

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

Petitioner of this important consideration.

Similarly, Defense Counsel failed to present witnesses who were not related to the Petitioner to establish that the family dogs would have reacted excitedly to any disruption in the home. The Petitioner's husband, whose testimony might have been viewed as suspect because of his relationship to the Petitioner, was the only defense witness presented on this critical point. Even if Defense Counsel did not plan to introduce evidence on this crucial point prior to trial, once the State made an issue of how much the husband had been drinking on the night in question, Defense Counsel should have been prepared to present a non-familial witness to establish the fact that the family dogs would have sounded an alarm if they had heard the boy screaming as he claimed.

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

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

As should have been clear to Defense Counsel from the discovery materials in this case, the complaining witness claimed that he had *screamed* for help while he was being sexually assaulted and no one came to his aid. The Petitioner has alleged that Defense Counsel should have been prepared to introduce demonstrative evidence to establish the setting in which this incident occurred and the unlikelihood that the boy could have in fact screamed as he claimed without being heard by the victim's husband who was asleep in the next room. In support of this allegation, the Petitioner has introduced a floor plan of the house where this event occurred which contains dimensions of all the rooms in the house and common areas in the house. *See, App. p. 665; Petitioner's Exhibit No. 5*. This floor plan establishes that the room where this assault allegedly happened was only a few feet away from where the Petitioner's husband lay sleeping. Had Defense Counsel introduced evidence in support of the defense theory suggested by his opening argument,

this floor plan would have supported the Petitioner's claim that the version of the facts put forth by the complaining witness was not credible. Petitioner asserts that Counsel should have been prepared to demonstrate the size and layout of the house where this sexual assault allegedly occurred. Simply put, if PCR Counsel could discover this evidence, there is no logical reason why Defense Counsel could not have as well. This evidence may well have had an impact on the jury's judgment concerning the credibility of the Victim's story. While this Honorable Court may not agree that the unusual step of allowing a physical jury view of the scene was necessary, Petitioner would argue that she has demonstrated that other evidence could have been found or developed which would have given the jury a better sense of how implausible the complaining witness's story was. Thus, Petitioner has met her burden of proof that Defense Counsel was ineffective for failing to introduce evidence which would have demonstrated the size and layout of the house. In addition, Petitioner would submit that the lower court erred in refusing to allow her to introduce into evidence a video of the interior of the house where this crime allegedly happened.

As noted in the PCR testimony, Defense Counsel admitted that he did not present any evidence to support the theory of defense he advanced in his opening argument and further, that absent such evidence he was left with no foundation for requesting jury instructions which would have supported the Petitioner's theory of defense. Petitioner argues that she has established that if Defense Counsel had presented readily available evidence in support of the theory that the Petitioner *was the victim* of a sexually precocious adolescent, as opposed to the aggressor as he claimed, the Petitioner would have been entitled to jury instructions which advised the jury that the Petitioner could not be found criminally liable for having been involved in sex acts with a minor if they concluded that at the time of the acts she was either unconscious, so incapacitated as to be

unable to willfully engage in the activity in question or that she was physically helpless to fend off sexual advances made against her by another. In other words, the Petitioner would have been entitled to have a jury instruction given which addressed the law reflected in *S.C. Code Ann. § 16-3-654*, which defines Criminal Sexual Conduct in the Third Degree as occurring when a person commits a sexual battery upon a person the actor knows, or has reason to know, is "***mentally defective, mentally incapacitated, or physically helpless and aggravated force or aggravated coercion was not used to accomplish the battery.***" (Emphasis added). Petitioner does not suggest that such a charge would have been appropriately submitted as a lesser included offense, but rather, that she would have been entitled to have the jury charged that if an individual, even a minor, had sex with her while she was "***mentally incapacitated, or physically helpless***" the perpetrator of that sexual battery, not Petitioner, would have been guilty of a crime. Likewise, consistent with Petitioner's theory of defense, she asserts that she would be entitled to a jury charge that informed the jury that a juvenile, even one under the age of fourteen, may be prosecuted for committing the crime of criminal sexual conduct pursuant to South Carolina Law. *See, S.C. Code §16-3-659*. Petitioner now respectfully submits that the lower court erred in failing to rule that Trial Counsel's failure to introduce available evidence in support of her theory of defense ultimately deprived her of the opportunity to have her jury receive instructions consistent with that defense.

For all the reasons set forth above, Petitioner urges this Honorable Court to find that the PCR Court erred in failing to grant Petitioner a new trial where she met her burden of proof that Defense Counsel failed to provide the Petitioner reasonable professional assistance of counsel prior to and during her jury trial in that he neglected to prepare and present readily available evidence which would have supported the theory of defense he himself put forth in his opening argument. The Petitioner has demonstrated

that the evidence in question was likely to have generated reasonable doubt concerning the veracity of the complaining witness and the believability of the tale he told. Petitioner has established that there exists a reasonable probability that the outcome of her trial would have been different but for the errors and omissions of Defense Counsel in preparing and presenting her defense at trial.

II.

Certiorari Question IV

PCR Allegation 7

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

As previously discussed, the trial judge ruled that the Petitioner's statement to the police was not knowingly, voluntarily or intelligently entered and excluded it from evidence at trial. Notwithstanding this ruling, the State repeatedly made reference to the fact that the Petitioner had been interviewed by law enforcement for 2 hours before she was arrested on the charge of Second Degree Criminal Sexual Conduct. In the prosecution's closing arguments the Solicitor chose to emphasize this point to the jury. Defense Counsel has acknowledged that he should have objected to any such reference by the prosecution during this trial. The PCR court agreed that Counsel's representation in this regard was deficient; however, the Court found that, **"that deficiency did not prejudice the defense in that this Court does not conclude from a preponderance of the evidence the result of the trial would have been different."** *App. pgs. 668 – 669 (Emphasis added)*. In her first Motion to Alter or Amend, Petitioner specifically argued that the Order of Dismissal provided "no basis for the Court's conclusion that the outcome of the Petitioner's trial would not have

been different but for the errors and omissions of Trial Counsel recognized within the language of the Order.” App. p. 680; Petitioner’s first Rule 59(e) Motion.

As previously stated, an involuntary statement is inadmissible and may not be used for any purpose, even impeachment, at trial. Here, the trial judge could not have been clearer in her ruling. Nevertheless, the State repeatedly attempted to do through the back door what the trial judge had expressly blocked them from doing directly; tell the jury the Petitioner had confessed.⁴ Where the Trial Court had ruled that the statement in question was not voluntarily, knowingly and intelligently entered, the prosecution should not have been allowed to invite the jury to infer that the Petitioner had confessed by repeatedly implying as much through their questioning of law enforcement witnesses and in their closing argument. Defense Counsel clearly erred in failing to object to this line of questioning and argument.

The fact that the Petitioner was prejudiced by this improper line of testimony and argument is readily apparent. At this trial, there was no physical evidence proving the sexual battery alleged even happened. The trial record establishes that the alleged Victim waited six months to make this allegation and did not do so until the Petitioner had fired his sisters from her employment. The version of the facts told by the complaining witness would likely have been viewed by this jury as highly suspect on their face in light of these factors alone had they not been sheparded toward believing Petitioner had confessed to this sexual assault by these improper comments and arguments made by the prosecutor. As argued *supra*, had Defense Counsel introduced evidence concerning 1) the size of the house where the assault allegedly occurred, 2) the fact that no one else heard him cry out and 3)

⁴ Sadly, this improper use of the statement ruled by the Trial Court to be unreliable and inadmissible was further perpetuated by the PCR Judge. In the Order of Dismissal issued by the lower court, actually saw fit to make reference to details of this so called confession in a footnote to his order in a manner which punctuated the most prejudicial details of the statement in question. See, Order of Dismissal; App. pp. 687-

the fact that the Petitioner was extremely thin and had been drinking on top of her prescription medications, the jury would have been even more likely to have doubted the credibility of the Victim's claims.⁵ As it was, any reasonable doubt the jury may have had concerning the veracity of this adolescent's story would likely have been negated by the prejudicial inferences urged by the Solicitor's improper questions during the examination of state witnesses and his arguments which implied that the Petitioner's statements to the police during her interview caused them to conclude she was guilty and place her under arrest. Defense Counsel's failure to object the first and every time the State offered this line of testimony and argument constituted ineffective assistance of counsel and warranted the grant of a new trial.

III.

Certiorari Question X

PCR Allegations 21 and 7

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

Petitioner respectfully asserts that the PCR Court abused its discretion in refusing to grant Petitioner a new trial based upon Defense Counsel's failure to object to numerous improper and prejudicial statements made by the prosecution during the State's closing arguments to the jury. In his PCR testimony, Defense Counsel freely admitted that he failed to raise objections to several portions of the State's closing argument which were improper. Petitioner now respectfully argues that the lower court erred in finding that Petitioner was not prejudiced by Defense Counsel's failure to object to statements made by the prosecution in its closing arguments which were clearly calculated to imply that

688, fn. 1.

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

As previously noted, in this trial the State repeatedly attempted to imply that the Petitioner had confessed by drawing attention to the fact that she was not arrested until immediately after she was questioned by the police for approximately two hours. Where the trial court had excluded her statement to the police from evidence, questions designed to imply she had made incriminating statements that resulted in her arrest were clearly improper. Likewise, the State's attempt to drive this point home during their closing arguments to the jury was equally improper. *App. p. 341, l. 25 – p. 342, l. 16*. The prejudice arising from this argument is obvious. In a case where the credibility of the Victim's story was crucial to the State's case, the implication that the Petitioner had actually implicated herself in her interviews with the police was highly prejudicial. Petitioner asserts that the prejudice arising from this line of questioning and closing argument is obvious. In the face of such obvious prejudice to Petitioner's right to a fair trial, the PCR Court has offered no explanation for its finding that Petitioner was not

⁵ As previously noted, the jury heard no evidence concerning the Petitioner's prescription drug use. They did, however, hear testimony that Petitioner had been drinking on the night in question.

prejudiced by Defense Counsel's deficient performance.

Petitioner's *PCR Allegation 21* in fact alleged that Trial Counsel was ineffective for failing to object to three improper arguments advanced by the prosecution during closing arguments. The lower court only ruled on Counsel's failure to object to two of the arguments addressed by Petitioner's allegation. In another portion of the State's closing argument the prosecutor effectively vouched for the credibility of the complaining witness in a manner that was clearly improper. Defense Counsel's failure to object to this line of argument constituted ineffective assistance of counsel as well. In his closing argument to the jury the prosecutor talked about the 200 forensic interviews his expert witness had conducted in her career and then stated, "*Folks, these are people who can detect when someone is making something up or if there is nothing there. Okay?*" App. p. 341, ll. 19-22. In this portion of his closing argument the Solicitor essentially vouched for the credibility of the Victim based on the implied opinion of his expert witness that the Victim was being truthful. This line of argument was improper for two reasons. First, in her testimony before the jury, Ms. Hefner never stated that she had interviewed the Victim in this case. App. p. 254, l. 10 – p. 255, l. 25. Therefore, the prosecution was inviting the jury to draw an inference from matters not on record in this trial. A Solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *Matthews v. State*, 350 S.C. 272, 565 S.E.2d 766 (2002); *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816(1990). He may not however, vouch for the credibility of a witness based on personal knowledge or other information outside the record; *State v. Kelly*, 343 S.C. 350, 540 S.E.2d 851 (2001). Secondly, this argument invited the jury to substitute the opinion of a State witness for their own on the crucial issue of the credibility of the Victim. It is improper for the State to assure the jury of a witness's credibility because it is the role of the jury to assess the

credibility of the witnesses at trial. *Id.* Defense Counsel admitted in his PCR testimony that he should have objected to this argument. App. p. 519, ll. 15-20.

Defense Counsel likewise conceded that he should have objected to another portion of the State's closing in which the prosecution personally commented on the credibility of the sole witness offered for the defense. App. p. 343, l. 25- p. 344 l. 12. App. p 510, ll. 1-9. The prosecution also commented on Mr. Tappeiner's previous "*problems with alcohol.*" In his PCR testimony, Defense counsel acknowledged that there had been no evidence supporting that argument and, that it should have been objected to. App. p. 345 ll. 9-10. App. p. 520, ll. 10-15. During the testimony of the Petitioner's husband he acknowledged having one prior DUI fifteen years earlier. App. p. 307, ll. 3 – 5. Once again, it is improper for the prosecution to personally comment on the credibility of any witness and he is confined to the record when advancing arguments in favor of the State.

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

have objected to this argument in which the State was once again arguing matters not in evidence to bolster the credibility of its key witness.

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

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

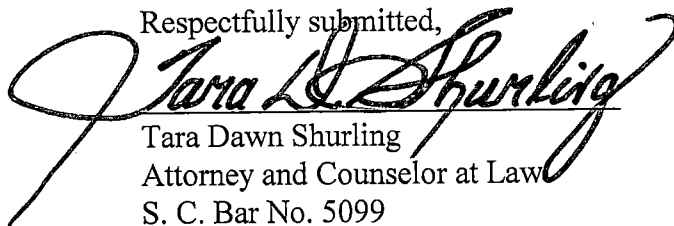
In his PCR testimony, Defense Counsel testified that he should have objected to this portion of the prosecutor's closing argument which he acknowledged, was improper because it "staked" the jury. App. p. 521, ll. 7-13. Once again, this argument should have been objected to by Trial Counsel and was not.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

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

CONCLUSION

Based upon all the arguments and authorities discussed herein, Petitioner now most respectfully submits that the PCR Court abused its discretion in denying her Application for Post-Conviction Relief. Petitioner's conviction and sentence should be reversed and her case be remanded for a new trial.

Respectfully submitted,


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ATTORNEY FOR PETITIONER

DATE September 23, 2015

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No. 2010-CP-07-2396
Appellate Case No. 2013-001885

RECEIVED

SEP 23 2015

S.C. Supreme Court

SUSAN TAPPEINER, 338050,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Brief of Petitioner in the above entitled case has been served upon opposing counsel, this the 23rd day of September, 2015, by mailing in an envelope with postage prepaid, properly addressed as follows:

Rutledge Johnson
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Sharon McCollister

Sharon McCollister
Paralegal to Tara Dawn Shurling

SWORN TO BEFORE me this 23rd day
of September, 2015.

Jeanne Graham
Notary Public for South Carolina

My Commission Expires: 2/28/24.

LAW OFFICE OF



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September 23, 2015

RECEIVED

VIA HAND DELIVERY

SEP 23 2015

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

S.C. Supreme Court

RE: Susan Tappeiner, 338050 v. State of South Carolina; 2010-CP-08-2396
Appellate Case No. 2013-001885

Dear Mr. Shearouse:

Please find attached the original and fourteen (14) copies of the Brief of Petitioner, my Certificate of Service on opposing counsel, and the thirteen (13) additional copies of the Appendix for filing in the above captioned case. I would appreciate you clocking the additional copy of the Brief of Petitioner and Certificate of Service and return to my courier. With my thanks for your assistance in this matter, I remain,

Sincerely yours,

A handwritten signature in black ink that reads "Tara Dawn Shurling". The signature is written in a cursive, flowing style.

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/*sm*
Enclosures

cc: Rutledge Johnson, Assistant Attorney General (w/enclosures)
Susan Tappeiner (w/enclosures)
David Sanders (w/out enclosures)