ALAN WILSON
ATTORNEY GENERAL

February 3, 2016

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S.C. SUPREME COURT

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

Re: **Yancey Thompson v. State of South Carolina**
Appellate Case No: 2014-006611
Lower Court Case No: 2011-CP-32-0152

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Patrick Schmeckpeper
Assistant Attorney General
SC Bar #102100

PS/lg
Enclosures

cc: Tiffany L. Butler, Esquire
Trisha Allen, Victim Services

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2014-006611

Yancey Thompson, #330395, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

ISSUE PRESENTED

1. Is there any evidence to support the PCR Court's that counsel was not ineffective for failing to object to purportedly inadmissible testimony where there was nothing objectionable about Dr. Luberoff's testimony; counsel was under no duty to be clairvoyant with regard to the forensic interviewer's testimony; and Petitioner failed to meet his burden to show prejudice?

2. Is there any evidence to support the PCR Court's that counsel was not ineffective in failing to object to the introduction of evidence that Petitioner sexually assaulted the victim in Richland County, where the assault was admissible under Rule 404(b), SCRE, and as part of the *Res Gestae* of the charged offense; and Petitioner failed to meet his burden to show prejudice?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was indicted at the July 2007 term of the Lexington County Grand Jury for disseminating harmful materials to minors (2007-GS-32-2249); criminal sexual conduct (CSC) with a minor – 11 to 14 years of age, 2nd degree (2007-GS-32-2252); and CSC with a minor – under 11 years of age, 1st degree (2007-GS-32-2250). Petitioner was represented by Charles Brooks, Esquire, and Irma Brooks, Esquire. On September 2-4, 2008, Petitioner underwent trial and was found guilty as indicted. The Honorable John R. Milling sentenced him to confinement for a period of ten (10) years for disseminating harmful materials to minors; twenty-five (25) years for CSC, 1st degree; and twenty (20) years for CSC, 2nd degree. All sentences were set to run concurrently to one another.

A timely Notice of Appeal was filed on Petitioner's behalf. State v. Thompson, Op. No. 2010-MO-028 (S.C. filed November 8, 2010). The Remittitur was issued on November 24, 2010.

Applicant subsequently filed an application for post-conviction relief on January 14, 2011. (2011-CP-32-0152). He was represented by Robert W. Mills, esquire. An evidentiary hearing was convened at the Lexington County Courthouse before the Honorable R. Lawton McIntosh. In an order dated November 26, 2013, Judge McIntosh denied and dismissed the application with prejudice. This appeal follows.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. There is ample evidence to support the PCR Court's finding that Petitioner's guilty plea was voluntary, where the plea colloquy was sufficiently comprehensive and cogent; and Petitioner did not need to be specifically advised of parole eligibility because it was a collateral consequence of his guilty plea.

Deficient Performance

Dr. Luberoff's Testimony

The PCR judge correctly found that Dr. Luberoff's testimony to the victim's past sexual abuse was admissible within the hearsay exception that allows for limited corroborative testimony in criminal sexual conduct cases. App. p. 577. A statement is not hearsay if "[t]he declarant testifies at trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case . . . where the declarant is the alleged victim and the statement is limited to the time and place of the incident." Rule 801(d)(1)(D), SCRE (2015); see also Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) ("A well-settled exception in criminal sexual conduct cases allows limited corroborative testimony. When the victim testifies, evidence from other witnesses that the victim complained of the sexual assault is admissible in corroboration; however, such evidence is limited to the time and place of the assault and cannot include details or particulars"). Dr. Luberoff's statement that she was informed the victim had been sexually assaulted prior to performing her medical exam tracks this rule almost precisely, in that the only information conveyed is the time the sexual assault took place – before the exam.

This statement was also admissible as a statement for purposes of medical diagnosis or treatment. Rule 803(4). "Statements made for purposes of medical diagnosis or treatment and describing medical history" fall under an exception to the general prohibition against hearsay.

Id. Dr. Luberoff testified that the purpose of her examination of the victim was to discovery any injuries, and that "[i]t's quite important to examine children in situations with allegations [of sexual abuse] to be sure that we're not missing some kind of a sexually transmitted disease or condition, and to look for evidence of neglect and so on, the overall health fo the child. App. p. 283, l. 22 – p. 284, l.1. She further emphasized that "[t]he purpose of the exam is not for [her] to decide whether a child has been sexually abused or not," but "to look at sort of a larger issue of a child's overall health and whether there are any leftover effects from abuse that need to be treated or need to be addressed." App. p. 284, l. 2-6.

This testimony clearly falls under the applicable hearsay exception. Clearly the purpose of the exam was not to collect evidence for a criminal prosecution, but rather aimed toward the well-being and health of the victim for the purposes of evaluating her health. As a result, it was admissible at trial and counsel was not ineffective for failing to object to its introduction.

Remaining Witnesses

While the PCR judge found counsel exhibited deficient performance in failing to object to bolstering testimony, Respondent submits the PCR judge was mistaken to the extent his ruling that counsel's performance was deficient relied on State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); or other cases that established new standards following Petitioner's trial in 2008. The standard of reasonableness under professional norms does not include a duty of clairvoyance. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial). Accordingly, the PCR judge reached the correct result, even if its reasoning was wrong. See Westbury v. Bauer, 284 S.C. 385, 387, 326 S.E.2d 151, 152 (1985) (An appellate court may affirm a trial judge's

decision on any ground appearing in the record and, hence, may affirm the trial judge's correct result even though he may have erred on some other ground); Rule 243(g), SCACR (2015) (allowing for Respondent to offer additional sustaining grounds in post-conviction relief appeal).

Prejudice

Regardless of whether counsel was deficient in failing to object to hearsay or bolstering testimony, there is ample probative evidence in the record to support the PCR judge's finding the Petitioner failed to meet his burden to show prejudice.

This Court has viewed cases involving "forensic interviewers," particulary in the context of bolstering and hearsay, with close scrutiny. See, e.g., Kromah v. State, 401 S.C. 340, 737 S.E.2d 490 (2013) (counsel deficient for failing to object to expert testimony of forensic interviewer to the effect that victim's testimony was "compelling" evidence of abuse, but error in admission harmless); State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011); Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010); see also Mangal v. State, 2015 WL 9583810 (Ct. App. 2015).[1] In any event, the proper analysis for determining ineffective assistance of counsel remains, as delineated in Strickland, deficiency and prejudice. 466 U.S. 668, 104 S.Ct. 2052. In order to show prejudice, an applicant has the burden to show that but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. Id. This type of determination is not automatic, and requires consideration of "the totality of the evidence before the judge or jury," understanding that "[s]ome of the factual findings will have ben unaffected by the errors, and factual findings that were affected will have been affected in different ways." Id. Moreover, such a finding – once made by the PCR judge, who had the

[1] While, as stated above, counsel has no duty of clairvoyance, these cases provide useful fact patterns for the purpose of analyzing prejudice in this case.

opportunity to hear testimony and make credibility findings[2] – is entitled to great deference from reviewing courts. Dempsy v. State, 363 S.C. 365, 610 S.E.2d 812 (2005).

There is probative evidence in the record to support the PCR judge's finding that Petitioner was not prejudiced by counsel's alleged deficiencies. The PCR judge found that the victim's testimony was corroborated throughout Petitioner's trial by admissible testimony and evidence. The victim testified at trial that Petitioner raped and molested her over the course of several years. App. p. 126, l. 13-15 ("[Petitioner touched me, did stuff to me that he wasn't supposed to"); p. 128, l. 25 – p. 129, l. 1 ("[Petitioner] took his clothes off and put his thing in my private part").[3]

The medical examiner, Dr. Susan Luberoff, testified that she made "a finding about [the victim's] hymen that was concerning . . . for possibly being related to sexual abuse." App. p. 265, l. 3-5. She stated that the victim had incurred "deep notching" to her hymen, which is "very concerning for trauma," App. p. 267, l. 6, and that, in her expert opinion and to a reasonable degree of medical certainty, the victim's "notches were so deep that it's my opinion that they are related to sexual abuse or penetrating vaginal trauma." App. p. 270, l. 13-16. Compare Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (credibility crucial in light of questionable nature of medical evidence, where exam showing the victim's hymen was ruptured did not take place until three years after alleged abuse occurred); Vail v. State, 402 S.C. 77, 90, 738 S.E.2d 503, 510 (Ct. App. 2013) (Court found victim's credibility was "extremely crucial" to the outcome in light of the fact that her "hymen was fully intact with either no evidnce of trauma or the trauma

[2] The PCR judge found that, "[a]s a matter of general impression," the testimony of counsel and co-counsel was more credible than the testimony of Petitioner and his wife. App. p. 574.

[3] The PCR judge specifically found the victim's trial testimony credible, taking into account the trial judge's comments during the sentencing phase of the trial, App. p. 413, l. 3-8, as well as how "[t]he victim precisely detailed the commission of the offenses from [Petitioner's] use of hair grease, pornography, and to [Petitioner's] conduct in psychologically grooming the victim. App. p. 579-80.

had healed despite the alleged six to nine incidents of sexual intercourse"). As outlined above, the medical examiner's testimony did not contain any impermissible bolstering or hearsay. Compare Mangal v. State, Op. No. 5372 (S.C. Ct. App. filed Dec. 30, 2015) (*pet. for rehearing filed Jan. 11, 2016*) (Court of Appeals found prejudice where expert medical examiner testified that her finding of abuse was based on trauma to the victim's hymen consistent with penetration **and** the history that the victim shared with her, which she believed to be true "[b]ased on the way [the victim] shared it and all the information that she shared").

The PCR judge found Dr. Luberoff's testimony to be compelling, and further corroborated the victim's testimony. It also found the victim's testimony was corroborated by testimony from her mother, Monica Gleaton. App. p. 580. Ms. Gleaton testified at trial that once the victim stopped living with Petitioner, she had nightmares, would "shout out" in her sleep, and would "fret" around men. App. p. 237, l. 5-12. The PCR judge also emphasized the absence of any contradictory testimony at trial. Compare Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (No prejudice or evidence of guilt where "[e]ven the State acknowledged in its brief that 'there was a great deal of conflicting testimony from virtually every State and defense witness who testified at trial,'" and the trial judge commented: "I'm not giving you the maximum sentence in this matter. I'm not sure what all went on in this case. There is a lot of confusion as to the stories that were told by many of the witnesses").

Respondent would also point out that the victim's testimony was corroborated by other evidence introduced at trial. The victim testified at trial the Petitioner showed her a book from his closet that had "people in there that didn't have any clothes on, sitting on top of each other and stuff." App. p. 137, l. 25. This book, titled "Super Sex," was seized from by Detective

James Hickman during the execution of a search warrant at Petitioner's residence. App. p. 218, l. 14-19. It was found in Petitioner's closet. Id.

The PCR judge's findings are sufficiently supported, and that the strong corroborative evidence here that was admissible negates any harmful effect from counsel's alleged deficient performance. Petitioner seeks to replace this Court's nuanced, context-driven approach to determining prejudice with a more algebraic form of analysis, in which any improper corroboration where credibility is at issue results in a Sixth Amendment violation unless there is overwhelming evidence against an accused criminal defendant. Such a rule, however, is at odds with previous forensic interviewer cases *and* *Strickland*. Accordingly, certiorari should be denied.

Petitioner contends the PCR Court should have found the guilty plea involuntary because both plea counsel and plea judge did not advise Petitioner that the mandatory minimum sentence of thirty years would have to be served day-to-day. Petitioner attempts to link this lack of advisement to ineffective assistance of counsel in the context of a guilty plea and argues that plea counsel's failure to discuss parole *ineligibility* was the equivalent to providing erroneous parole information. Respondent submits that the issues raised by Petitioner are meritless and thus the decision by the PCR Court should not be disturbed. Certiorari should therefore be denied.

II. There is ample evidence to support the PCR Court's finding that counsel was not ineffective in failing to object to the introduction of evidence that Petitioner sexually assaulted the victim in Richland County, where the assault was admissible under Rule 404(b), SCRE, and as part of the *Res Gestae* of the charged offense; and Petitioner failed to meet his burden to show prejudice.

There is ample probative evidence in support of the PCR judge's finding that counsel was not ineffective for failing to object to evidence that Petitioner sexually abused the victim in Richland County.

Evidence of prior bad acts is inadmissible to show propensity to commit the specific crime charged. Rule 404(b), SCRE (2015). Such evidence may, however, be admissible to establish a motive, intent, absence of mistake, common scheme or plan, or identity of the perpetrator. Id.

The *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 652 S.E.2d 745, 753 (2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Where evidence is admissible to provide a full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*. State v. McGee, 408 S.C. 278, 288, 758 S.E.2d 730, 735 (Ct. App. 2014).

"To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id.

The evidence that Petitioner abused the victim in Richland County was clear and convincing based on the testimony of the victim which – as discussed in the previous section –

was properly corroborated throughout the trial. In addition, the testimony regarding the prior bad acts was relevant to show the complete, whole story relating to the charges of criminal sexual conduct. See State v. Martucci, 380 S.C. 232, 258, 669 S.E.2d 598 (Ct. App. 2008).

Prejudice

In any event, Applicant failed to show prejudice. The victim here testified that Petitioner raped and sexually assaulted her a number of times over the course of several years, first in "Bayberry," App. p. 128, then in "Glen Village," App. p. 132, on either "Charleston Highway or Old Charleston Highway," App. p. 134, in "White Knoll," App. p. 144. She further testified that she could not remember every single time she was abused, because "it happened to [her] more than [she] [could] count." App. p. 162, l. 4-7. She said that the abuse happened "at every house," App. p. 168, l. 5-7, but also "a lot of times in Glen Village.," App. p. 161, l. 22-24. Given the continuous any systematic nature of the abuse – as testified to at trial –there is no reasonable likelihood that the jury would have come to a different conclusion had it heard of one less instance of rape. Therefore, Respondent respectfully requests that certiorari be denied.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's ruling and deny the requested petition for writ of certiorari.

Respectfully submitted,
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By: _____
ATTORNEYS FOR RESPONDENT

February 3, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
Court of Common Pleas
The Honorable R. Lawton McIntosh, Circuit Court Judge

YANCEY THOMPSON,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Ms. Tiffany L. Butler, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 3rd day of February, 2016

LAKESICHA GIBBS
LEGAL ASSISTANT