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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Florence County
Court of Common Pleas
D. Craig Brown, Circuit Court Judge

2013-CP-21-1147
Appellate Case No. 2015-001597

ROBERT L. JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Trial Counsel was not ineffective and no prejudice was established where Trial Counsel did not object to Ursula Wardy's testimony when that testimony aided in trial counsel's reasonable strategy.

II. No prejudice was established where Trial Counsel did not object to Debbie Elliott's testimony about the Victim's age when the alleged assaults occurred.

III. Trial Counsel's alleged failure to object to Debbie Elliott's improper opinion testimony was not preserved where the allegation related to improper opinion was not presented to the PCR Court, was not addressed in the PCR Court's Order of Dismissal, and there was no Rule 59 Motion.

IV. Assuming the issue is treated as preserved, Trial Counsel was not ineffective for failing to object to the testimony of Debbie Elliott because counsel was not required to be clairvoyant and there was no prejudice to Petitioner.

V. Trial Counsel was not ineffective and no prejudice was established where Trial Counsel refused the Trial Judge's offer of a more thorough curative instruction and that issue was addressed and ruled upon by the Court of Appeals on direct appeal.

STATEMENT OF THE CASE

When Victim was in the eighth grade, Victim's special education teacher, Ms. Ursula Wardy, asked Victim if she was pregnant. (App. p. 50, ll. 13-20.) Victim denied being pregnant at first, but then stated she was pregnant. (App. p. 50, ll. 17-20.) Victim believed her "Uncle Robert," Petitioner, was the father of the baby she was carrying. (App. p. 53, l. 25 – p. 54, l. 7.) After revealing the abuse to Ms. Wardy, law enforcement began its investigation. (App. p. 54, l. 23 – p. 55, l. 4.)

Victim explained the abuse progressed from touching of her chest, to receiving and giving oral sex, to digital penetration, to vaginal penetration with his penis, to anal penetration, and to observing Victim have sex with another child. (App. p. 77, ll. 1-3; p. 77, l. 22 – p. 78, l. 13; p. 78, l. 19 – p. 80, line 10; p. 82, l. 13 – p. 83, l. 23; p. 85, l. 16 – p. 86, l. 2; p. 87, ll. 13-23; p. 92, l. 20 – p. 94, l. 12.) Victim stated the abuse began when she was around 6-7 years old and ended when she was about 13 years old. (App. p. 77, ll. 1-3; p. 93, ll. 20-25.) Victim also explained the abuse happened in more than one location because Petitioner moved homes while he was still abusing Victim. (App. p. 77, ll. 4-10; p. 78, ll. 14-18; p. 81, ll. 13-20.) Additionally, Victim described how Petitioner used a taser to ensure she had sexual intercourse with him. (App. p. 82, l. 17 – p. 83, l. 10.)

When Petitioner was arrested, he was found with a taser in his pocket, which was taken into evidence. (App. 184, ll. 12-17, p. 185, ll. 14-16.) During the investigation of the abuse, Petitioner waived his rights and spoke to law enforcement. (App. p. 169, l. 10 – p. 172, l. 5.) Petitioner admitted he had known Victim and another child were having sex together while in Petitioner's room with Petitioner in the room. (App. p. 180, ll. 13-22.) Petitioner admitted to telling Victim her unborn baby may come out looking like him, Petitioner, because she had called him a "pervert." (App. p. 182, ll. 8-12.)

However, when Victim's child was born, testing determined the baby's father was the other child Victim had sex with and not Petitioner. (App. p. 196, ll. 1-6.)

After the conclusion of the investigation into Petitioner, he was indicted at the June 2010 term of the Florence County Grand Jury for Contributing to the Delinquency of a Minor, four counts of Second Degree Criminal Sexual Conduct with a Minor, and three counts of Lewd Act on a Minor. (App. pp. 363-367.) On August 2, 2010, Petitioner proceeded to a jury trial before the Honorable Michael G. Nettles and a jury. (App. p. 1.) Petitioner was represented by William Meetze, Esquire ("Trial Counsel"). (App. p. 299.)

Throughout the trial, Trial Counsel emphasized Victim's initial erroneous identification of Petitioner as the father of the baby and the DNA results that showed Petitioner was not the father. (App. p. 53, l. 25 – p. 54, l. 10; p. 109, l. 25 – p. 110, l. 23; p. 193, l. 8 – p. 196, l. 6.) Using the State's witnesses, Trial Counsel was able to remind the jury of that erroneous belief by Victim at least three times. (Id.) In addition to confirming Victim originally identified Petitioner as the father to her unborn child to her Special Education teacher, Trial Counsel was also able to successfully limit Debbie Elliott's testimony and prevent her from being qualified as an expert. (App. 142, l. 22 – p. 148, l. 1.) And, when Detective Robinson stated he had "used police reports from the police department to establish his residency [as] filed in police reports," (App. 172, ll. 25 - App. 174, ll. 11) Trial Counsel was able to object quickly, move for a mistrial, have the testimony stricken, receive a modified jury instruction from the trial court, and preserve the issue for appellate review. (App. p. 173, l. 23 – p. 178, l. 20; p. 248, ll. 18-24; p. 362.)

Despite trial counsel's efforts, the jury found Petitioner guilty of all the charges as indicted, and Judge Nettles sentenced Petitioner to a term of twenty years on one count of Second Degree Criminal Sexual Conduct with a Minor and a consecutive twenty year term on a

second count of Second Degree Criminal Sexual Conduct with a Minor. (App. pp. 368-374.) Judge Nettles sentenced Petitioner to concurrent terms on the remaining convictions.

Following the convictions, Petitioner filed a timely notice of appeal. Breen R. Stevens, Esquire, of the Office of Appellate Defense, perfected Petitioner's appeal, arguing the "trial court abused its discretion by failing to grant a mistrial after [Petitioner]'s objection to testimony regarding prior police reports at his address was sustained, but the information was already heard by the jury." (App. p. 352.) In a *per curiam*, unpublished opinion, the Court of Appeals affirmed the convictions pursuant to cases cited in support of a trial court's discretion in granting or denying a mistrial and other supporting cases. The opinion does not cite any cases for failure to preserve the issue. (App. pp. 361-62.)

Following direct appeal, Petitioner filed an application for post-conviction relief on April 29, 2013, alleging "[f]ailure to properly object to trial court's failure to operate in common law jurisdiction." (App. p. 294.) Respondent filed a return on or about May 14, 2014. An evidentiary hearing into the matter was convened at the Florence County Courthouse on April 15, 2015, before the Honorable D. Craig Brown. Petitioner was present at the hearing and represented by Jonathan Waller, Esquire ("PCR Counsel"). In questioning Trial Counsel and Petitioner, PCR counsel focused on specific lines of trial transcript testimony for witnesses Wardy and Elliott. (App. p. 325, ll. 8-13, p.326, 1-7.) PCR counsel also challenged Trial Counsel for "not asking for a curative charge." (P. 327, ll. 20-21.)

Judge Brown dismissed Petitioner's post-conviction relief application by Order filed on June 24, 2015. Petitioner did not file a Rule 59(e) motion. Petitioner filed his Notice of Appeal on or about July 21, 2015, and his Petition for Certiorari on March 9, 2016.

This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "'any evidence' of probative value" exists to sustain the post-conviction relief court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989).

In a post-conviction relief action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where an application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

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

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

I. Trial Counsel was not ineffective and no prejudice was established when Trial Counsel did not object to Ursula Wardy's testimony where that testimony aided in trial counsel's reasonable strategy.

Trial Counsel was not ineffective for failing to object to Ursula Wardy's testimony because Trial Counsel needed to establish that Victim originally, and erroneously, identified her uncle, Petitioner, as the likely father of her unborn child. Trial Counsel knew and was able to show the jury that DNA evidence established Petitioner was not the father. Throughout the trial, Trial Counsel highlighted Victim's incorrect identification of Petitioner as the father of her unborn child and elicited testimony on the same issue he did not object to when Wardy testified: that testimony being that Victim originally identified Petitioner as her abuser and the father of her unborn child.

"The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001). One exception to the rule allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. Id.; Rule 801(d)(1)(D), SCRE. The corroborative testimony is restricted to the victim's complaint of the time and place of the sexual assault. Dawkins, 346 S.C. at 156, 551 S.E.2d at 262. Any other details or particulars, including the perpetrator's identity, must be excluded. Id. at 156.

"However, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds

from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

In Watson, this Court reversed a PCR court's determination that counsel was ineffective for failing to prevent the introduction of hearsay testimony of several witnesses who testified about the abuse allegations against the defendant. Watson, 370 S.C. at 72, 634 S.E.2d at 644. This Court held that "counsel articulated a valid reason for failing to object to the hearsay testimony" where that reason was that counsel "wanted to avoid the possibility that the prosecution would have shown the video of the victim talking about the sexual abuse." Id.

At the PCR Hearing, PCR counsel specifically identified Page 25, lines 4-7 in the trial transcript (App. p. 325, ll. 8-13) as the areas of testimony to which Petitioner alleged Trial Counsel was ineffective for failing to object when Ms. Wardy stated Victim said "she was being molested by her uncle at her uncle's house." Petitioner asserts Trial Counsel should have objected to prevent Ms. Wardy from saying Victim said her uncle was the one molesting her.

When Trial Counsel was asked why he did not object to that statement, he answered that he did not have a strategy and he must have just missed it. (App. p. 325, l. 24.) However, later in his direct examination and still discussing Ms. Wardy's testimony, Trial Counsel explained that

he recalled Ms. Wardy testifying that Victim told her the uncle got her pregnant and "that wasn't true. I mean **that was part of the defense to – you know, that was an allegation that she had made that turned out not to be accurate**." (App. p. 328, l. 23-p. 329, l. 3 (emphasis added).) On cross-examination, Trial Counsel further explained that his strategy was to cast doubt on the victim's story and "make an argument that the State had not proven beyond a reasonable doubt the allegations." (App. p. 330, l. 22 – p. 331, l. 4.)

Trial Counsel's strategy was clear throughout the trial. In fact, on cross-examination of Ms. Wardy, Trial Counsel himself questioned Ms. Wardy about who Victim said the father of her unborn baby was:

> **Q. And you asked [Victim] at that point in time who the father was?**
> **A. Yes, sir.**
> **Q. And [Victim] told you it was [Petitioner]?**
> A. She didn't give me a name. She said that she was afraid it was her uncle's baby.
> Q. That's the only thing she told you in that regard?
> A. Yes, sir, in the hallway.
> Q. And that answer that it was uncle's baby was in response to a question of who the father of her baby was?
> A. Yes, sir.

(App. p. 53, l. 25 – p. 54, l. 10 (emphasis added).)

And when cross-examining Victim, Trial Counsel used Victim's prior statements to emphasize how Victim's story had changed about the identity of the father of her unborn baby:

> **Q. When you spoke to the folks at school, you told them that – well, when you found out you were pregnant, you told them that your Uncle Robert was the father; correct?**
> **A. Yeah.**
> Q. You didn't mention to them anything about [the minor child who actually was the father]?
> A. Yeah – no, not really.
> ...
> Q. Okay. And, of course, after that, blood test[s] were done to determine the father?
> A. Yeah.

> Q. It was determined that your Uncle Robert is not the father of your baby?
> A. Yes.

(App. p. 109, l. 25 – p. 110, l. 23 (emphasis added).)

Continuing with this strategy, Trial Counsel not only questioned Detective Robinson about this same issue, but over the State's objection, questioned Detective Robinson about an incident report that repeated Victim's allegations that Petitioner was the father of her unborn child.

> Q. School personnel, and the folks you spoke with, Ms. Wardy and Ms. Livingston, correct?
> A. Yes, sir.
> ...
> **Q. And, eventually, Victim did admit that she was pregnant, correct?**
> **A. That's correct.**
> **Q. And said that the father was her uncle?**
> A. . . . . But to answer your question, I believe that, yeah, she was afraid that her Uncle Roberts was the father, i.e., the reason why she wouldn't admit she was pregnant originally.
> ...
> Q. Does this statement – or **does this incident report indicate that the complainant advised – that victim number one confided that she was pregnant and that the suspect [Petitioner], who was her uncle, and her baby's father?**
> ...
> A. Yes, sir, that's what this police report says. . . . .
> ...
> Q. And it was determined at that point in time that [Petitioner] was not the father?
> A. That's correct, D.N.A. results determined that [Petitioner] was not the biological father.

(App. p. 193, l. 8 – p. 196, l. 6 (emphasis added).)

Tying his strategy together in his closing argument, Trial Counsel emphasized to the jury that:

> "[I]t's a big deal **that [Victim] said in October to Ms. Wardy** when it was found out that she was pregnant, when she finally came forward and said yes, I'm pregnant, she told her **that the father was [Petitioner.] She was unequivocal** about that. She didn't give any other possibilities of any other person being the father. . . . . What's unquestioned is, it was

> determined unequivocally that [Petitioner] was not the father after the baby was born in February of 2008."

(App. p. 231, ll. 4-14 (emphasis added).)

Getting testimony out of Ms. Wardy that highlighted Victim's initial reporting of Petitioner as the father of her unborn baby and then reminding the jury that DNA proved another person was the father of the baby was a key factor in Trial Counsel's strategy. Knowing he had to address Victim's pregnancy because it was related to the Contributing to the Delinquency of a Minor charge and knowing his client had confessed to knowing and not stopping the two children from engaging in sex in his bedroom, Trial Counsel used the pregnancy and Victim's claim that her uncle was the one to impregnate her to his client's advantage. As with Watson, Trial Counsel had a "valid reason for employing a certain strategy [and] such conduct [should] not be deemed ineffective assistance of counsel." Watson, 370 S.C. at 72, 634 S.E.2d at 644 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). Not only was this not ineffective assistance, there was no prejudice where Victim's pregnancy allegation was wrong due to DNA evidence that her baby was fathered by someone other than Petitioner and it was an important part of the defense to outline Victim's original claims against Petitioner.

II. No prejudice was established where Trial Counsel did not object to Debbie Elliott's testimony about the Victim's age when the alleged assaults occurred.

At the PCR hearing, Petitioner also made the same allegation against Trial Counsel as regards his failure to object to Debbie Elliott's testimony. Debbie Elliott, a forensic psychologist who interviewed Victim twice, was asked by the State about the time frame of the assaults as communicated to her by Victim. Ms. Elliott answered that Victim stated the sexual intercourse

happened "when she was 13, but that fondling had started around the age of seven or eight and progressed into other forms of sexual abuse." (App. 153, ll. 22 – App. 154, ll. 4.)

This Court is well aware that "the rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (citing Jolly v. State, 314 S.C. 17, 433 S.E.2d 566 (1994)). One exception to the rule allows limited corroborative testimony in criminal sexual conduct cases when the victim testifies. Id.; Rule 801(d)(1)(D), SCRE. The corroborative testimony is restricted to the victim's complaint of the *time* and place of the sexual assault. Dawkins, 346 S.C. at 156, 551 S.E.2d at 262.

As a result, any hearsay testimony corroborating the victim's statement that the sexual battery occurred while Victim was thirteen years old but that fondling had started around the age of seven or eight and had progressed into other forms of sexual abuse was admissible.[1]

Even assuming it was ineffective not to object, there was no prejudice established where there was other evidence that corroborated Victim's testimony. See State v. Chavis, 412 S.C. 101, 111, 771 S.E.2d 336, 341 (2015) (holding error in admitting hearsay testimony by forensic psychologist was harmless because "Appellant's crimes were established by evidence independent of both" the expert and the victim). In this case, Petitioner admitted to knowing Victim was having sex with another child in his room while he was present. (App. p. 180, ll. 13-22.) Victim's resulting pregnancy at age 13 was also undisputed. Petitioner was found in possession of a taser, which was the weapon he was accused of using to intimidate Victim into having sex with him. (App. p. 82, l. 17 – p. 83, l. 10; p. 184, ll. 12-17, p. 185, ll. 14-16.) While not definitive as to whether it was caused by abuse or "consensual" sex at the age of 13, a

[1] As in Watson, the jury heard about the forensic interview only through this witness as opposed to viewing Victim's forensic interviews.

medical examination showed Victim's "hymenal tissue was thick estrogenized with a cleft, which simply just represents a tear at the five o'clock position[, which] represent[s] . . . past injury to this hymen tissue." (App. p. 134, ll. 13-23.) Petitioner also admitted to making the unusual claim that he would not be surprised if Victim's baby came out looking like him because she called him a pervert. (App. p. 182, ll. 8-12.) Additionally, Victim's guidance counselor testified that at a meeting with Victim and Victim's mother to discuss issues related to Victim' becoming upset that kids were teasing her about looking pregnant, Petitioner surprisingly showed up to the meeting and refused to leave the room until directly asked by Victim's mother to leave. (App. p. 61, l. 14 – p. 62, l. 11.)

Because counsel was not ineffective for failing to object and because Petitioner's crimes were established by evidence independent of Victim and this witness's testimony, Petitioner can show no prejudice and this Petition should be denied.

III. Trial Counsel's alleged failure to object to Debbie Elliott's improper opinion testimony was not preserved where the allegation related to improper opinion was not presented to the PCR Court, was not addressed in the PCR Court's Order of Dismissal, and there was no Rule 59 Motion.

Petitioner argues the PCR Court erred in finding Trial Counsel was not ineffective for failing to object to Debbie Elliott's opinion testimony. However, this argument was not preserved and not addressed by the PCR Court and therefore is not properly before this Court.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). "It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" Id. (quoting Wilder Corp. v. Wilke, 330 S.C. at 76, 497 S.E.2d at 733). "Imposing such a requirement on the appellant 'is meant to enable the

lower court to rule properly after it has considered all relevant facts, law, and arguments.'" I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); State v. Sheppard, 391 S.C. 415, 423, 706 S.E.2d 16, 20 (2011) ("Our law is clear that an issue may not be raised for the first time on appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting issues and arguments on appeal).

At the PCR hearing, PCR Counsel specifically pointed to Page 128, lines 1-4 (App. p. 154, ll. 1-4) in the trial transcript (App. p. 326, ll. 1-7) and argued Trial Counsel should have objected when Ms. Elliott answered the question of "What was her . . . answer[] to you in terms of the time frame of her assault" with "[b]ut the last time that the sexual intercourse had happened was [when] she was 13, but that fondling had started around age seven or eight and it progressed into other forms of sexual abuse." (App. p. 153, l. 22 – p. 154, l. 4; p. 326, ll. 1-7.) PCR counsel and Petitioner never raised the issue to the Court or gave Trial Counsel an opportunity to respond or address the section of Ms. Elliott's testimony related to her recommendation regarding Victim. PCR counsel was never asked about the testimony in which Ms. Elliott said she recommended Victim have no direct or indirect contact with Petitioner and receive treatment for sexual victimization. (App. p. 155, ll. 21 – App. p. 156, ll. 3.) The issues presented to the PCR court, offered to Trial Counsel to address, and ruled upon by the PCR court were limited to the area of the transcript specifically identified by PCR counsel and did not reach the "opinion" testimony given by Ms. Elliott.

Because this issue was not raised or ruled upon, it was not preserved. This Court should find Petitioner's issue was not preserved and is unreviewable at this stage.

IV. Assuming the issue is treated as preserved, Trial Counsel was not ineffective for failing to object to the testimony of Debbie Elliott because counsel was not required to be clairvoyant and there was no prejudice to Petitioner.

Should this Court elect to treat the issue as preserved, the petition should still be denied because Trial Counsel was not ineffective. The cases relied on by Petitioner were not issued until years after this case went to trial. Further, a review of the testimony at issue and the evidence in this case shows there was no prejudice to Petitioner.

The long standing principle that has governed PCR jurisprudence is that a defense attorney does not hold a duty of clairvoyance to anticipate either changes of law or facts during challenged representation. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). Strickland explicitly states "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, **viewed as of the time of counsel's conduct**." Strickland, 466 U.S. at 690 (emphasis added); Phoenix v. Matesanz, 233 F.3d 77, 84 (1st Cir. 2000) (strategic choices are given greater latitude during trial when time is short.). South Carolina courts "have never required an attorney to be clairvoyant or anticipate changes in the law [that] were not in existence at the time of trial." Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (holding counsel "could not be ineffective" for failing to request a jury charge that would not have been applicable for at least other year).

At the time of Respondent's trial, Chavis and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) had not been decided. Kromah, three years after this case went to trial, acknowledged that additional guidance on the admissibility of forensic interviews and testimony was required

and outlined a set of statements "forensic interviewer[s] should avoid at trial." Kromah, 401 S.C. at 360, 737 S.E.2d at 500. One of those examples was listed as "any statement that indirectly vouches for the child's believability, such as stating the interviewer has made a 'compelling finding' of abuse." Id. In the years since Kromah was decided, several cases have followed, analyzing whether specific testimony falls within that or another Kromah category. See, e.g., State v. Brown, 411 S.C. 332, 768 S.E.2d 246 (Ct. App. 2015) (holding expert's testimony did not improperly bolster or corroborate child victims' testimony); State v. Smith, 411 S.C. 161, 171, 767 S.E.2d 212, 217 (Ct. App. 2014) (holding there was no improper vouching); Chavis, 412 S.C. 101, 771 S.E.2d 336 (holding expert's recommendation did improperly bolster Victim's credibility but because "Appellant's crimes were established by evidence independent of [expert] and Victim," that error was harmless).

Petitioner argues Trial Counsel should have used the dissent in State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009), to foretell the future guidance of the Court on this issue. But, Douglas is very different than this case. Douglas involved a witness **who had been qualified as an expert**. Douglas, 380 S.C. at 505, 671 S.E.2d at 610. Further, the witness in Douglas testified that only upon Victim's agreement that she would tell the truth, did the forensic interview continue. Id. And Douglas was a case in which "the case turned primarily on the veracity of the victim." Id.

Strickland requires that Counsel's performance may not fall below an "objective standard of reasonableness." Because Kromah and Chavis had not yet been decided at the time of Respondent's trial, trial counsel's failure to object was not ineffective. Furthermore, even with the limited guidance provided by the dissenting opinion in Douglas, because of Trial Counsel's efforts, this case was significantly different. Importantly, this witness was **not qualified as an**

expert due to Trial Counsel's extensive efforts. (App. 142, l. 22 – p. 148, l. 1.) Further, as outlined supra in Section II, this was not a case in which the verdict turned primarily on the veracity of Victim. Even if the testimony was improper, it did not prejudice Petitioner because Petitioner's crimes were established by evidence independent of Victim and this witness's testimony.

V. Trial Counsel was not ineffective and no prejudice was established where Trial Counsel refused the Trial Judge's offer of a more thorough curative instruction and that issue was addressed and ruled upon by the Court of Appeals on direct appeal.

Petitioner argues the PCR Court erred in finding that Trial Counsel was not ineffective when he declined the trial court's offer "to grant a **more thorough** curative charge" because it resulted in a failure to preserve the issue of the trial court's decision to deny the motion for mistrial.

As an initial matter, Trial Counsel objected, placed his arguments on the record, successfully had the testimony stricken, and had the trial court give a curative instruction both immediately after the objection and in the closing charges to the jury. (App. p. 173, l. 23 – p. 178, l. 20; p. 248, ll. 18-24.)

Further, the trial court's decision not to grant the mistrial was the sole issue raised on direct appeal. (App. p. 354.) In deciding to affirm the convictions, the Court of Appeals issued a per curiam, unpublished decision that cited cases related to a trial court's level of discretion in granting or denying a mistrial, related to jury charges instructing a jury to disregard incompetent evidence curing the error, and related to a witness's vague reference to prior criminal activity not warranting a mistrial. (App. p. 362.) The Court did not cite any authority on failure to preserve the issue. (App. p. 362.)

Thus, there was no error as this issue was properly preserved and reviewed.

CONCLUSION

For the foregoing reasons, the Petition should be denied. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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July 27, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County
Court of Common Pleas
D. Craig Brown, Circuit Court Judge

2013-CP-21-1147
Appellate Case No. 2015-001597

ROBERT L. JOHNSON, 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:

Lanelle Cantey Durant, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 27th day of July, 2016

DEONNA ROGERS
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

July 27, 2016

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

Re: **Robert L. Johnson, #211854 v. State of South Carolina**
Appellate Case No. 2015-001597
Lower Court Case No. 2013-CP-21-1147

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

for Johanna C. Valenzuela
Senior Assistant Deputy Attorney General
SC Bar No. 79834

JCV/dgr
Enclosures

cc: Appellate Defender Lanelle Cantey Durant (2 copies)
Trisha Allen, Victim Services