STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lexington County

Honorable R. Lawton McIntosh, Circuit Court Judge

YANCEY THOMPSON, #330395,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

Appellate Case No. 2014-001611

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Did the PCR judge err by finding trial counsel provided effective representation where counsel failed to object to the impermissible hearsay testimony of the forensic interviewer, the medical doctor who examined Minor, social worker Trina Elfering, and Officer Traci Barr, since such testimony impermissibly corroborated Minor's identification of Petitioner as her abuser under Rule 801(d)(1)(D), SCRE, and improperly bolstered Minor's credibility, which prejudiced Petitioner?

COUNTER STATEMENT OF ISSUES PRESENTED

I.

Is there probative evidence of record to support the PCR judge's ruling that the medical doctor's testimony – which did not relate identification of Petitioner, but only a report of sexual abuse – was properly received under the hearsay exception for medical diagnosis?

II.

Is there probative evidence of record to support the PCR judge's ruling that, while counsel was deficient in failing to object to certain testimony in the child sexual abuse assessment expert's, and Officer Barr's, testimony, such was harmless in context of the whole of the evidence which included medical testimony of damage consistent with penetration, and other evidence corroborating the fact, and victim's details, of the crimes.

III.

Is there probative evidence of record supporting a finding that counsel was not ineffective in failing to object to the social worker's testimony – in which she relayed both that the child identified Petitioner as the abuser, and that Petitioner denied being the abuser – for exceeding time and place exceptions under Rule 801(d)(1)(D), where the testimony, much like Officer Barr's admissible testimony, showed the investigation progression, did not access credibility as to the crime, and was harmless in light of other evidence most specifically, the medical evidence supporting sexual abuse?

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. Petitioner was indicted during 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). (App. pp. 596-601). Petitioner was represented by Charles Brooks, Esq., and Irma Brooks, Esq.

On September 2-4, 2008, Petitioner was tried by a jury before the Honorable John R. Milling on all three charges. (App. pp. 1-418). Petitioner was found guilty on all three charges. (App. p. 403). Judge Milling sentenced Petitioner to confinement for a period of ten (10) years for disseminating harmful materials to minors conviction; twenty-five (25) years for the CSC, 1st degree conviction; and twenty (20) years for CSC, 2nd degree, all to be served concurrently. (App. p. 414). Petitioner appealed from the convictions.

Appellate Defender M. Celia Robinson and Chief Appellate Defender Robert M. Dudek represented Petitioner on appeal. This Court summarized the issues presented as follows:

> On appeal, Thompson argues the circuit court erred in: (1) not giving preclusive effect under collateral estoppel to a consent order from the family court stating the victim was abused by an "unknown perpetrator"; (2) failing to direct a verdict of acquittal because the State did not produce sufficient evidence that one of the crimes occurred in Lexington County; and (3) failing to find the State violated its disclosure obligations.

State v. Thompson, No. 2010-MO-028, 2010 WL 10097749, at *1 (S.C. Nov. 8, 2010).

The Court also noted that it declined to reach argument on *Brady* violations as Petitioner "did not raise them to the circuit court." *Id.*, n. 1. In the same Rule 220(b)(1), SCACR summary opinion, this Court affirmed, *id.*, and later issued the remittitur on November 24, 2010.

Petitioner then filed an application for post-conviction relief on January 14, 2011. (2011-CP-32-0152). (App. pp. 419-28). An evidentiary hearing was convened at the Lexington County Courthouse before the Honorable R. Lawton McIntosh on January 28, 2013. (App. pp. 434-521). Petitioner was present and was represented by Robert W. Mills, Esq. The State was represented by Assistant Attorney General J. Benjamin Aplin and Assistant Attorney General John W. Whitmire. In an order filed December 10, 2013, Judge McIntosh denied and dismissed the application with prejudice. (App. pp. 570-582). Petitioner subsequently filed a Motion to Alter Judgment pursuant to SCRCP 59(e). (App. pp. 583-588). By Order filed May 27, 2014, Judge McIntosh denied the Motion to Alter Judgment. (App. pp. 594-595).

Petitioner appealed and filed a Petition for Writ of Certiorari in this Court. In the Petition, he presented two issues. First, did the PCR judge err by finding trial counsel provided effective representation where counsel failed to object to the impermissible hearsay testimony of the forensic interviewer, the medical doctor who examined Minor, social worker Trina Elfering, and Officer Traci Barr, since such testimony impermissibly corroborated Minor's identification of Petitioner as her abuser under Rule 801(d)(1)(D), SCRE, and improperly bolstered Minor's credibility, which prejudiced Petitioner? Second, did the PCR judge err by finding trial counsel provided effective representation where counsel failed to object to impermissible evidence that Petitioner allegedly sexually abused Minor in another jurisdiction, Richland County, where such evidence was inadmissible as a prior bad act under Rule 404(b), SCRE, and even if the evidence was relevant, its probative value was substantially outweighed by unfair prejudice to Petitioner?

By Order filed December 2, 2016, this Court granted a writ of certiorari to Question I of the petition, and denied certiorari to Question II. This Brief of Respondent follows.

ARGUMENT

When the argument in the petition is analyzed within the proper legal framework, and in light of a review of the full record before the PCR court, the record well-supports relief was not warranted. This Court should affirm the denial of relief.

Standard of Review and Relevant Law

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State,* 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). The reviewing court "will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id. See also Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision.").

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 673 (1984)). A PCR "applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRCP. *See also Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). In order to prove deficient performance, the convicted defendant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687). The petitioner "must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." *Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001). "A reasonable probability is a

probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693).

"'[E]rror by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" *Smith v. State,* 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010) (quoting *Strickland,* 466 U.S. at 691). "To establish prejudice, the defendant is required 'to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.,* at 565–66, 689 S.E.2d at 631 (quoting *Strickland,* 466 U.S. at 694). "[N]o prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." *Id.* at 566, 689 S.E.2d at 631 (citing *Rosemond v. Catoe,* 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)).

Relevant Facts from the Trial

Monica Gleaton, the mother of the minor victim in this case, was a child herself when she began having children. (App. p. 221). She was seventeen when she had the victim, and already had four other children. (App. pp. 221-222). She reached out to family members to care for the children as she attempted to finish school for a nursing certificate, which she eventually completed. (App. pp. 222-223). When the victim was approximately seven months old, Ms. Gleaton turned to a cousin, Julia Thompson, to care for the child. Later, Ms. Thompson married Petitioner. (App. p. 223). Eventually, some years later, Ms. Gleaton sought to bring the victim to her home. (App. p. 226). Her first few months of being at home allowed Ms. Gleaton to observe the child had nightmares, disturbed sleep, and would "fret" when she encountered men. (App. p. 237).

The victim, fourteen years old at the time of trial, (App. p. 124), testified that she was sexually abused by Petitioner in multiple ways in several residences. (App. pp. 128-146). She also described a book of pornography in a green bag in a closet that he would show to her. (App. pp. 136-137).

DSS worker Trina Elfering testified that she first received a report in January 2007 that the victim was not going to school; her clothes were dirty and ill-fitted; she ate and slept on the floor though the other children did not; and she was physically abused by the other children in the home. (App. p. 171). She testified, in an interview, the victim denied mistreatment by other children, but alleged Petitioner had been sexually abusing her. Ms. Elfering referred the victim for interview by a "professional forensic interviewer." (App. p. 174). She testified she used the information from the interview in her report to the police. (App. p. 176). The specific assertions used from the interview were not detailed. On cross-examination, defense counsel brought out that Ms. Elfering "concluded that there was no abuse or neglect regarding the other children." (App. p. 176). Defense counsel also brought out that Ms. Elfring spoke to Petitioner one time, and "[h]e denied the allegations." (App. p. 178).

Detective Traci Barr testified she reviewed the forensic interview video and "[b]ased on ... training and experience," the "disclosures appear[ed] consistent." (App. p. 186). Particular disclosures were not elicited. (App. p. 186). She testified the medical report appeared to "corroborate" the account, as well. (App. pp. 186-187). Again, no specifics were elicited. (App. p. 186). Based on information in the interview, the detective "as part of the follow-up of [the] investigation," researched to confirm the areas were in Lexington County, and the approximate time the family would have been there. (App. p. 187). The State offered same to present evidence on the residences being in Lexington County. (App. p. 191; see also pp. 208-210). The

detective also testified officers, pursuant to the child's information, officers obtained a search warrant and seized the book in the closet as described. (App. p. 210).

Dr. Susan Luberoff testified that she performed an exam on victim to determine if there was physical evidence of abuse. (App. p. 263). She testified that she understood that it has been "some months" before the exam that she had last been abused or at risk of abuse. (App. p. 269). Upon examination, Dr. Luberoff found "very deep notching" in the hymen. (App. p. 267). She testified: "In my opinion and with a reasonable degree to medical certainty, these notches were so deep that it's my opinion that they are related to sexual abuse or penetrating vaginal trauma." (App. p. 270).

Dr. Alicia Benedetto, a forensic evaluator, testified that she interviewed the victim. She testified as an expert in child sexual abuse assessment. (App. p. 291). She testified that disclosure is generally made over a period of time, and that "[c]hildren have a different sense of time" than adults. (App. pp. 292-293). She explained the concept of "delayed disclosure," and that some children will not disclose the abuse for years. (App. pp. 294-296). Dr. Benedetto testified the victim "disclosed chronic sexual abuse by" Petitioner. (App. p. 296). She testified that the victim reported "vaginal penetration, anal penetration, oral sex and... some physical abuse...," from age "5 or 6 ... to the age of 12." (App. p. 297). After a question to connect a residence and time, defense counsel objected. The judge ruled he would allow testimony as to "locations, date, and time." (App. p. 297). Dr. Benedetto testified due to the "emotional effort" and difficulty suffered by the victim in the interview, she diagnosed victim with post-traumatic stress disorder – a rare diagnosis for the doctor to make, but supported by the "genuine, just palpable grief with the interview." (App. p. 300). She testified her label of "compelling" related to a rating system for interviews. (App. pp. 301-302). She opined victim's disclosure was

consistent with a child who had been sexual abused. (App. p. 302). She noted the "amount of detail" and "emotional intensity" from the victim during her assessment. (App. p. 302). On cross-examination, Dr. Benedetto explained that in order to make the post-traumatic stress disorder diagnosis, the reaction to trauma had to be intense with residual effects such as nightmares and other reactions. (App. pp. 316-318). She testified she used the assessment to make the diagnosis of post-traumatic disorder. (App. p. 300; pp. 316-318).

The PCR Ruling

The PCR Court found Petitioner failed to meet his burden of proving both deficient representation and prejudice for failing to object to impermissible hearsay and bolstering during the course of the trial. First, the PCR Court found Petitioner failed to prove his attorneys were deficient in not objecting to Dr. Luberoff's testimony, as the testimony was admissible under the medical diagnosis exception. (App. p. 577). Second, the PCR Court found defense counsel deficient in failing to object to some of Dr. Benedetto's testimony on the grounds of vouching and hearsay, but not on other times. (App. p. 578). He noted counsel's testimony that "recent developments in case" regarding forensic interviewing testimony was post-trial. (App. p. 578). Third, he found counsel's representation deficient for failing to similarly object to portions of Detective Barr's testimony while also finding the remainder of the testimony admissible as non-hearsay testimony on investigation. (App. p. 578). He concluded, however, Petitioner failed to prove prejudice from these instances of deficient performance. (App. p. 579). In particular, the PCR Court found the medical evidence compelling, and the victim's mother's testimony on resulting trauma and the victim's detailed testimony of abuse when Petitioner was her caretaker during that time frame made the few objectionable instances harmless. (App. pp. 579-580).

I.

There is probative evidence of record to support the PCR judge's ruling that the medical doctor's testimony – which did not relate identification of Petitioner, but only a report of sexual abuse – was properly received under the hearsay exception for medical diagnosis.

Rule 803(4), SCRE provides: "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history... or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are exceptions to the rule prohibited hearsay. "Certainly, a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim." *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct. App. 1997). In this case, the PCR judge reasonably found the doctor's testimony regarding the report of sexual abuse fell under this established exception.

Dr. Luberoff's examination was for the purpose of determining if there was evidence of abuse. It naturally flows that whether there was alleged sexual or physical abuse was "reasonably pertinent" for diagnosis. Moreover, 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 of the child." (App. pp. 283-284). She 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). Further, the testimony was not specific as to the allegations received such as may increase the danger or potential prejudice. Contrary to Petitioner's argument, nothing in the brief reference to

the report of abuse, or possibility of abuse, actually bolstered or vouched for any particular statement made by the child. Nor did the reference relate a particular detail. Notably, the referenced did not at all touch upon who the child accused.

At any rate, the statements were admissible under the noted exception. The PCR reasonably and logically found Petitioner failed to carry his burden of proof. Petitioner is not entitled to any relief.

II.

There is probative evidence of record to support the PCR judge's ruling that, while counsel was deficient in failing to object to certain testimony in the child sexual abuse assessment expert's testimony, and Officer Barr's, testimony, such was harmless in context of the whole of the evidence which included medical testimony of damage consistent with penetration, and other evidence corroborating the fact, and victim's details, of the crimes.

Respondent again submits, (see Return, pp. 7-8), that while the PCR judge found counsel exhibited deficient performance in failing to object to bolstering testimony, 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) and *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011), or any of the 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."). *See also Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985) ("[F]air assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'") (quoting *Strickland*, [466 U.S. at 690]). Evens so, the PCR judge reached the correct result, *i.e.* relief was not warranted. *See Westbury v. Bauer*, 284 S.C. 385, 387, 326 S.E.2d 151, 152 (1985) (the appellate court may affirm a trial judge's decision on any ground appearing in the record). *See also* Rule 243(g), SCACR (respondent may offer additional sustaining grounds on appeal).

Further, the testimony as to emotional state led to a diagnosis of post-traumatic stress disorder. The assessment of the extent of emotional state was part and parcel of that diagnosis. (App. p. 300; see also pp. 316-318). Thus, to the extent the rating system of "compelling" was

employed in assessing the victim's statements, there is clear overlap into the observed basis for the diagnosis. "An expert may give an opinion based upon personal observations or in answer to a properly framed hypothetical question that is based on facts supported by the record." *State v. Weaverling*, 337 S.C. 460, 474, 523 S.E.2d 787, 794 (Ct. App. 1999) (quoting *State v. Evans*, 316 S.C. 303, 311, 450 S.E.2d 47, 52 (1994)). Further, "an expert giving an opinion [may] rely on facts and data that are not admitted into evidence or even admissible into evidence if they are of a type reasonably relied upon by experts in the particular field." *Kromah,* 401 S.C. at 358, 737 S.E.2d at 499 (citing Rule 703, SCRE). While the diagnosis may indirectly support the fact the crimes occurred, it does not directly vouch for the witness. *See generally State v. Brown*, 411 S.C. 332, 345, 768 S.E.2d 246, 253 (Ct. App. 2015), *reh'g denied* (Feb. 11, 2015), *cert. denied* (Aug. 6, 2015) ("The fact that [expert's] testimony corroborated some of the minor victims' reasons for delaying disclosure of the abuse does not mean her testimony improperly bolstered their accounts.").

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

This Court has recently reviewed cases involving "forensic interviewers," particularly 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 in light of remaining evidence, including medical evidence of harm); *State v. Jennings*, *supra*; *Smith v. State*, 386l S.C. 562, 689 S.E.2d 629 (2010). Trial counsel was without this pointed guidance. However, the proper analysis for determining ineffective

assistance of counsel remains, as set out in *Strickland*, deficiency and prejudice. There is probative evidence in the record to support the PCR judge's finding that Petitioner was not prejudiced by counsel's alleged deficiencies.

First and foremost, like *Kromah*, there was medical evidence that supported the fact of penetration. 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), that victim had incurred "deep notching" to her hymen, and opined, "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). Without medical evidence, even the proof of the crime is subject to challenge and the victim's credibility is crucial. *See Jennings,* 394 S.C. at 480, 716 S.E.2d at 94–95 (where "no physical evidence presented" and case depended solely on children's accounts, error in "admission of the written reports was not harmless"); *Vail v. State*, 402 S.C. 77, 90, 738 S.E.2d 503, 510 (Ct. App. 2013) (victim's credibility was "extremely crucial" to the outcome in light of the fact that her "hymen was fully intact with either no evidence of trauma or the trauma had healed despite the alleged six to nine incidents of sexual intercourse"). Further, the victim testified at trial that Petitioner raped and molested her over the course of several years which was the basis for the prosecution, (see App. p. 126, ("[Petitioner] touched me, did stuff to me that he wasn't supposed to"); pp. 128 - 129 ("[Petitioner] took his clothes off and put his thing in my private part")). 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), 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). The PCR Court also found compelling the testimony victim's mother, Monica Gleaton, who

testified about the victim's nightmares, sleep disturbances, and that victim would "fret" around men. (App. pp. 579-580; see also p. 237). The PCR judge also emphasized the absence of any contradictory testimony at trial. (App. p. 580).

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). 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). It was found as victim described in Petitioner's closet. (App. p. 218).

Further still, the majority of testimony from the detective fit decisively into admissibility for evidence going to explanation of the investigation, not vouching, and establishing whether the incidents described actually could have occurred in Lexington County. Of note, Petitioner raised an issue on appeal challenging the State's evidence supporting the crimes took place in Lexington County. *See State v. Thompson*, *supra* (rejecting Petitioner's issue the trial court erred by "failing to direct a verdict of acquittal because the State did not produce sufficient evidence that one of the crimes occurred in Lexington County," noting "evidence of venue, *though slight*, is sufficient to establish jurisdiction") (emphasis in original). This testimony on the investigation of residences in particular was admissible on a basis distinctly separate and apart from simple corroboration or impermissible bolstering.

In sum, the record shows the PCR judge's findings are fully and fairly supported, and that the strong corroborative evidence here that was admissible on a separate and distinct basis negates any harmful effect from counsel's alleged deficient performance. The slight improper testimony is not sufficient to show prejudice. Thus, Petitioner is not entitled to any relief.

III.

There is probative evidence of record supporting a finding that counsel was not ineffective in failing to object to the social worker's testimony – in which she relayed both that the child identified Petitioner as the abuser, and that Petitioner denied being the abuser – for exceeding time and place exceptions under Rule 801(d)(1)(D), where the testimony, much like Officer Barr's admissible testimony, showed the investigation progression, did not access credibility, and was harmless in light of other evidence most specifically, the medical evidence supporting sustained sexual abuse.

The PCR judge did not directly address this allegation; however, PCR counsel elicited testimony about same at the PCR hearing, (see App. pp. 448-449), and requested a ruling in the Rule 59(e) motion, (App. p. 586). Given that the issue was so raised, Respondent does not rely upon a procedural bar. However, the PCR Court's finding of lack of prejudice similarly holds true here.

Again, first and foremost, is the medical evidence that supports the testimony of penetration, and other corroborating evidence as outlined above in prior argument. Second, when read in context, in her testimony, Ms. Elfering, though she does relate an accusation against Petitioner, does not attempt to vouch for the victim in credibility of all things. Moreover, Ms. Elfering referred the victim for interview by a "professional forensic interviewer." (App. p. 174). She testified she used the information from the interview in her report to the police. (App. p. 176). However, the specific assertions used from the interview were not detailed. Additionally, defense counsel brought out that Ms. Elfring spoke to Petitioner one time, and "[h]e denied the allegations." (App. p. 178). Given the investigative nature of the testimony, it is highly unlikely that but for an objection, the result of the trial would have been different. As noted above, to show the required prejudice to obtain relief, a petition must demonstrate "[t]he likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693). Again, Petitioner is not entitled to any relief.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court affirm the PCR Court's Order of Dismissal.

Respectfully submitted,

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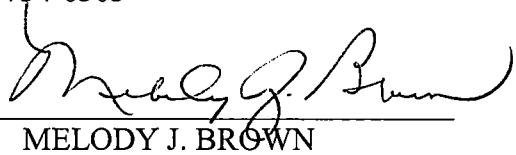
By: 

MELODY J. BROWN
SC Bar No. 14244

July 6, 2017.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

RECEIVED
JUL 06 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas (PCR)
The Honorable R. Lawton McIntosh, Circuit Court Judge

Yancey Thompson,

Petitioner,

v.

State of South Carolina,

Respondent.

Appellate Case No. 2014-001611

PROOF OF SERVICE

I, Melody J. Brown, counsel for the Respondent, certify that I have served the within Brief of Respondent on the Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Robert M. Pachak, Esq., S.C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 6th day of July, 2017.

MELODY J. BROWN
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ATTORNEY FOR RESPONDENT