STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Timothy Allen Lemacks .....Petitioner,

v.

State of South Carolina, ...Respondent.

Appellate Case No. 2016-002387

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUE PRESENTED

Did the post-conviction relief (PCR) judge correctly find trial counsel was not ineffective when he did not object to evidence of Minor's prior consistent statements and used those statements for purposes of impeachment?

STATEMENT OF FACTS

Procedural History

Petitioner was indicted at the January 2011 term of the Colleton County Grand Jury for criminal sexual conduct with a minor- first degree. Petitioner was represented by David Mathews, Esquire. The State was represented by Charles Balish, Esquire, of the First Circuit Solicitor's Office. Petitioner proceeded to jury trial on February 28 before the Honorable D. Craig Brown. On March 2, 2011, the jury convicted Petitioner as indicted and Judge Brown sentenced Petitioner to confinement for a period of twenty-five years.

Petitioner filed a timely notice of appeal. His appeal was perfected by Lanelle Durant, Esquire, of the South Carolina Office of Commission on Indigent Defense Division of Appellate Defense. Following the submission of an Anders brief, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Lemacks, No. 2013-UP-363 (S.C. Ct. App. October 2, 2013). The Remittitur was issued on October 18, 2013.

Petitioner filed an application for PCR on February 25, 2014. In his application Petitioner alleged:

1. Police never tested me for DNA.
2. No DNA or visual evidence present during the use of rape kit.
3. Rushed to trial, David Mathews put in for a speedy trial without my knowledge.

Respondent made its Return on August 20, 2014. An evidentiary hearing into the matter was convened on October 27, 2014, at the Beaufort County Courthouse. Tristan M. Shaffer, Esquire represented the Applicant. Ashleigh Wilson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. PCR Counsel orally amended Petitioner's PCR application to allege:

4. Trial Counsel was ineffective for failing to object to Michelle Amaya's testimony to statements made by the alleged victim that are outside of time and place.

5. Trial Counsel was ineffective for failing to object to Tiffany Davis's testimony of statements that were made by the alleged victim outside of time and place.
6. Trial Counsel was ineffective for failing to object to Epifanio Garcia's conveying that the victim identified Applicant to him.
7. Trial Counsel was ineffective for failing to object to Detective Geathers, who conveyed hearsay statements made by the victims, giving specific facts about the case outside of time and place.
8. Trial Counsel was ineffective for failing to object to the State's attacks on trial counsel in closing argument
9. Trial Counsel was ineffective for eliciting hearsay from the victim's sister.
10. Trial Counsel was ineffective for failing to object to Tiffany Davis's testimony of what happened to her.

In an order of dismissal dated December 15, 2015, Judge Dickson dismissed Petitioner's application and found Counsel's decisions and conduct were appropriate and did not fall below the professional norms of reasonableness. Judge Dickson also found that the evidence against Petitioner was overwhelming and proper objections to the hearsay would not have changed the outcome of the trial.

Facts

Petitioner lived with Minor and her family. App. 138. Minor was in bed with her sister and Petitioner. App. p. 85. Petitioner put his hand in Minor's underwear and his finger in her vagina. App. p. 93. He then took it out and put his finger in again a few seconds later. App. pp. 93; 94. Victim attempted to scoot away from Petitioner and told him to stop. App. p. 94. Victim pretended to sleep and Petitioner left the bed. App. p. 95. Victim then got her sister and brother and made them sleep with her on the top bunk in a different room. App. p. 96. Victim told her mother what happened that next morning. App. p. 100.

Victim's mother took her to the grandmother's house, called the police, and then took Victim to the hospital. App. pp. 100; 143. No physical evidence of trauma or sexual abuse was found by the doctor. App. p. 173. Victim was taken for a forensic interview. App. p. 222.

Relevant Post-conviction Relief Hearing Testimony

Counsel admitted, in hindsight, there was some testimony to which he thought he should have objected. App. 346. Counsel did not admit that the hearsay was prejudicial or that it affected the outcome of the trial.

Counsel also testified, "I want to get into why somebody's lying, if they're lying, if they're just mistaken. I mean - - why would the little - - why would a girl say this if it didn't happen? And you know, the most common reason is because they - - somebody puts them up to it, or they want to be cool, and somebody else has made an allegation...[T]here were - - the inconsistency that I remember, if I am remembering it correctly, is whether she was on the top of the covers or under the covers." App. 356, l. 15 – App. 357, l. 2."[My] recollection is that... she said she was wearing something she clearly wasn't... I wanted them to get into that, even though it was hearsay." App. 349. Counsel testified that, due to the length of time since the trial, he did not recall the reasons behind each decision at trial. App. 354; 356. However, Counsel did testify, "I mean, if I'm getting into that, I did it for some – probably to show inconsistencies, but I – I had a reason." App. 357. "Q: And it's your testimony today that you decided not to object, kind of, on a strategic basis? A: Right." App. 357, l. 13-15. Counsel did admit that not every failure to object was part of his trial strategy. App. 360.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review in a post-conviction relief action 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) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's ruling. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court's decision when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

"Applicant bears the burden of proving the allegations in his application." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814. Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland v. Washington, 466 U.S. 668, 670.

ARGUMENT

I. There is probative evidence to support the PCR court's finding trial counsel's decisions were appropriate under the circumstances because the witnesses' statements were used by Counsel as a matter of trial strategy to impeach Minor's credibility. Alternatively, Minor's statements were admissible under Rule 803(2) and Rule 803(4), SCRE.

The PCR court found "defense counsel's decisions and conduct were appropriate under the circumstances." App. 367. The proper standard of review in a post-conviction relief action is whether "*any* evidence of probative value" exists to sustain the post-conviction relief court's findings. Cherry, 300 S.C. at 119, 386 S.E.2d at 626. (emphasis added).

There is probative evidence to support the PCR court's finding that Counsel employed a valid trial strategy. Additionally, the challenged statements were admissible hearsay, under Rule 803(2) and Rule 803(4), SCRE. Therefore, this Court should deny Petitioner's Petition for Writ of Certiorari based on the following reasons:

A. Counsel employed a valid trial strategy of attacking Minor's credibility through the hearsay statements of witnesses.

Counsel's decision not to object to hearsay testimony was part of a valid trial strategy, used in his closing argument, to attack Minor's credibility. At the PCR evidentiary hearing, Counsel testified he decided not to object on a strategic basis. App. 357, l. 13-15. Counsel testified, "[My] recollection is that... she said she was wearing something she clearly wasn't... I wanted them to get into that, even though it was hearsay." App. 349. Counsel testified that, due to the length of time since the trial, he did not recall all the reasons behind each decision at trial. App. 354; 356. However, Counsel did testify, "I mean, if I'm getting into that, I did it for some – probably to show inconsistencies, but I – I had a reason." App. 357.

This Court has found that there are valid trial strategies for choosing not to object to improper hearsay testimony:

> **[T]he failure to object to improper hearsay testimony in a criminal sexual conduct case** because the testimony is merely cumulative to the victim's testimony is not a reasonable strategy where the evidence is not overwhelming or the improper testimony bolsters the victim's testimony. 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) (cites omitted).

Here, Counsel did not testify he chose not to object because the evidence was merely cumulative. Instead, Counsel testified he wanted the hearsay evidence admitted in order to attack Minor's inconsistent statements. App. 349 - 357. This is a valid reason for not objecting to improper hearsay testimony and is probative evidence to sustain the PCR court's finding.

Counsel elicited multiple hearsay statements from Detective Geathers, concerning inconsistent statements made by Minor, on cross-examination. App. 225-231; 238-247. Counsel used those hearsay statements in his closing argument to assert Petitioner's innocence. App. 280. Counsel's closing argument reflects the decision to use Detective Geathers hearsay statements to show inconsistencies in Minor's testimony. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). A strategic or tactical decision does not have to be articulated by counsel. A court may infer from the record that counsel's actions reflect strategic decisions and, thus, should not be disturbed under Strickland. See Wood v. Allen, 558 U.S. 290 (2010). The applicant must prove that counsel's performance was deficient. Cherry, 300 S.C at 117, 386 S.E.2d at 625. Petitioner has failed to prove that Counsel's strategy of allowing hearsay evidence, in order to elicit impeachment material, was deficient.

Counsel's admission that some of the withheld objections were, in hindsight, a mistake matters little. "The relevant inquiry is not whether any one attorney believes he was ineffective, but whether his performance fell below an objective standard of reasonableness." Credell v. Bodison, 2011 WL 573425 (United States District Court, D. South Carolina, Anderson, J., 2011). "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled." Chandler, 218 F.3d at 1313. Counsel's claim he should have objected to some of the hearsay was made with the retrospective knowledge that his client was found guilty. Counsel's decision, at trial, to allow the hearsay was not deficient performance because it was a valid strategy to attack Minor's credibility.

There was only one instance of damaging bolstering testimony and it was immediately objected to by Counsel and corrected by a curative instruction from the trial judge. App. 165. "They called the SANE nurse to come see her [Minor], Ms. Kerr, and Ms. Kerr talked to her [Minor] and she [Minor] was able to say what had happened to her and gave pretty clear evidence. She was believable, because she was tearful, but she was..." App. 165. ll. 3-6. Counsel immediately objected. App. p. 165. The Court sustained the objected and instructed the jury, "Let the record reflect that the last response of Dr. Amaya be stricken from the record and you are not to consider that response by her in any way, shape or form in your deliberations." App. 165. ll. 15-18. "Generally, a curative instruction is deemed to have cured any alleged error." Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct.App.2005); see also 75B Am.Jur.2d Trial § 1284 (1992) ("By striking the evidence and instructing the jury to ignore it, the court may often cure its error in admitting the evidence, or render such error harmless, even in criminal cases."). "A curative instruction to disregard incompetent evidence and not to consider it during

deliberation is deemed to have cured any alleged error in its admission." Walker, 366 S.C. at 658, 623 S.E.2d at 130; see also Kelsey, 331 S.C. at 70, 502 S.E.2d at 73 (instruction to disregard inadmissible evidence is usually viewed as having corrected the error in its admission). The only bolstering evidence presented in this case was properly objected to by Counsel and corrected by the trial judge's curative instruction.

This objection shows Counsel delineated between statements he believed were harmful to Petitioner's case and statements he believed were not harmful. Counsel objected to Dr. Amaya's bolstering of Minor's credibility. App. 165. As an expert witness, Dr. Amaya's bolstering of Minor's credibility would have been harmful and, thus, Counsel requested and received a curative instruction. Id.

Tiffany Davis, Minor's mother, made similar statements:

> "Minor, are you absolutely sure?" And she said, "Yes, ma'am."...And I had no reason to believe she would make up anything like that."

App. 141 l. 11-14.

> Q: So do you believe her?
> A: Yes, I believe her with 100 percent of what's in my body and hers. I believe everything that's coming out of that baby's mouth.

App. 144 l. 19-21

> Q: And do you believe your daughter?
> A: Yes, I do believe her.

App. 146 l. 8-9

Instead of objecting to these statements, Counsel used these statements to attack the credibility of Minor and Ms. Davis in his closing argument. App. 279-280. Counsel demonstrated to the jury, through cross-examination and hearsay testimony, that Minor made numerous inconsistent statements. Counsel used Ms. Davis's unwavering belief in her child to

highlight the inconsistencies in Minor's story. App. 280-281. This valid trial strategy should not be discolored by the lens of hindsight.

> Judicial scrutiny of counsel's performance must be highly deferential... [It] is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Stone v. State, 419 S.C. 370, 383–84, 798 S.E.2d 561, 568 (2017)

Counsel also drew attention to other inconsistencies in Minor's hearsay statements. Counsel noted, in Minor's medical report, Minor said Petitioner put a single finger inside her. App. 166. This was in direct contradiction to Minor's other hearsay statement to the forensic interviewer that Petitioner inserted two fingers "all the way" into her vagina. App. 174-175. Counsel also asked Dr. Amaya numerous questions concerning the lack of physical evidence indicating sexual assault and the increased likelihood of trauma with two fingers. Id. This line of questioning demonstrated Minor's inconsistent testimony regarding the abuse itself in relation to the physical evidence. This cross-examination also called the veracity of Minor's statement to the nurse into question. "It is apparent from the trial record that counsel's strategy was to exploit in closing argument the only weakness in the State's case, that is, the inconsistencies between the victims' written statements and their trial testimony...counsel's performance was not objectively unreasonable." Huggler v. State, 360 S.C. 627, 636, 602 S.E.2d 753, 758 (2004) (concurring opinion). Here, Minor's inconsistent statements were the only weaknesses in the State's case. Counsel appropriately chose a trial strategy to attack that weakness. Therefore, there is probative

evidence to support the PCR court's finding that Counsel's strategy to attack that weakness, by any means necessary, did not fall below the professional norms of reasonableness.

Therefore, this Court should deny the Petition for Certiorari because Counsel's decision to use hearsay evidence for the purpose of impeaching Minor's testimony was a valid trial strategy and should not be deemed ineffective through the distorting lens of hindsight.

B. Minor's statements were admissible hearsay under Rule 803(2) and Rule 803(4), SCRE.

Counsel was not deficient because the statements Minor made to the witnesses were admissible as excited utterances and for the purposes of medical diagnosis and treatment, under Rule 803(2) and Rule 803(4), SCRE.

1. Rule 803(2), SCRE

The statements Minor made to the witnesses were admissible as excited utterances, under Rule 803(2). "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. Minor's statements were admissible because they were made shortly after Minor's abuse, were very painful, Minor was still in an emotional state, and Minor's age extended the stress of the excitement.

> There are three elements that must be met to find a statement to be an excited utterance:
> (1) the statement must relate to a startling event or condition;
> (2) the statement must have been made while the declarant was under the stress of excitement; and
> (3) the stress of excitement must be caused by the startling event or condition.

State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007).

Here, Minor, a ten-year-old girl, had her vagina "all the way" penetrated by two fingers of her "Uncle Timmy." App. 111. Minor further testified the pain was like a car door being slammed on her fingers. App. 105. Respondent contends this certainly qualifies as a startling event.

Each witness testified Minor was upset and crying. Tiffany Davis: "While she was saying all this, she was crying; she was upset." App. 141, l. 12-13. Dr. Amaya: "She was noted to be very upset, tearful." App. 164, l. 15. Epifanio Garcia: "And she come up crying." App. 199, l. 18. Davis testified she took Minor straight to the hospital after she learned of the assault. App. 143. At the hospital, Minor was still visibly upset and crying about the assault, which had just occurred the night prior. Given Minor's age and the stress of the recent event, it is evident Minor's statements were excited utterances. Cf. State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002) (finding where a six-year-old suddenly stopped testifying that the trial court did not err in allowing a police officer to testify that the child had indicated who was in the apartment on the night his mother was fatally attacked and that it was the defendant; the testimony was admissible as an excited utterance under Rule 803(2), SCRE, even though some twelve hours had passed since the attack, as time is just one factor to consider, along with the declarant's demeanor and age, and the severity of the startling event, and even statements in response to an officer's questioning can be an excited utterance because the statements still have spontaneity, especially for a child, for whom stress can last longer than for an adult; the Court stated it is the totality of the circumstances that must be considered in this analysis). Therefore, Counsel did not err by failing to object because the testimony was admissible.

2. Rule 803(4), SCRE

Minor's statement to the nurse was admissible because it was related to the nurse's attempt to diagnose and treat Minor.

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

Rule 803(4), SCRE

The substance of the nurse's report falls under this exception. The incident occurred the night before the examination. App. 164. Petitioner inserted a finger into Minor's vagina while Minor was lying down and it hurt. App. 166. These facts are relevant to diagnosis and fall under the hearsay exception in Rule 803(4). Petitioner alleges Borroughs stands for the proposition that Minor's medical report was prejudicial and did not fall under the medical diagnosis hearsay exception. State v. Burroughs, 328 S.C. 489, 502, 492 S.E.2d 408, 414 (Ct. App. 1997). Petitioner's reliance on Burroughs is distinguishable from this case. In Borroughs, the victim told the doctor the alleged rapist "asked for a hug." Id at 501, 492 S.E.2d at 414. Burroughs found this was outside the scope of the "medical diagnosis" exception because it was not "reasonably pertinent" to the victim's diagnosis or treatment. Id. Importantly, the court found that, "[T]his portion of the victim's story proved to be extremely important to the State's case against Burroughs." Id.

In contrast, other than the identification and actions of Petitioner, Minor's medical report contained only the location and movement of the children preceding and following Petitioner's assault of Minor. Unlike in Burroughs, the location and movement of the children preceding and

following the alleged incident were undisputed and not important to the State's case. The children's movement was undisputed because it did not demonstrate guilt or prejudice Petitioner. Minor's brother also corroborated Minor's story, concerning the children's location and movement the night of the assault. App. 127-129. Therefore, Burroughs is distinguishable from this case because there was no self-corroborating prejudicial evidence.

In this case, Minor's identification of Petitioner to the nurse was necessary for diagnosis and treatment and, thus, falls under the hearsay exception outlined in Rule 803(4). "The perpetrator's identity would rarely, if ever, be a factor upon which the doctor relied in diagnosing or treating the victim." State v. Brown, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985). The Supreme Court of Arizona undertook a thorough analysis and review of this case in State v. Robinson, 153 Ariz. 191, 200, 735 P.2d 801, 810 (1987). The Robinson analysis goes further than the Brown analysis, "We recognize that the identity of the victim's assailant and other statements attributing fault ordinarily are inadmissible under Rule 803(4) because identity and fault usually are not relevant to diagnosis or treatment... This general rule, however, is inapplicable in many child sexual abuse cases because the abuser's identity *is* critical to effective diagnosis and treatment." State v. Robinson, 153 Ariz. 191, 200, 735 P.2d 801, 810 (original emphasis). Robinson provided an analysis of when identity is critical to effective diagnosis and treatment:

> The exact nature and extent of the psychological problems which ensue from child [sexual] abuse often depend on the identity of the abuser. The psychological sequelae of sexual molestation by a father, other relative, or family friend may be different and require different treatment than those resulting from abuse by a stranger. Furthermore, effective treatment may require that the victim avoid contact with the abuser, not just to prevent further abuse, but also to facilitate recovery from past abuse.

Id.

"[W]e held that identity of the perpetrator is pertinent to the treatment or diagnosis of a child rape victim." State v. Aguallo, 318 N.C. 590, 596, 350 S.E.2d 76, 80 (1986). "The identification of respondent as a child sexual abuser was reasonably pertinent to a course of treatment that include[d] removing [the victim] from the home." In re K.A., 178 N.C. App. 561, 631 S.E.2d 893 (2006). "[I]nformation that the abuser is a member of the household is therefore 'reasonably pertinent' to a course of treatment which includes removing the child from the home." Colvard v. Com., 309 S.W.3d 239, 256 (Ky. 2010), as corrected (Apr. 9, 2010). "It is apparent from the testimony of the physician quoted above that he was involved in attempting to diagnose and, if diagnosed, to then treat child abuse, not simply bruises on the little girl's face. The identity of the person causing those injuries is a pertinent fact in these circumstances." Goldade v. State, 674 P.2d 721, 726 (Wyo. 1983).

Here, Petitioner resided in Minor's house. App.138, l. 21-22. Petitioner's presence in Minor's home necessitated Minor's identification of Petitioner as the assailant for the nurse to appropriately facilitate Minor's recovery. Minor's identification of Petitioner to the nurse was necessary for the nurse to properly diagnose and treat Minor and, thus, falls under the hearsay exception outlined in Rule 803(4).

Furthermore, in Brown, the doctor's testimony regarding the assailant's identity was found to be harmless, because it was cumulative, and the conviction was affirmed. Brown, 286 S.C. at 447, 334 S.E.2d at 817. Here, the identification of Petitioner was also cumulative to the victim's identification. There was no question that Petitioner was the accused. Petitioner's indictments were in evidence and he was seated at the defense table. App. 24; 299. Victim testified and pointed him out during testimony. App. 84. As in Brown, there was no prejudice in Minor's identification of Petitioner to the nurse.

Minor's statements to the nurse were relevant to the victim's medical diagnosis and treatment under Rule 803(4). Minor's statements to the nurse, Ms. Davis, Mr. Garcia, and Detective Geathers were admissible under the excited utterance exception under Rule 803(2). Therefore, this Court deny the Petition for Certiorari because Minor's statements were admissible, under the hearsay exceptions of Rule 803(2) and Rule 803(4).

C. There is probative evidence to support the PCR court's finding Petitioner was not prejudiced because the admission of the testimony, when evaluated under the totality of the circumstances, was harmless beyond a reasonable doubt.

Petitioner relies heavily on Jolly for the assertion that improper corroboration testimony, which is cumulative to the victim's testimony, cannot be harmless. PWC 13-14. Jolly was overruled by Jenkins. "Our finding that the error was not harmless is based on our analysis of the facts of this individual case, not based on any categorical rule. (collectively overruling *Jolly v. State,* 314 S.C. 17, 443 S.E.2d 566 (1994), to the extent *Jolly* imposes a categorical or per se rule regarding harmless error." State v. Jenkins, 398 S.C. 215, 227, 727 S.E.2d 761, 767 (Ct. App. 2012), rev'd, 412 S.C. 643, 773 S.E.2d 906 (2015) (internal citations omitted) (overruled on other grounds). In overruling Jenkins, this Court found: "[T]rial errors occur during the presentation of the case to the jury, and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt... appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case." State v. Jenkins, 412 S.C. 643, 650–51, 773 S.E.2d 906, 909 (2015).

Here, the hearsay evidence was used by Counsel to attack Minor's credibility and, thus, was divested of its ordinarily prejudicial nature. Further, Ms. Davis's statements of unconditional belief in Minor were used by Counsel to point out inconsistencies in Minor's testimony and deprive Ms. Davis's testimony of credibility during his closing argument. Though these

statements would normally be prejudicial, in this case, Counsel used them to assert Petitioner's innocence. Counsel turned the normally prejudicial evidence against the State's case, where it was at its weakest. Counsel, thereby, deprived the evidence of its potential prejudice.

Accordingly, Respondent asks this Court to deny the Petitioner for Writ of Certiorari because Petitioner was not prejudiced by the elicited testimony.

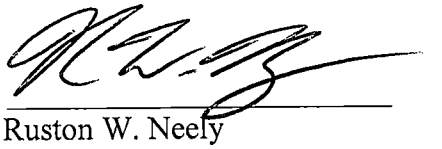
CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the petition be denied. If this Court sees fit to grant the petition for writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

RUSTON W. NEELY
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

August 14, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Circuit Court Case No: 2014-CP-15-0163
Appellate Case No.: 2016-002387

TIMOTHY LEMACKS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to the Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 14th day of August, 2017.

Jennifer Jennison

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Legal Assistant for Petitioner