STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable Brooks P. Goldsmith, Circuit Court Judge



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Appellate Case No.: 2015-002325

ROOSEVELT ANTHONY REAVES,.....Petitioner,

v.

STATE OF SOUTH CAROLINA,.....Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## TABLE OF CONTENTS

## ISSUE PRESENTED

Did the PCR judge err in refusing to find appellate counsel ineffective in failing to raise the trial judge's error in allowing hearsay testimony from a nurse examiner that went beyond the time and place restrictions of Rule 801(d)(l)(D), that improperly corroborated and bolstered the complaining witness' testimony, and was not admissible pursuant to Rule 803(4) or Rule 801(d)(l)(B)?

## STATEMENT OF THE CASE

Petitioner was indicted during the May 2010 term of the Richland County Grand Jury for Criminal Sexual Conduct in the First Degree (2010-GS-40-1317), and Burglary in the First Degree (2010-GS-40-1305). Petitioner was represented by James D. Cooper, III, Esquire, Charlie Cochran, Esquire, and Clarke Newton, Esquire. On April 11-13, 2011, Petitioner proceeded to a jury trial before the Honorable Clifton B. Newman where he was convicted of Criminal Sexual Conduct in the First Degree and acquitted of Burglary in the First Degree. Judge Newman sentenced Petitioner to thirty years' imprisonment for Criminal Sexual Conduct in the First Degree.

A Notice of Appeal was filed and an appeal was perfected on Petitioner's behalf. Following briefing, the South Carolina Court of Appeals affirmed his conviction and sentence by unpublished opinion. State v. Roosevelt Reaves, 2013-UP-422 (Ct. App. filed November 20, 2013). The Remittitur was sent on December 6, 2013.

Petitioner filed an application for post-conviction relief on January 27, 2014, to which the State filed a return on June 23, 2014. An evidentiary hearing was held before the Honorable Brooke P. Goldsmith on April 2, 2015. Jonathan D. Waller, Esquire represented the Petitioner, and J. Clayton Mitchell, Esquire represented the State. In a written order dated September 30, 2015, Judge Goldsmith denied relief and dismissed the application. Petitioner filed a notice of appeal on November 13, 2015, which was perfected by the filing of a petition for writ of certiorari and appendix on September 7, 2016. This return follows.

## STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

## ARGUMENT

Probative evidence exists to uphold the post-conviction relief judge's finding that appellate counsel was not ineffective in his decision not to raise the trial judge's purported error in allowing hearsay testimony from a nurse examiner.

In his post-conviction relief application, Petitioner alleged ineffective assistance of appellate counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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, supra.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, supra. The applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). " However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, 302 S.C. at 537; Gilchrist v. State. 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State. 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Jones, 463 U.S. at 754.

That presumption cannot be overcome in the case at hand. Petitioner argues that the PCR judge erred in ruling that these issues regarding hearsay were properly admitted, and notes that, at the PCR hearing, appellate counsel could not recall why he did not raise these issues on appeal. However, Petitioner fails to establish that he was prejudiced by these decisions. "To establish prejudice relating to the actions of appellate counsel, Defendant must establish a reasonable probability that, but for his counsel's unreasonable failure to include a particular issue on appeal, he would have prevailed on his appeal." United States v. Mason, 2012 WL 5845807 at *1 (citing Smith v. Robbins, 528 U.S. at 285-86, 120 S. Ct at 764).

Petitioner went to great lengths to discuss the alleged inadmissibility of the SANE nurse's testimony for several reasons; however, Petitioner does not discuss how the omission of this testimony would have changed the outcome of the trial. There is no testimony in the record nor was other evidence presented in the petition that points toward the allegedly inadmissible

testimony being prejudicial or harmful to the Petitioner. All of the testimony about which Petitioner complains describes how the assault was represented to the SANE nurse – none of it identifies Petitioner in any form or fashion, nor does it provide evidence that was not already described in the victim's testimony.

Petitioner takes care to argue that this testimony bolsters that of the victim. Respondent respectfully disagrees, as the significance of this testimony does not rise to the level of bolstering. Pursuant to State v. Chavis, 412 S.C. 1017, 71 S.E.2d 336 (2015), "[w]hether an error is harmless depends on the circumstances of the particular case." (citing State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). "The materiality and prejudicial character of the error must be determined from its relationship to the entire case." Id. The Chavis court contrasted the cases of State v. Jennings, 394 S.C. 473, 716 S.E.2d 91 (2011) and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), both of which involved testimony of experts and the consideration of whether their testimony bolstered the victims'. The Court determined, essentially, that if the case does not turn solely on the victim's testimony (i.e., if physical or other evidence is available), then testimony such as this is not bolstering and its admission is harmless error. Respondent submits that the case at bar is more akin to Kromah, in that DNA evidence was present, evidence of violent sexual assault was present, and other criminal acts accompanied the crime.

For all of the above reasons, Respondent submits that Petitioner has not overcome the burden of showing prejudice on the part of appellate counsel, thus not allowing a finding of ineffective assistance of appellate counsel. Respondent avers that the admission of the nurse's testimony was harmless error; however, assuming *arguendo* that it was not, it still does not rise to the level of prejudice, as the above-recited case law grants appellate counsel the freedom and

leeway of advocacy in determining which issues to present on appeal. For these reasons, Respondent argues that Petitioner's petition for writ of certiorari should be denied.

## CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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1/27, 2017

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of **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:

**Kathrine H. Hudgins**
**S.C. Commission on Indigent Defense**
**Appellate Defense**
**PO Box 11589**
**Columbia, SC 29211**

This 27th day of January, 2017

FELICIA V. HAYES
Legal Assistant For Respondent