THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 13 2017
S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
The Honorable Eugene C. Griffith, Circuit Court Judge

Case No: 2014-CP-32-04769

Lance Austin Williams, # 345477 .....Respondent,

v.

State of South Carolina, ...Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Eugene C. Griffith. Jr. Order dated June 19, 2007 and filed June 20, 2017, granting post- conviction relief to the Respondent. The State filed a Motion to Alter or Amend Judgment on June 29, 2017. The Motion was denied by Order filed August 18, 2017. The State received notice of entry of the Order on August 23, 2017.

Respectfully submitted,

Melody J. Brown
S.C. Bar # 14244
Senior Assistant Deputy Attorney General
South Carolina Attorney General Office
Post Office Box 11549
Columbia, South Carolina 29211-1549

Attorney for the Petitioner.

September 13, 2017

Other Counsel of Record:

Richard A. Harpootlian, Esquire
Post Office Box 1090
Columbia, South Carolina 29202
Attorney for Respondent

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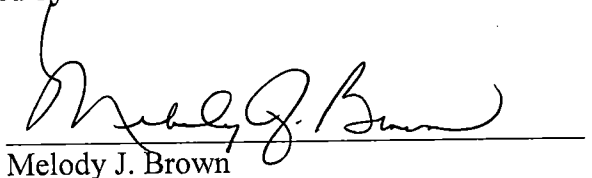
PROOF OF SERVICE

I, Melody J. Brown, Counsel for the Petitioner, certify that I have today served the notice of appeal upon the Respondent by depositing a copy of it in the United States mail, postage prepaid, addressed to his attorney of record:

Richard A. Harpootlian, Esquire
Post Office Box 1090
Columbia, South Carolina 29202

I further certify that all parties required by Rule to be served have been served this 13th day of September, 2017.



Melody J. Brown
Senior Assistant Deputy Attorney General
South Carolina Attorney General Office
Post Office Box 11549
Columbia, South Carolina 29211-1549
Attorney for the Petitioner

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF LEXINGTON) ELEVENTH JUDICIAL CIRCUIT

FILED
2017 AUG 18 AM 10:28
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Lance Austin Williams,)
Petitioner,) **ORDER DENYING DEFENDANT'S MOTION TO ALTER OR AMEND**
)
vs.)
)
State of South Carolina,) Civil Action No.:
) 2014-CP-32-4769
Respondent.)
)

On June 19, 2017, this Court granted post-conviction relief to the petitioner. This matter then came before the Court on the Respondent's Motion to Alter or Amend under Rule 59(e), SCRCP, asking the Court to reconsider its grant of post-conviction relief on June 19, 2017. While considering the Motion to Reconsider and the Memorandum submitted by the State, the Memorandum submitted by the applicant, and while considering the applicable laws of the state of South Carolina, this Court respectfully denies the Respondent's Motion to Alter or Amend the Judgement.

IT IS SO ORDERED.

Eugene C. Griffith, Jr.
Presiding Judge
Eleventh Judicial Circuit

August 15, 2017
Newberry, SC

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP3204769

Lance Austin Williams #00345477		**State of South Carolina**	

PLAINTIFF(S) **DEFENDANT(S)**

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

8/18/2017

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **18th August 2017**, and a copy mailed first class or placed in the appropriate attorney's box or **18th August 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian
PO Box 1090 Columbia, SC 29202

Melody Jane Brown
PO Box 11549 Columbia, SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lisa M. Comer/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014-CP-32-04769

Lance Austin Williams, SCDC #00345477

PLAINTIFF(S)

State of South Carolina

DEFENDANT(S)

Submitted by: Eugene C. Griffith, Jr.	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge | 2154 Judge Code | 06/19/17 Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Johanna C. Valenzuela, Esq.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT

Lance Austin Williams, SCDC No. 00345477 Applicant, vs. State of South Carolina, Respondent.	C/A No.: 2014-CP-32-04769 **OPINION AND ORDER**

This is a post-conviction relief action brought by Applicant, Lance Austin Williams, alleging violations of the right to counsel guaranteed by the Sixth Amendment to the United States Constitution. Having had an opportunity to carefully consider the evidence and applicable law, Applicant's petition is **GRANTED** for the reasons explained below.

PROCEDURAL BACKGROUND

Applicant was indicted for unlawful neglect of a child (2010-GS-32-01860) and criminal sexual conduct with a minor in the first degree (2010-GS-32-01861). At trial, Applicant was represented by James R. Snell, Jr., Esquire (Mr. Snell) and H. Wayne Floyd, Esquire (Mr. Floyd). After a plea of not guilty, Applicant was convicted of both counts. On April 5, 2011, the Honorable R. Knox McMahon, Circuit Court Judge, sentenced Applicant to two terms of incarceration, 10 years and 25 years, respectively, to run concurrently and ordered Applicant be placed on the Central Registry of Child Abuse and Neglect and the South Carolina Sex Offender Registry.

Applicant retained his current counsel for his appeal. On July 24, 2013 the Court of Appeals affirmed the conviction. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). On July 24, 2014, the Supreme Court denied Applicant's petition for a writ of certiorari.

Applicant's counsel, Richard A. Harpootlian, Esquire (PCR Counsel), filed this action on December 31, 2014, alleging violations of the Sixth Amendment's guarantee of effective assistance from counsel. On August 13, 2015, the State served a return opposing post-conviction relief. On October 25, 2016, Applicant filed an Amended Application.

On January 30 and 31, 2017, the Court held an evidentiary hearing that included testimony from both of Applicant's Trial Counsels and from an expert witness who was not called to testify at trial. After the evidence was presented, PCR Counsel notified the Court that Applicant would seek leave to amend his Application to conform with the evidence. On February 3, 2017, Applicant moved for leave to file a second amended application. That motion was granted and the Second Amended Application, filed on April 13, 2017, joined three issues.

The first issue alleged by Applicant: that Trial Counsels' preparation, both in terms of investigation and legal research, which he argues is a specific error contemplated by Strickland and a total failure to function as a meaningful state adversary such that prejudice is presumed under United States v. Cronic, 466 U.S. 648 (1984).

The second issue alleged by Applicant: that Trial Counsels ran afoul of Strickland by failing to call an available expert witness to testify the victim's injuries were consistent with Applicant's statement to police and testimony at trial which would have established a "medically recognized treatment" defined by S. C. Code Ann. § 16-3-651 and a legal defense to the charge of criminal sexual conduct with a minor.

The third issue alleged by Applicant: that photographs of the victim's vagina inflamed the passions and prejudices of the jury, which invited a verdict based on something other than the evidence. Also Trial Counsels' failure to make a contemporaneously objection preserving the issue

on appeal was ineffective and prejudicial within the meaning of Strickland v. Washington, 466 U.S. 668 (1984).

STANDARD OF REVIEW

The Sixth Amendment guarantees a criminal defendant the reasonably effective assistance of counsel in his defense. U.S. CONST. amend. VI; Strickland, 466 U.S. at 683; Von Dohlen v. State, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004). Counsel's assistance is measured by "an objective standard of reasonableness." Weik v. State, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014) (quoting Wiggins v. Smith, 539 U.S. 510, 521 (2003)). There are two paths to establish the denial of effective assistance and a violation of the Sixth Amendment.

Under Strickland, a post-conviction relief applicant can establish a claim for ineffective assistance of counsel by proving: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing Strickland, 466 U.S. at 687). An applicant bears the burden of proving both prongs. Id. at 383, 629 S.E.2d at 356. Under the prejudice prong, an applicant must show a "reasonable probability" that, but for counsel's errors, the result of the trial would have been different. Von Dohlen, 360 S.C. at 603, 602 S.E.2d at 740. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. Id. at 603, 602 S.E.2d at 740–41; Strickland, 466 U.S. at 687–694.

In Cronic, the United States Supreme Court held certain situations so fundamentally undermine the accused's right to the adversarial proceeding guaranteed by the Sixth Amendment such that prejudice is presumed. Cronic, 466 U.S. at 656–59. When "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Id. at

659. Circumstances warranting relief may be present when "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659–60 (citing Powell v. Alabama, 287 U.S. 45 (1932) as an example); see also, United States v. Ragin, 820 F.3d 609, 612 (4th Cir. 2016) (lawyer who slept through portions of trial met Cronic's standard).

FINDINGS OF FACT

A circuit court hearing an application for post-conviction relief must resolve any factual dispute necessary to decide the application. See S.C. Code Ann. § 17-27-70 (2015); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005). As factfinder, a circuit court must weigh the credibility of witnesses and determine what weight, if any, to give the evidence presented. See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). In discerning whether relief is warranted, a post-conviction relief court's decision must be supported by probative evidence. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

This Court has carefully reviewed the record in this case. That review has included an examination of the trial transcript, live testimony taken during a two-day hearing on January 30 and 31, 2017, and exhibits offered into evidence during that hearing. Having made such a review, the Court makes the following factual findings.

Relevant Trial Testimony

On April 15, 2010, Applicant cared for his girlfriend's fifteen-month-old daughter for about 10 hours. Williams, 405 S.C. at 268–69, 747 S.E.2d at 197. That evening, the child's mother and other family members took her to the emergency room after observing bruises on her face,

arms, and genital area. See id.; see also Trial Tr. 163:1–164:16 (testimony of mother); PCR Hr.'g Tr. 85:2–88:11 (summarizing the State's allegations).

The next day, Lexington County Sherriff's Department (LCSD) Detective Ed Prestigiacomo learned Applicant cared for the child the day her injuries were discovered and contacted Applicant who agreed to meet Det. Prestigiacomo at the LCSD. See Williams, 405 S.C. at 268–70, 747 S.E.2d at 197. Det. Prestigiacomo confronted Applicant with photos of bruising on the child's arm, which Applicant attributed to a hand-injury that caused him to be heavy-handed with the child. See id. at 269, 747 S.E.2d at 197. The detective also confronted Applicant with photos of bruising behind the child's ears, which Applicant explained resulted from two instances when he disciplined the child for misbehaving by slapping her on the ears. See id. Applicant was then shown photos of bruising on the child's forehead and near her genitals, which Applicant explained were the result of a fall and the application of eczema cream. See id. at 270, 747 S.E.2d at 197; see also Trial Tr. 502:16–12. Applicant was placed under arrest.

At trial, Applicant took the stand and conceded he was too rough with the child. He testified that he agreed to watch the child when asked by her mother, his girlfriend, but that he expected to be relieved of that obligation by 1:00 or 2:00 p.m. that afternoon. See Trial Tr. 489:4–490:2. Upon learning his girlfriend would not return until 6:00 p.m., Applicant testified he felt "used". Id. at 496:15–22. Applicant changed several wet diapers that morning, and a "messy diaper," he described as "diarrhea, runny" that afternoon. Id. at 497:24–498:7. Applicant described "poop everywhere" on the child's lower region, which required him to clean the child's genital area by wiping between the lips of the vagina to remove feces. Id. at 498:21–500:22. Applicant conceded he was "[a]ggravated" and "rougher than [he] should have been." Id. at 501:8–16; see also id. at 503:2–5 (explaining his aggravation stemmed from having to watch the child).

Thereafter, the child began throwing toys and misbehaving, and Applicant "popped" her twice, once on each side of the head. See id. at 503:6–16 & 504:4–14. At trial, Applicant conceded he hit her too hard, explaining, "[i]t was very wrong[,]" to hit her like that. Id. 504:3 & 15–17. Applicant also testified the child fell and hit her head while playing outside earlier that day. Id. at 492:6–16.

Two State witnesses offered evidence in support of the criminal sexual conduct charge. The State offered Marlene Clary with Palmetto Health Richland's regional nurse examiner program to testify as an expert in the field of forensic nurse examination. Trial Tr. 223:24–224:7 & 229:13–15. Mr. Snell indicated he had no notice of Ms. Clary, but declined to *voir dire* her before the Court qualified her, without objection, as an expert in forensic nurse examination. See id. at 229:16–230:16. Ms. Clary testified she examined the child and spoke to the child's mother on April 15, 2010. See id. at 231:6–16, 234:6–235:8, 235:20–236:4. At trial, she reported the findings of her examination, referring to a report documenting bruising on the child's neck, head, thigh, elbow, and knee. See id. at 240:24–242:3 & 243:25–249:19. Through Ms. Clary, the State introduced three diagram images—full body, face, and genitals—without anatomical features, that noted the location of "any type of abnormality." See id. at 238:12–239:13 (discussing Trial Ex. 9), 245:20–246:24 (discussing Trial Ex. 10) & 250:10–22 (discussing Trial Ex. 11). Mr. Floyd unsuccessfully interposed objections to the diagrams, arguing the State "can put the report itself in which this actually just a copy of it[,]" but inquired, "Why do they need a blow-up copy of it?" Id. 239:15–240:6; see also, id. at 246:2–21 (raising "the same objection") & 251:1–5 (same).

The child also received a genital exam. See Trial Tr. 254:10–15. Ms. Clary reported observing swollen labia and "an abrasion between the left minora and majora, basically the lips." Id. at 254:18–23. With respect to the child's hymen, Ms. Clary "was not able to visualize all of it

at one time[,]" which prevented her from making a determination as to whether it was all intact. Id. at 267:19–268:11. Nevertheless, she offered the opinion her observations were consistent with trauma. See id. at 267:4–6 & 270:18–271:5. Ms. Clary also testified she collected an unidentified specimen located on the child's foot, buccal swabs for DNA from the child's genital area, a diaper, and clothing. See id. at 242:4–243:24 & 271:22–272:8. That collection of samples failed to reveal any semen. Id. at 261:8–20 (and negative lab results) & 305:6–21.

Finally, the State asked Ms. Clary to authenticate and then offered Exhibits 12, 13, 14, and 15 as photographs of the child taken during her examination. See id. at 275:21–276:6. After being marked, the following exchange occurred:

> [Trial] Court: All right. Mr. Floyd?
>
> Mr. Floyd: No objection, Your Honor.
>
> [Trial] Court: No objection?
>
> Mr. Floyd: No objection Your Honor.
>
> [Trial] Court: All right. State's 12, 13, 14 and 15 are in evidence without objection.

Id. at 276:10–14. When asked about Exhibit 14, Ms. Clary identified the photograph as the child's genitalia and explained:

> Ms. Clary: ... That's her labia minora in the center there, that kind of a V-shaped area pointing down. There's a darkened area in the middle and then the redness on either side of that. And because there's traction there, you can't really appreciate the majora, the outer part, the lips, because I'm spreading that apart so I can better visualize the inner genitalia.

Id. at 281:6–13. Ms. Clary also described Exhibit 13 to show "her mons, her genitalia, her mons and her labia minora and then the folds in between, you know, where her legs meet her genitalia there." Id. at 281:17–21. This Court has reviewed the images and they are graphic.

The State also called Dr. Susan Luberoff, a pediatrician, to testify as an expert in the field of child abuse pediatrics. See Trial Tr. 310:1–15 & 313:3–5. Without objection, the Court qualified Dr. Luberoff as an expert in that field. See id. at 313:6–314:16. Dr. Luberoff testified she was consulted on April 16, 2010 and examined the child and took photographs. See id. at 314:16–317:23. Dr. Luberoff cited bruising discussed by Ms. Clary as evidence of physical abuse. See id. at 321:24–322:23 & 333:1–6. With respect to the child's genitals, Dr. Luberoff testified the child "had injury to her genital area that included a series of bruises in sort of a curved pattern over the front or the pubic area of her diaper area." Id. at 323:5–8; see also id. at 335:7–25 (discussing "arc pattern" of bruising in pubic area). Dr. Luberoff opined further that "[s]he had injuries to her hymen, which is part of the structure of the vagina. She had injuries just under the clitoris, which were some injuries on both sides of torn tissue or torn skin." Id. at 323:8–11. Dr. Luberoff observed an "injury to her hymen" she described as "bruising[.]" Id. at 323:11–12.

Dr. Luberoff's testimony also suggested penetration into, not just the genitals, but the child's vagina. She testified that in her experience "the most common type of sexual abuse that ends up being discovered to be true or that a finding is made involves digital fondling or digital penetration of a child's genital area[,]" and that it was "extremely rare for [her] to find an injury to the child's hymen." Trial Tr. 340:20–341:16. Dr. Luberoff also opined that the arc pattern of bruising on the pubic area and the bruising on the hymen as "diagnostic of vaginal penetration." See id. at 342:25–343:16 ("...And the only way to get there is by penetrating into that area. So these were penetrating injuries."). Dr. Luberoff also identified the arc-pattern bruising on the child's pelvic bone to represent "bite marks." 344:22–345:10.

Dr. Luberoff also authenticated Trial Exhibits 16, 17, 18, 19, and 20 as photographs she took during her exam, all of which were admitted into evidence without objection by Trial

Counsels. See Trial Tr. 324:3–325:6. As with Ms. Clary, the State asked Dr. Luberoff to explain these photographs, which included photographs "where [Dr. Luberoff had] taken the labia and moved them to the side in order to see the internal structures." See id. at 343:20–346:16 (discussing Trial Ex. 19). As with the photos admitted through Ms. Clary, this Court has examined them and they are graphic.

Evidence Presented at the Post-Conviction Relief Hearing

During the PCR hearing, Applicant called both of his former trial counsels and an expert witness to testify. The State called no witnesses.

Mr. Snell testified he was retained by Applicant on April 17, 2010, almost one year before the case was called to trial on March 30, 2011. See PCR Hr.'g Tr. 15:4–20. During his year-long representation of Applicant, Mr. Snell met with him "probably close to 20" times. Id. at 17:3–5. Mr. Snell explained, in his experience on other similar cases, "it would be very likely that a charge like [first degree criminal sexual conduct] would be substantially reduced by the prosecutor's office to something closer to, you know, matching the facts of ten [years]." Id. at 20:2–9; see also id. at 40:1–25 (same). Instead, he was told by the assistant solicitor handling Applicant's prosecution "there would not be any offers." Id. at 20:2–5. Mr. Snell was informed of the State's position 12 days before Applicant's case was called to trial. Id. at 22:13–23:3. When he received the notice, he was not expecting an imminent trial. Id. at 39:17–20; see also id. at 42:3–8 (agreeing it was "certainly surprising.").

Five days before trial, Mr. Snell received an email from the assistant solicitor with a list of 24 possible witnesses. PCR Hr.'g Tr. at 26:16–27:1 & 27:17–19 (discussing Pl.'s Ex. 1). Of these potential witnesses, Mr. Snell had spoken to six of them prior to trial. Id. at 27:23–25. Mr. Snell spoke to Det. Prestigiacomo on two occasions, but made no notes of those interviews. Id. at 28:5–

14. When asked whether he spoke to the child's aunt (and the State's first witness), Mr. Snell explained, "the folks I spoke to were only the law enforcement individuals. As far as the private folks that were the fact witnesses *I didn't speak to any of them.*" Id. at 28:23–29:3 (emphasis added). Pressed further about specific witnesses called at trial, Mr. Snell conceded they were never contacted. Mr. Snell testified neither he nor his investigator spoke with the child's mother (id. at 32:17–20), the mother's friend dispatched from the hospital to retrieve diaper evidence (compare id. at 32:21–24, with Trial Tr. 195:14–197:2), the child's grandmother (PCR Hr.'g Tr. 32:25–33:3), Ms. Clary (see id. at 33:3–8), or Dr. Luberoff. See id. at 33:22–34:25. Mr. Snell testified that Dr. Ann Able, a consulting physician, spoke with Dr. Luberoff while evaluating the case for the Applicant. Mr. Snell was forced to correct himself to explain that the consultant simply reviewed Dr. Luberoff's report and adopted her findings. See id.; see also id. at 35:1–36:5 (equivocating further, then conceding "I don't have a recollection of her saying she went back and had a discussion regarding the merits of the situation."). In fact, Dr. Able, the consulting physician that reported to Mr. Snell, agreed with Dr. Luberoff's opinion, practiced medicine in the same physician practice as Dr. Luberoff. Id. at 82:11–16. Mr. Snell testified he had a "very brief" conversation with LCSD investigator Shelby Derrick one year before trial. Id. at 36:6–13. He had no recollection of LCSD crime scene investigator Troy Crump (id. at 36:18–19), likely because Mr. Crump was not identified on the witness list provided by the State. See id. at 36:20–37:2 (discussing his absence from Pl.'s Ex. 1). He had no recollection of whether he spoke to SLED's DNA analysist, Adrienne Riley-Hefney, one of just two witnesses he cross-examined at trial. Compare id. at 33:9–19, with Trial Tr. 306:13–308:21. He also had no notes or recollection of LCSD evidence custodians, Beth Harmon and Candy Kyzer. See PCR Hr.'g Tr. at 37:3–21.

In short, Mr. Snell's testimony evidenced almost no pre-trial investigation into what State witnesses might say at trial. See id. at 37:22–25 ("Q. Now, I want you to look at page 3 of the trial transcript. The people I have just read off to you are the people that testified for the State in the case, correct? A. Yes, sir."); see also id. 38:1–25 ("Q. And you had no notes prior to the trial of any interview with any of these people" A. Correct. Yes, sir."). Nevertheless, Mr. Snell "didn't see a need for a continuance." Id. at 78:14–19.

Although Mr. Snell had access to several possible experts to aid Applicant's defense, no expert was presented at trial. Applicant's family paid to retain registered nurse Cindy Hurley, but she was not called to testify because Dr. Luberoff "said the same things that Ms. Hurley would have said[,]" namely that the child suffered no life-threatening injuries and that the vaginal injuries were not the type that would have been inflicted by a penis. See Hr.'g Tr. 52:2–53:25. Mr. Snell explained, "a big part of [Ms. Hurley's] review was we talked about diaper changes and how diaper changes were conducted and made since the child's injuries came through or from a diaper change." Id. at 54:1–4. Asked whether this formed the basis for Applicant's defense, Mr. Snell testified, "the defense in this was that it was not a [sic] intentional sexual act or an intentional assault in the genital area of the child. Id. at 54:5–8.

Mr. Snell also consulted with Dr. Edward Friedlander, but did not retain him. Hr.'g Tr. 66:25–67:24. Dr. Friedlander reviewed records provided by Mr. Snell and spoke with him on the telephone. Dr. Friedlander is a medical doctor who practices and teaches pathology[1] at Mississippi State's medical university. See PCR Hr.'g Tr. 125:15–129:15. His training includes conducting sexual assault examinations and he has been qualified as a testifying expert by state and federal

[1] Dr. Friedlander explained the field of pathology as the study of injury and disease and a "bridge discipline between basic medical science and clinical medicine." PCR Hr.'g Tr. At 129:16–25.

courts on approximately 50 occasions. Id. at 130:6–131:21. Dr. Friedlander's work as an expert witness has earned him the Missouri Bar Association's highest non-lawyer recognition for *pro bono* work. See id. at 141:21–142:4. This Court found Dr. Friedlander qualified to offer opinions in the field of pathology. Id. at 140:13–17.

After reviewing the records prior to the trial, Dr. Friedlander sent Mr. Snell a letter indicating this case bore the indicia of a man who became frustrated with having to care for another man's child and "[w]hile changing a diaper loses control of himself and takes out his anger physically on the child." See id. at 67:18–24 & 68:19–69:8. However, in Dr. Friedlander's view the State's case summary was "in error" because "[t]here are a pair of visual abrasions of the vulva which is not the vagina which are quite consistent with the defendant's account of having gripped the child here forcefully while he was out of control when he was trying to clean her." Id. at 69:8–16 (discussing Pl.'s Ex. 7). Mr. Snell conceded this assessment was helpful to Applicant. (id. at 69:23–25) It was consistent with the written statement and trial testimony of Applicant, that he was frustrated because the child defecated and feces had gotten between the lips of her vagina (id. at 70:23–71:19). See id. at 142:12–143:10. Dr. Friedlander agreed touching to clean feces off the genitals is a legitimate and medically necessary act. Id. at 147:5–13; see also id. at 155:8–12 (describing it as part of a child's "basic medical care"). Dr. Friedlander's medical opinion was consistent with what Applicant told police and the jury, which, if believed, would have entitled Applicant to a medical-touching defense.

Mr. Snell was not clear as to why Dr. Friedlander was not retained. See id. at 72:22–73:17 (claiming Dr. Friedlander "would have had a big retainer" but failing to recall how much). After suggesting Applicant's story changed over time, Mr. Snell agreed that Applicant's version of events mirrored his statement to police "weeks or months" before trial, but he still did not contact

Dr. Friedlander or Ms. Hurley to testify. See id. at 74:8– 75:22. Regardless of reason, there is no dispute that no medical expert testified at trial to explain that the injuries to and near the child's vagina were consistent with a diaper change. See id. at 73:18–25.

> Mr. Harpootlian: And that was the defense? The defense was a rough diaper change basically?
>
> Mr. Snell: Rough diaper change. Yes, sir.
>
> Mr. Harpootlian: Okay. Dr. Friedlander's opinion was consistent with that?
>
> Mr. Snell: It was.

Id. at 74:1–6.

During the PCR hearing, Dr. Friedlander testified concerning Trial Exhibits 19 and 20, which he explained were superior images to the ones provided when he reached his initial opinion. See PCR Hr.'g Tr. 147:16–148:3. After reviewing these photos (admitted here as Pl.'s Exs. 5–10), Dr. Friedlander testified "[i]t's clear what's happened." Id. at 148:4–6; see also id. at 163:16–164:9 (same). Using the State's trial exhibits to illustrate his testimony, Dr. Friedlander pointed to two "little scratch[es]" on the vulva and a bruise on the hymen. See id. at 149:3–24 (discussing Trial Ex. 19/Pl.'s Ex. 5). Dr. Friedlander also highlighted "three little bruises consistent with finger impressions[,]" on the child's pubic area. See id. at 150:2–8 (discussing Trial Ex. 20/Pl.'s Ex. 6). While illustrating with his hands, Dr. Friedlander explained:

> Mr. Harpootlian: Are those two injuries that you see in those two photos consistent or inconsistent with your position that these injuries occurred while he was attempting to remove feces from the lips of this little girl's vagina?
>
> Dr. Friedlander: It's a perfect match. He's holding her down too hard and he's opening the lips here so he can with the other hand remove the feces and this is scratching probably by his nails. These are two parts of the nails where the nails would rub up against and then the impression only on the back half, that's

> where the finger is going to strike [the hymen]. It's a perfect match.

Id. at 150:9–19. While the hymen was bruised, it was not penetrated. Id. at 174:10–15 ("A. Okay. The vulva was penetrated. The hymen is not penetrated."). Likewise, there is no evidence of intrusion into the vagina. Id. at 178:13–15. Dr. Friedlander also testified that the size of the abrasions on the child were consistent with a scratch by an adult fingernail. See id. at 150:20–151:3. Finally, Dr. Friedlander challenged the objectivity of Dr. Luberoff's testimony that the bruises on the child's pubic area, which he identified as finger impressions, were bite marks when a "good fit" for the injuries was what Applicant had described. See id. at 158:19–159:15; see also id. at 171:23–171:9 (using photo exhibit to note the absence of markings consistent with a bite). He was also critical of Dr. Luberoff's description of anatomy of the child's genitals, explaining "[i]t's sloppy usage to call the vulva the vagina" because, while the vulva is an exterior structure to the genitals, the vagina is located behind the hymen. See id. at 144:25–145:13 (explaining, "it's common speech but it's not scientific.").

As for the child's other injuries, Dr. Friedlander believed the child "was manhandled[,]" which he conveyed to Mr. Snell prior to trial and again to this Court. See PCR Hr.'g Tr. 151:15–22. Dr. Friedlander was available and willing to come to South Carolina to testify and quoted Mr. Snell the modest fee of $1,000 because he believed Applicant had been too rough with the child. See id. at 156:9–157:12. Nevertheless, Dr. Friedlander was disappointed when Mr. Snell failed to contact him again because he believed Applicant "was over charged[,]" and believed he could help explain "what really happened[.]" See id. at 158:5–18.

The day before Applicant's trial began, Applicant's mother gave Mr. Snell $5,000 to retain additional counsel. PCR Hr.'g Tr. 44:20–45:1. A memorandum by Mr. Snell in his file dated March 29, 3:22 p.m. recorded his contemporaneous observation that Applicant's mother "did not

want to hurt [his] feelings" but "wondered if I would have co-counsel for [Applicant's] trial." See id. at 45:5–48:25 (discussing and admitting Pl.'s Ex. 2 into evidence) & 49:16–50:15 (publishing memo). After Applicant's mother left, Mr. Snell contacted Mr. Floyd who agreed "to help", whereupon Mr. Snell obtained a certified check from applicant's mother and delivered it and a copy of all discovery and reports to Mr. Floyd. Id. at 50:9–13. At the time Mr. Floyd was retained—between 12 and 48 hours before trial—he had not met Applicant. Id. at 50:16–24, 51:13–18 (Mr. Floyd's first meeting with applicant was 12 hours before trial...) & 187:22–23 (and Mr. Floyd agreeing with that timeline); but see id. at 61:18–62:8 (second guessing his recollection, but agreeing Mr. Floyd was retained no more than 48 hours before trial).

Mr. Floyd is an experienced criminal defense lawyer with 42 years' experience during which he has tried "hundreds" of criminal cases. See PCR Hr.'g Tr. 185:23–186:4 & 186:25–187:5. Mr. Floyd testified that when he agreed to assist Mr. Snell, he planned to "just help him through the trial[,]" and not serve as primary counsel. Id. at 188:4–16. Prior to jury selection, Mr. Floyd had not spoken with any of the witnesses: "all I had was his file. Whatever he provided me, I reviewed that." Id. at 188:17–22. Mr. Floyd testified that when he handles a case, his practice is to speak with the witnesses. Id. at 188:23–189:7. With respect to lay witnesses, "[y]ou *always* want to try to make contact with them and see what they've got to say." Id. at 189:12–15 (emphasis added). Notwithstanding his limited preparation, Mr. Floyd handled the pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing, cross-examined 11 of 13 State witnesses, and delivered closing argument. Id. at 190:2–191:3. When asked how his trial role expanded, Mr. Floyd explained that during trial Mr. Snell "just asked me to continue with the cross examinations and I did." PCR Hr.'g Tr. 191:4–192:1.

At trial Mr. Floyd understood genital penetration for a medically recognized reason gave Applicant a defense to the criminal sexual conduct charge, but he did not ask Mr. Snell whether he retained an expert to address the penetration issue. PCR Hr.'g Tr. 193:4–10. In fact, Mr. Floyd was so cognizant of the import of the factual issue, he intentionally saved this question as his last for Dr. Luberoff. See id. at 193:11–21 ("Q. And it was your defense, right? A. Mm-hmm. It was the main portion of it. Yes."). Mr. Floyd first became aware of Dr. Friedlander's opinion during the PCR hearing:

Mr. Harpootlian:	Okay. Now, you have heard Dr. Friedlander's testimony this morning. Did that testimony corroborate your defense?
[...]	
Mr. Floyd:	Yes.
Mr. Harpootlian:	That is that it would be medically necessary to penetrate the vulva of a 15 month old to clean fecal matter from the lips of the vagina, right?
Mr. Floyd:	Correct.
Mr. Harpootlian:	And that's what Mr. Williams had said in his statement given to the police the day of his arrest, correct?
Mr. Floyd:	Correct.
Mr. Harpootlian:	So that explanation was consistent – inconsistent with what Dr. Luberoff said - but consistent with what Dr. Friedlander said, correct?
Mr. Floyd:	Correct.
Mr. Harpootlian:	So if you had been made aware of Dr. Friedlander -- Did you ever see a written report from Dr. Friedlander?
Mr. Floyd:	No.
Mr. Harpootlian:	That letter that we have introduced into evidence, you ever seen that before?
Mr. Floyd:	No. I don't think I ever saw it.

Mr. Harpootlian: Okay. So Mr. Snell never related to you what you heard here this morning?

Mr. Floyd: Correct.

Id. at 193:22–194:23. Had Mr. Floyd known Dr. Friedlander was available to corroborate Applicant's defense, he would have brought him to trial to offer what he characterized as "a crucial piece of testimony." Id. at 197:3–198:3. Instead, Applicant went to trial with no expert to counter Dr. Luberoff's testimony. Id. at 198:10–12.

Finally, having crossed examined both witnesses through which the State obtained the admission of graphic photos of the child's genitals, Mr. Floyd conceded, "... I didn't have any major trial strategy to not object." PCR Hr.'g Tr. 215:1–23; cf. id. at 213:25–214:22 (explaining he objected to the silhouette images because they were "[t]oo graphic.").

Having carefully examined the record in this matter, the Court now turns to the law.

CONCLUSIONS OF LAW

The Sixth Amendment's right to counsel protects the fundamental right to a fair trial. Strickland, 466 U.S. at 684 (citing Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938), and Gideon v. Wainwright, 372 U.S. 335 (1963)). The Constitutional guarantee of a fair trial "is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Id. The right to counsel is "crucial" to the adversarial system because it is counsel's skill and knowledge that equips a defendant with the tools to meet and defend the government's claims. Id. Because of the import counsel plays in a fair trial, the Sixth Amendment guarantees, not simply the presence of a lawyer, but "effective assistance" by a lawyer loyal to the client's cause, who keeps the client informed, and who brings to bear "such skill and knowledge as will render the trial a reliable adversarial

testing process." Id. at 688. This Application implicates the fundamental right to the effective assistance of counsel in three ways.

I. Trial preparation.

Applicant alleges Trial Counsels' "lack of trial preparation, including the failure to interview virtually any State witness or to comprehend and appreciate facts that entitled Applicant to a legal defense" falls below the constitutional guarantee of effective assistance within the meaning of Strickland and constitutes "a total failure to function as a meaningful State adversary" as contemplated by Chronic. 2nd Am. PCR Appl. ¶ 11.c. The Court agrees and holds that Mr. Snell's lack of preparation fundamentally undermined Applicant's trial in a manner that is actually and presumptively prejudicial. The Court reaches this conclusion for three reasons.

First, a defense counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. Federal courts have construed this obligation to require an "appropriate factual and legal inquir[y] and to allow adequate time for trial preparation and development of defense strategies." Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998) (citing Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)). "Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel." Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003) (citing Huffington, 140 F.3d at 580; Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986)).[2] The United States Court of Appeals for the Fourth Circuit has defined the parameters of a successful failure-to-investigate allegation by explaining:

[2] The exception to counsel's investigation obligation is "where counsel is familiar with the substance of their testimony." Huffington, 140 F.3d at 580 (collecting cases).

> The reasonableness of the investigation depends, in part, upon the importance of the witness to the prosecution's case: "Although a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation, the failure to investigate everyone whose name happens to be mentioned by the defendant does not suggest ineffective assistance." Huffington, 140 F.3d at 580. As we noted in Huffington, most of the witnesses whom federal courts have deemed "crucial" were "alibi witnesses *or eyewitnesses critical to the determination of guilt*," such as self-defense witnesses. Id.

Tucker, 350 F.3d at 444 (emphasis added). Thus, while counsel's failure to investigate every possible witness might be excused, failure to investigate all witnesses bearing on guilt or innocence is objectively unreasonable.

The Court holds Mr. Snell was objectively unreasonable in failing to interview, or attempting to interview, any State witness other than the lead detective. Testimony of Ms. Clary and Dr. Luberoff was unquestionably critical to Applicant's conviction, but Mr. Snell made no effort to contact them. Likewise, Mr. Snell recognized the timeline placing the child in Applicant's care was critical to establishing his responsibility for the injuries (see PCR Hr.'g Tr. 107:8–108:6 & 229:3–21), but no lay witness was contacted to test the veracity of these claims or explore avenues for impeachment. Thus, Mr. Snell failed to act on the import ascribed by his own assessment when he failed to interview any lay witnesses. See id. at 117:4–20. Finally, although Mr. Floyd repeatedly challenged the State's efforts to establish a chain of custody for a dirty diaper collected by a friend of the child's mother (see, e.g., Trial Tr. 418:16–25; PCR Hr.'g Tr. 229:22–230:17), he lacked sufficient information to do so having had no opportunity to interview the witnesses prior to mounting that challenge. Notably, but for the unusual circumstances whereby he came to handle the bulk of Applicant's trial work on the eve of trial, Mr. Floyd's practice is to conduct these interviews prior to trial. In short, the facts here indicate that Mr. Snell's failure to interview *all* of these witnesses abdicated counsel's responsibility to investigate critical witnesses determinative of guilt or innocence.

Second, Mr. Snell's representation was deficient because the lawyer who prepared the case for trial labored under a misapprehension of law and fact as to what constituted a legal defense. S. C. Code Ann. § 16-3-655 provides in part that "[a] person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age[.]" S.C. Code Ann. § 16-3-655(A)(1). A "sexual battery" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or *any intrusion, however slight*, of any part of a person's body or of any object *into the genital or anal openings* of another person's body, *except* when such intrusion is accomplished for *medically recognized treatment* or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (emphasis added). The statute does not require sexual gratification nor does it require *vaginal* penetration. See State v. Morgan, 352 S.C. 359, 365–73, 574 S.E.2d 203, 206–10 (Ct. App. 2002) (construing the inclusion of cunnilingus in the statute and holding "Penetration of the vagina is NOT necessary or required." (emphasis original)).

Mr. Snell repeatedly sought to highlight the lack of vaginal penetration, a fact of no legal consequence to Applicant's defense. For example, when Dr. Friedlander was asked why he was not retained, he recounted a 15-minute conversation with Mr. Snell he described as "perplexing" in which Mr. Snell appears to have misapprehended the utility of Dr. Friedlander's opinion while probing for an opinion that, if given, was of no legal utility. See PCR Hr.'g Tr. 152:4–11.

Mr. Harpootlian: Why was it perplexing?

Dr. Friedlander: After we got - after I made it clear to him that we could not think of any way to defend the idea that this child was manhandled, then he starts trying to explain the law to me.

Mr. Harpootlian: Right. And?

Dr. Friedlander: I don't really understand the law, but he was saying to me that if -- He was trying to get me to say that there was some way that this could not have been done with a, uh – He was - he was trying to get me to say that it was not done by

	penetration of the finger. He said that was there any way that I could say that the finger was in the vulva and I really couldn't.
Mr. Harpootlian:	He was trying to get you to back off the position that there was a penetration of the genitalia?
Dr. Friedlander:	That is what I was trying to say.
Mr. Harpootlian:	Right. And you said clearly there was penetration of the vulva?
Dr. Friedlander:	Yes.
Mr. Harpootlian:	Okay.
Dr. Friedlander:	I couldn't do that and he was trying to explain to me about the law said this and the law said that and I didn't really understand it.

Id. at 153:15–154:12. Mr. Snell never asked Dr. Friedlander whether the removal of fecal matter from the child's vaginal area was a medically recognized treatment. Id. at 155:4–7.

Similarly, when Mr. Snell moved the Trial Court for a directed verdict, he argued a lack of vaginal penetration. See Hr.'g Tr. 448:19–450:22. Citing the "medical testimony" offered by the State, Mr. Snell argued, "there's been no evidence presented of any penetration in to the opening." Id. at 448:21–449:14. When the Trial Court sought clarification, Mr. Snell first explained the "genital opening[,]" but then proceeded to argue, "[t]he testimony is that it was a bruised hymen and the hymen sits on the outside of the vaginal canal, which would be the genital opening." Id. at 449:18–23. When the Trial Court asked, "What are you defining as the genital opening?", Mr. Snell responded, "[t]he vagina." Id. at 449:25–450:2. In denying Applicant's motion, Mr. Snell, correctly, cited Morgan for the proposition that the criminal sexual conduct statute "defines the genital organs not to be only the vagina, and it held that vaginal penetration is not required to be convicted of criminal sexual conduct with a minor." See id. at 456:21–459:1.

The record is uncontradicted that Mr. Snell's apparent view at trial was neither factually nor legally accurate. See, e.g., PCR Hr.'g Tr. 235:13–17 (Mr. Floyd conceding, "That's not accurate.") & 236:2–9 ("It's inaccurate. It's an inaccurate argument."). During the PCR hearing, Mr. Snell correctly defined a sexual battery defined as "any intrusion into a private parts of the *genitalia* for an unrecognized medial purpose." Hr.'g Tr. 72:4–7 (emphasis added). He also agreed there is a statutory defense for a diaper change:

Mr. Harpootlian:	An unrecognized medical purpose?
Mr. Snell:	Right. So we have a diaper change which certainly can be a medical purpose, a legitimate reason for any adult to touch a child's genitalia. The child had injuries. The State charged him with criminal sexual conduct even though I don't believe there was anything sexual or any evidence that it was sexual.
Mr. Harpootlian:	Didn't have to be, did it?
Mr. Snell:	According to the State's version it did not.
Mr. Harpootlian:	Well --
Mr. Snell:	Read the statute. There is no requirement of --
Mr. Harpootlian:	But if there was a medical reason to have an intrusion, it would have been a defense?
Mr. Snell:	Exactly. Such as a diaper change.

Id. at 72:8–21; see also id. at 77:6–78:3 (same). The record before the Court does not demonstrate that this more recent (and accurate) understanding guided Mr. Snell's representation while preparing Applicant's case and representing him at trial. During cross-examination by the Assistant Attorney General, Mr. Snell stated that "basically a lot of folks got an anatomy lesson" from Dr. Luberoff during Applicant's trial. See PCR Hr.'g Tr. 108:16–109:9. To provide an effective defense, Mr. Snell should have armed himself with this knowledge *before* trial.

The Court also holds that the foregoing deficiencies—a failure to investigate, misunderstanding of the penetration requirement and failure to appreciate the significance of the medically recognized treatment defense—were prejudicial to Applicant's defense within the meaning of Strickland. While speculation or conjecture are never sufficient to substantiate that deficient performance was prejudicial, Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). Here, there is a convincing record that the lawyer charged with preparing Applicant's case failed to conduct any meaningful investigation and misapprehended the relevant legal inquiry. This resulted in a reliance on inaccurate factual and legal claims to the exclusion of a potentially meritorious defense. Prejudice attaches when counsel's performance "has adversely affected the defense." Huffington, 140 F.3d at 578. The Court finds that Applicant's defense was adversely affected. In the parlance of Strickland, there is a reasonable probability here that, but for counsel's errors, the outcome of Applicant's trial might have been different.

Third, in addition to the foregoing, the Court holds that Mr. Snell's overall lack of preparation and legal understanding is presumptively prejudicial to Applicant. In Cronic, the Supreme Court recognized an ineffective assistance claim based on an overall breakdown of the guarantee to counsel rather than a specific omission. The Court identified three situations where the presumption appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659. Second, prejudice is presumed if there is a constructive denial of counsel. Id. Constructive denial occurs when counsel "fails to subject the prosecution's case to meaningful adversarial testing," making "the adversary process itself presumptively unreliable." Id. Third, the Court identified instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate

without inquiry into the actual conduct of the trial." Id. at 659–60 (citing Powell, 287 U.S. 45, as illustrative).

Applicant's case here warrants a presumption of prejudice. This conclusion is supported by a record indicating that while Mr. Floyd is a very seasoned and capable lawyer, he tried the bulk of Applicant's case with no more than one-day's preparation. Mr. Snell explained Mr. Floyd's role as "the family want[ing] someone older to appear in front of the jury[,]" but that explanation is incongruous with the facts. See PCR Hr.'g Tr. 64:17–25. Of the 13 witnesses called by the State, all but two were cross-examined by a lawyer with only a day's involvement in the case. See id. at 65:1–18 & 66:5–22. By Mr. Floyd's description, his expansive role at trial appears to have occurred by happenstance. See id. at 191:4–192:1. The Court concludes these facts implicate Cronic's third situation where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Cronic, 466 U.S. at 659–60.

With respect to Mr. Snell's involvement, it implicates Cronic's second situation: the constructive denial of counsel that occurs when counsel "fails to subject the prosecution's case to meaningful adversarial testing[.]" Cronic, 466 U.S. at 659. This conclusion is supported by Mr. Snell's failure to investigate and misapprehension of the facts and law discussed above.

This lack of adversarial testing is evidenced in other ways. For instance, when the State offered Ms. Clary as an expert without having given the notice required by Rule 5 of the Criminal Rules of Procedure, Mr. Snell failed to object, notwithstanding his awareness of the State's Rule 5 obligations. See Hr.'g Tr. 56:3–57:18.

> Mr. Harpootlian: So and you had been in this case for a year and you were not aware that she was going to be an expert witness until not even that day, until as you're sitting in the courtroom?

Mr. Snell:	Correct. Now, I would have – we would have known that she was – we would have had those reports provided. We knew that she was a potential expert. Excuse me. Potential witness.
Mr. Harpootlian:	Correct.
Mr. Snell:	But as far as the specific questions or things that she would be asked by the prosecutor I did not until she was called as a witness.
Mr. Harpootlian:	And you understand that under Rule 5 you would have had a perfectly good objection to ask her testimony not be allowed?
Mr. Snell:	As far as expert opinion testimony, yes, sir.

Id. at 57:19–58:9; see also id. at 62:9–23. Asked to identify a strategic decision supporting the decision *not* to object to Ms. Clary's expert designation, neither Mr. Snell nor Mr. Floyd were able to provide one. See id. at 58:24–59:5 & 205:24–207:15. Not only did Ms. Clary testify as an expert in forensic nurse examination, but she was the witness through which the State sought and obtained the admission of photographs of the child's vagina into evidence. See id. at 60:7–61:16 (discussing Trial Exs. 16–20, remarked as Pl.'s Exs. 3–6).

Likewise, neither of Applicant's trial counsels raised objection to Dr. Luberoff's testimony who, although the State identified her as a testifying expert, was identified for the first time just five days before trial. See id. at 63:16–23. Rule 5 requires disclosure of physical examinations and scientific tests or experiments within 30 days of a request and authorizes the court to exclude the testimony of undisclosed witnesses in violation of the rule. See Rule 5(a)(1)(D), (a)(3) & (e)(4), SCRCrimP. Mr. Snell agreed that since he filed a Rule 5 motion soon after Applicant was arrested, the State's disclosure of Dr. Luberoff five days before trial was "late." See id. at 64:4–12. Mr. Snell also agreed Dr. Luberoff's untimely identification would have been grounds to seek a continuance. See id. at 64:13–16. When coupled with the other significant evidence detailed

above, the Court concludes Mr. Snell failed to provide Applicant with the adversarial representation the Constitution requires such that prejudice must be presumed.

In summary, the Court holds that Mr. Snell was ineffective in failing to investigate this case and in misunderstanding law and facts that would have provided Applicant a defense. The Court further holds that Strickland prejudice attaches to these deficiencies.

II. Failure to call expert.

Applicant alleged that Trial Counsels' failure "to call an expert witness or witnesses to testify that the victim's injuries were consistent with Applicant's statement to police and testimony at trial was ineffective because it would have constituted a 'medically recognized treatment' ... and thus constituted a legal defense to the charge of criminal sexual conduct with a minor." 2nd Am. PCR Appl. ¶ 11.b. The Court agrees and holds Trial Counsels were ineffective in failing to call an available medical expert to offer testimony the child's injuries were consistent with a rough diaper change. Mr. Snell's decision not to retain Dr. Friedlander was objectively not reasonable because it denied Applicant a defense. As discussed above, Mr. Snell's belief Dr. Friedlander's testimony was not helpful overlooked that it provided the factual predicate to a legal defense. Dr. Friedlander was available and believed he could help Applicant by explaining in his view what happened. This Court found Dr. Friedlander to offer credible alternative theory of how the child sustained the genital injuries during a diaper change—the only person to offer such a view. Mr. Snell's decision is also problematic because it ignored his client's statements about what happened. See Strickland, 466 U.S. at 691 (the reasonableness of counsel's actions may be determined or influenced by defendant's own statements or actions). Nor can Mr. Snell's decision not to retain Dr. Friedlander be justified by a vigorous cross-examination attacking the accuracy of the State's expert evidence (cf. Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008)) because

this challenge was never mounted at trial. In the Court's view, Mr. Snell's failure to present this evidence at trial was not objectively reasonable and was ineffective.

The absence of Dr. Friedlander's testimony was prejudicial to Applicant. "A PCR applicant cannot show he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005). Here, the Court holds the failure to call Dr. Friedlander prejudiced Applicant's defense for two reasons.

First, Dr. Friedlander's testimony was critical because it would have given the jury a choice between Dr. Luberoff's testimony and another opinion that corroborated Applicant's statements and testimony. Mr. Floyd agreed that since Applicant's defense (in his mind) was a medically appropriate diaper change, and Dr. Friedlander's testimony demonstrated how the child's injuries corresponded to that claim, he "would have emphasized that [testimony]" had he known about Dr. Friedlander because doing so would have created a dispute of fact. See PCR Hr.'g Tr. 218:10–25. Instead, the only medical testimony on which the jury could rely was that of Dr. Luberoff, which suggested the 15-month old child might have been digitally penetrated and bitten on the pelvic bone. This Court found Dr. Friedlander's explanation as to why Dr. Luberoff was wrong about penetration and the bite mark to be credible and persuasive. A jury should have been afforded an opportunity to do the same.

Second, the record indicates the jury *did* have serious questions about Dr. Luberoff's testimony and was struggling to apply it to the law of criminal sexual conduct. During deliberations, the jury sent the Trial Court a note asking whether there was a transcript of Dr. Luberoff's testimony and for clarification concerning the law of criminal sexual conduct. See PCR Hr.'g Tr. 201:8–18. The jury note is persuasive evidence of a serious debate concerning the

interplay between Dr. Luberoff's testimony concerning penetration and the law. See id. at 203:11–13 ("Q. So obviously the intricacies of the law and penetration were in the jury's mind, correct? A. Yes."). Put differently, there is a reasonable likelihood the jury could have come to a different conclusion had Dr. Friedlander testified.

Therefore, the Court holds that Trial Counsel was ineffective for failing to call Dr. Friedlander at trial and that Applicant's defense was prejudiced because of this omission.

III. Failure to object to photos.

Finally, Applicant argues Trial Counsels' failure to contemporaneously object to "photographs that were not relevant to any matter in dispute[,] ... inflame[ed] the passions and prejudices of the jury, and invited a verdict based on factors other than the admissible evidence." 2nd Am. PCR Appl. ¶ 11.a. The Court agrees and holds Trial Counsels were ineffective in failing to make a contemporaneous objection to graphic images of the child's genitals.

A timely objection is a necessary predicate to the exclusion of evidence. When Applicant challenged the admission of the diagrams and the photos on appeal, the Court of Appeals declined to consider the photos, explaining:

> Williams only objected to the admission of the anatomical diagram enlargements (State's Exhibits 9, 10, and 11). He did not object to the admission of any of the photographs. He contends that any objection to the photographs was futile in light of the trial court's ruling on the diagrams. We disagree. The photographs and anatomical diagrams are not the same thing. He objected to each of the diagrams. He needed to object to at least the first picture to be able to argue that further objections would be futile. *Therefore, the admission of the photographs is not preserved for our review because Williams did not object to their admission.*
>
> As to the diagrams, the nurse used them to point out Victim's injuries. Accordingly, they were relevant and corroborated her testimony. They were not graphic at all; they were simply black and white diagrams of a child's head, body, and vagina. They did not have any prejudicial effect. Therefore, the trial court did not err in admitting the diagrams.

Williams, 405 S.C. at 281–82, 747 S.E.2d at 204 (emphasis added).

Failure to make a timely objection is routinely held as ineffective assistance unless trial counsel can point to a valid trial strategy for failing to object. See, e.g., Stone v. State, 419 S.C. 370, 798 S.E.2d 561, 570 (2017) (rejecting various explanations by trial counsel as failing "to articulate any valid strategic reason for not objecting to important victim impact testimony the trial court had the discretion to exclude."); Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (trial counsel articulated valid strategy); Dawkins v. State, 346 S.C. 151, 156–57, 551 S.E.2d 260, 263 (2001) (explanation that trial counsel did not want to upset jury by objecting was not a valid strategy where evidence improperly bolstered victim's testimony); Vail v. State, 402 S.C. 77, 88–89, 738 S.E.2d 503, 509 (Ct. App. 2013) (admission of inadmissible evidence elsewhere was not a legitimate reason not to object). When trial counsel acknowledges there was no strategy motivating a failure to object, the presumption of adequate representation on that basis disappears. See Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010). As Mr. Floyd candidly admitted, there was no strategy here even though he harbored real concerns about the images offered by the State. See PCR Hr.'g Tr. 233:1–16 (raising concerns the images were "much more vivid red[ ]" in the form shown to the jury, but that he "had no real trial strategy to keep them out."). This is not to suggest a timely objection would necessarily result in exclusion; but "[w]ithout an objection, however, there can be no debate; and the trial court has no opportunity to exercise its discretion." Stone, 419 S.C. 370, 798 S.E.2d at 569–70. Accordingly, the Court holds Trial Counsels were deficient in failing to object to the admission of graphic images of the 15-month old child's genitalia.

The Court holds this deficiency was also prejudicial. To meet Strickland's requirement of a reasonable probability of a different outcome, this Court must find it possible the photographs invited a decision from the jury on an improper basis. The relevance, materiality and admissibility

of photographs fall within the sound discretion of a trial court, not subject to reversal unless admission of the evidence prejudices the defendant based on a "reasonable probability" the verdict was influenced by the evidence. State v. Gore, 408 S.C. 237, 249, 758 S.E.2d 717, 723 (Ct. App. 2014); State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008). Rule 403, SCRE permits exclusion of relevant evidence when "its probative value is substantially outweighed by the danger of unfair prejudice[.]" "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). The Court concludes there was reason to exclude the photographs of the child's genitals and the photos may have provoked the jury to decide this case on an improper basis. While the Court is familiar with decisions authorizing autopsy photos to go to the jury, including autopsy photos of children, those decisions turn on the "necessity" to depict a fact in dispute. See, e.g., State v. Martucci, 380 S.C. 232, 250, 669 S.E.2d 598, 608 (Ct. App. 2008) ("Furthermore, the photographs were necessary to depict the severity of the bruises and the resulting trauma, which was inconsistent with accidental injury or play."). The State presented testimony from two medical examiners who observed scratches and bruising on the child's genitals. This testimony was bolstered by the admission of the diagrams the Court of Appeals held to have been properly admitted. The severity of any injury to the child's genitals was irrelevant to the criminal sexual conduct charge because all the State had to prove was penetration. Thus, what mattered was the existence of evidence of penetration ever so slight, not a graphic display of the injuries.

This Court cannot know how either the Trial Court or Court of Appeals might have responded to a timely objection. So too, is it mindful that "a trial court is not required to exclude relevant evidence simply because it is unpleasant or offensive." Williams, 405 S.C. at 281, 747

S.E.2d at 203–04. Nevertheless, the Court has reviewed the images in question and has grave concerns with their probative value and whether the jury could set aside any animus that might have been engendered toward Applicant after reviewing the images and refocus its attention on the facts in dispute. For this reason, the Court holds that Trial Counsels' failure to object to the images was prejudicial to Applicant.

Because this Court does not view its role as one to second-guess counsel's strategic choices, it has reviewed the record and Trial Counsels' decisions with the utmost deference. "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." Strickland, 466 U.S. at 689. Even affording both Trial Counsels all due deference, relief is warranted here.

Applicant's representation labored under serious defects that do not fall within the realm of sound trial strategy or the exercise of professional judgment. For these reasons, Applicant's request for post-conviction relief is **GRANTED**. Applicant's convictions for are unlawful neglect of a child and criminal sexual conduct in the first are **VACATED**.

AND IT IS SO ORDERED.

Eugene C. Griffith, Jr.
Circuit Court Judge

June 19th, 2017.
Newberry, South Carolina.