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**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Lexington County  
Court of Common Pleas  
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case No. 2017-001877  
Circuit Court Case No. 2014-CP-32-04769

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LANCE AUSTIN WILLIAMS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

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PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the PCR Court erred in finding trial counsel was ineffective for not interviewing and investigating witnesses when Williams failed to establish he was prejudiced by any error of counsel?
2. Whether the PCR Court erred in finding trial counsel was ineffective in finding trial counsel was ineffective in misunderstanding the law and facts regarding the defense's theory when counsel's testimony contradicts the PCR Court's findings and Williams failed to establish he was prejudiced?
3. Whether the PCR Court erred in finding trial counsel was ineffective in not objecting to the testimony of two State expert witnesses based upon Rule 5, SCCrimP?
4. Whether the PCR Court erred as matter of law in finding trial counsel was ineffective for not presenting testimony from Dr. Friedlander?
5. Whether the PCR Court erred as a matter of law in finding trial counsel was ineffective in not objecting to the introduction of photographs of the victim's injuries?

## STATEMENT OF THE CASE

Respondent Lance Austin Williams ("Williams") was indicted by the Lexington County Grand Jury during the July 2010 Term for one count of Criminal Sexual Conduct with a Minor, First Degree (2010-GS-32-1861) and one count of Unlawful Neglect of a Child (2010-GS-32-1860). (App. 638-41). On these charges, Williams was represented by James R. Snell, Jr., Esquire, and H. Wayne Floyd, Esquire. (App. 1-637). On March 30-April 1, 2011, Williams was tried by a jury before the Honorable R. Knox McMahon, Circuit Court Judge. Id. He was found guilty of both charges on April 1, 2011. (App. 595-601). On April 5, 2011, Judge McMahon sentenced Williams to ten years confinement for the unlawful neglect of a child

conviction, and twenty-five years confinement for the criminal sexual conduct with a minor, first degree conviction, both to be served concurrently. (App. 636).

Williams appealed. On appeal, Williams was represented by Richard A. Harpootlian, Esquire, Graham L. Newman, Esquire, and M. David Scott, Esquire. (See App. 642-666). The South Carolina Court of Appeals affirmed Williams's convictions and sentences by published opinion filed July 24, 2013. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). (App. 698-712). Williams filed a Petition for Rehearing on August 8, 2013. (App. 713-19). The Court of Appeals denied it on September 19, 2013. (App. 721). Williams then filed a Petition for Writ of Certiorari on October 21, 2013. (App. 722-40). By Order dated July 24, 2014, this Court denied the petition. The Remittitur was issued on August 2, 2014. (App. 766-68).

Williams subsequently filed an application for post-conviction relief on December 31, 2014. (App. 769-80). In the initial application, Williams presented three claims of ineffective assistance of trial counsel. First, he contended trial counsel failed to contemporaneously object at trial to the introduction of prejudicial evidence including, but not limited to, photographs that were not relevant to any matter in dispute. Second, he argued trial counsel failed to call several witnesses to testify at trial, who would have testified regarding false confessions. Third, he alleged trial counsel failed to raise with specificity the argument that his out-of-court statement should not have been admitted at trial because the statement was obtained in violation of Missouri v. Seibert, 542 U.S. 600 (2004); State v. Navy, 386 S.C 294, 688 S.E.2d 838 (2010); and State v. Evans, 354 S.C 579, 582 S.E.2d 407 (2003). Further, trial counsel failed to cross-examine the State's leading witness, Detective Prestigiaco, after the detective's trial testimony was substantially and materially different from the testimony he provided during the *in camera* Jackson v. Denno hearing. (App. 778).

The State filed its Return on August 23, 2015. (App. 781-86). On October 25, 2016, Williams filed an Amended Application for Post-Conviction Relief. (App. 787-96). An evidentiary hearing was held before the Honorable Eugene C. Griffith, Jr. on January 30-31, 2017. (App. 804-1052). Williams was present, and he was represented by Richard A. Harpootlian, Esquire. Id. The State was represented by Assistant Attorney General Johanna C. Valenzuela. Id.

After the evidentiary hearing, on February 8, 2017, Williams filed a Motion to Amend Pleadings. (App. 1121-57). The State filed its Return to Motion for Leave to Amend on February 13, 2017. (App. 1158-78). On April 13, 2017, the PCR Court granted Williams's Motion to Amend. (App. 1187-88).

On June 20, 2017, the PCR Court filed its order granting post-conviction relief. (App. 1189-1223). Petitioner served its Motion to Alter or Amend Judgment on June 29, 2017. The order denying the motion to alter or amend judgment was filed on August 18, 2017.

Petitioner served its notice of appeal on September 13, 2017, and the notice was filed with this Court on the same day.

#### STATEMENT OF FACTS

On April 15, 2010, victim's mother asked Williams, her boyfriend of a few months at the time, to watch victim for the day. Victim was about fifteen months old at the time. At the end of that day, while interacting with victim, Aunt noticed her behaving oddly and also noticed several bruises on her. (App. 127, 133). After changing her diaper, Aunt decided victim needed to go to the hospital. (App. 136). At the hospital, a rape kit was performed on victim and she was treated by a SANE nurse and Dr. Luberoff. (App. 266-279). Photographs detailed fresh bruises to the victim's forehead, mouth, ear, and neck. (App. 266-279, 330, 348). The victim had an arc

shaped bruise on her pubic bone that Dr. Luberoff testified could have been caused by Williams' teeth. (App. 323, 343-45). There were fresh abrasions on the inside of victim's labia coming down from her clitoris, and she had an acute bruise to the back of her hymen. (App. 334-35).

Law enforcement requested Williams come in for questioning. During the questioning, Williams eventually admitted hitting the victim twice for throwing her toys. (App. 387). Williams then admitted to roughly changing victim's diaper. (App. 388, 394-96). Williams claimed it was due in part to his not having any feeling in his hand. (App. 388, 394-96). Williams wrote his statement out and also answered questions written out by law enforcement. Id. At trial, Williams admitted on the stand that he hit victim on the head two separate times and admitted he hit her too hard. (App. 502-504). He also admitted he was frustrated and angry when he changed the victim's diaper and was "rougher than [he] should have been." (App. 501). Williams claimed he gave the victim the bruises on her pelvic area when he applied cream on her stomach area. (App. 533-34). Williams agreed his story had changed: he originally claimed he put the cream on victim's genital area until bruising was found inside vulva. (App. 534). While Williams claimed he was shocked at the level of victim's injuries, he also admitted he saw blood on a wipe after cleaning the victim's genital area, but he claimed he thought it came out of her "butt" due to constipation and not his actions. (App. 529-30). Importantly, Williams admitted whatever abrasions, redness, and swelling victim received that day were a result of how he handled her. (App. 535-36).

**Relevant facts from PCR hearing:**

Williams's trial counsel, James Snell, Esquire, testified he represented Williams for about a year before Williams' case was called to trial. (App. 818). Snell explained Williams was in jail the entire year leading up to his trial, and they met and spoke close to twenty times in that year.

(App. 819-20). Snell received notice the case was going to be a trial about two weeks prior to the case being called. (App. 830). To prepare for the trial, Snell worked on the file “every[]day . . . , going through, following up with our experts. . . . . Reviewing discovery. Meeting with [Williams]. Several conversations with [Williams’s] family.” (App. 830, ll 12-16). The experts working on the case with Mr. Snell were: (1) Ms. Cindy Hurley, a registered nurse retained to review the records, discuss medical subjects with the attorneys, and testify if necessary. (App. 855-57); (2) Dr. Abel, a medical doctor who spoke with the State’s expert witness and reviewed medical records she prepared on the victim and also advised on whether the victim may have required having cream rubbed on to her labia (App. 898); (3) someone to conduct a polygraph on Williams (App. 899); (4) Dr. Watson, a forensic psychologist dealing with issues involving sexual offenses, who reviewed discovery, interviewed Williams several times, and provided answers on psychological issues that may or may not be present in the case (App. 902); and (5) Dr. Burke, who has a Ph. D. in psychology and runs the sex offender treatment program for Department of Probation who conducted an Abel Assessment on Williams to determine if he had any alternative sexual attractions (App. 903).

Snell also personally spoke with six of the State’s anticipated witnesses, the law enforcement witnesses (App. 830), and the investigator, Dave Lawrence, who worked for trial counsel Snell, and reached out to all of the State’s fact witnesses (App. 834). Snell explained he preferred to have the investigator talk to fact witnesses in order to avoid creating a conflict by making himself a witness to the case in the event a witness’s story changing on the stand. (App. 845). Snell’s consultant, Dr. Anne Abel, spoke with the State’s expert, Dr. Luberoff. (App. 837).

Snell could not confirm whether he or his investigator spoke with about six of the witnesses listed on the State’s witness list. There was no written report by the investigator and

Snell testified he believed this was a decision based on fees and costs associated with that additional step. (App.846-47). Snell testified that at the request of Williams's family, he also reached out to a seasoned defense attorney, Wayne Floyd, to ask him to try the case with him. (App. 853-54). Snell brought the discovery to Floyd, met with him in person, conferenced with their consultant nurse, and took Mr. Floyd to the jail to meet with Williams before the trial started the next day. Id.

Snell testified that although the family wanted someone older to appear in front of the jury, he, himself was ready to try the case at the time it was called. (App. 867). He considered whether he needed more time and he "know[s] in this case [he] didn't see a need for a continuance . . . . didn't see anything to argue to a judge or explain why we needed more time for anything." (App. 881, ll 14-20). If he thought he needed another expert for the trial, he "certainly would have moved for a continuance or asked for additional time." (App. 886, ll 12-18). During the trial nothing indicated he needed to ask the court for more time. (App. 914).

Finally, along with the preparations discussed above, Snell also testified he provided some documents and materials to Dr. Ed Friedlander, reviewed a letter written by Dr. Friedlander to him discussing the case, and also had a phone conversation with Dr. Friedlander before ultimately deciding not to retain him. (App. 870).

At the time they were considering Dr. Friedlander, Williams was denying to Trial Counsel Snell that his statement to police was correct and denying he had caused the injuries to the child's vagina because he was angry or upset. (App. 874). Snell testified that at the time he was talking to Dr. Friedlander, he discussed with Williams a defense that the victim's injuries were caused by a "[r]ough diaper change," and Williams did not agree with that defense, claiming then that he was not angry and did not cause those injuries. (App. 877). Snell testified

the theory of the case changed throughout his representation of Williams due to Williams's changing version of events. (App. 873). While Williams admitted to police that he intentionally caused the injuries to the victim, he denied doing anything to the victim's vaginal area when he first met with Snell. Id. Based on Williams's version of events, the theory of the case was that someone else left the marks or that the injuries were not as extreme as the charges indicated. (App. 873). Eventually, as trial approached, a few weeks out, Williams reverted back to his original statement and admitted to his counsel that he had intentionally caused the injuries to the victim, claiming they were caused by anger and not sexual gratification. (App. 877-78).

When Williams's story changed again, Snell testified he did not reach back out to Dr. Friedlander; he already had Nurse Hurley on retainer who could testify as to the injuries and how they related to a diaper change. (App. 857, 876, 878). However, despite having discussed potential testimony with Dr. Abel and Nurse Hurley, the ultimate decision was not to call either because the State's witness already admitted on the stand in front of the jury that cleaning feces out of the genitals was medically necessary. (App. 879-80). In fact, the trial record shows the State's witness, Dr. Luberoff, ended up testifying that she agreed with Trial Counsel Floyd that touching genitals to clean for a diaper is appropriate, which was exactly what he was hoping to present through Nurse Hurley's testimony. (App. 376-77; 909).

Snell testified there were several theories they pursued on behalf of Williams: one was that someone else had caused the injuries, another was that there was no actual "intrusion" into the vagina, another was that Williams was not a "caretaker" as that term is used in the statute, and that cleaning the vagina was a medical necessity. (App. 911-13). To support the theory and their directed verdict motion that there was no "intrusion" as the statute required, counsel used images of the child's vulva and vaginal area to show the vagina was past the hymen. (App. 912).

Dr. Friedlander, a pathologist, was admitted as an expert in pathology, the study of disease and injuries of the human body, over the State's objection. (App. 942-43). As part of his practice, and since his completion of medical school and his residency in the 1980s, Dr. Friedlander testified he performed approximately 1300 autopsies. (App. 932). Dr. Friedlander testified he had been qualified in at least fifty courts in the country for both plaintiff and defense, prosecution and defense, and civil and criminal cases. (App. 934) Dr. Friedlander agreed a court found he was not qualified in a criminal case involving a deceased child. (App. 940-41).

Since completing his residency, only two percent of his practice involved treating live patients, specifically providing "ring-side" treatment to adult boxers. (App. 937). Since 1983, Friedlander had not treated any live patients for sexual assault. (App. 937-38). Dr. Friedlander agreed he did not receive training on "perpetrator assessment"--- the motives of the person who intrudes into the vagina or on the proper way to get fecal matter outside of the vaginal lips or the labia of a child (App. 970, 975). Dr. Friedlander testified he was also the proud and sole author of "the oldest one person medical website in existence": [www.pathguy.com](http://www.pathguy.com). (App. 939).

Dr. Friedlander explained he was initially contacted by Williams' mother. Snell then sent him a packet of materials that contained the police report and some photographs of the victim. (App. 945-47). Dr. Friedlander then prepared and sent a letter to Snell. (App. 947). The only photos Friedlander saw before sending that letter were those taken by the nurse, not the more detailed photos taken by Dr. Luberoff. (App. 947, 949-50, 950-51, 954, 966-67).

Dr. Friedlander testified that his expert opinion was that "[t]he photos [he reviewed] weren't very good but looking at everything I thought [Williams'] claim was truthful. . . [and] [i]f you care about the health of the children, you keep [the vagina] clean [of feces]." (App. 950, ll. 1-8). After reviewing Dr. Luberoff's photos, the injuries Friedlander saw in Dr. Luberoff's

photos were consistent with Williams trying to remove feces from the lips of the victim's vagina. (App. 953, ll 9-19). Dr. Friedlander testified he communicated this information to Snell and also indicated he believed the victim had been "manhandled." (App. 954). Dr. Friedlander claimed he told Snell: "[Y]our client was an asshole for the way he handled the kid[,] and I'm gonna charge a thousand dollars." (App. 960, ll. 3-4).<sup>1</sup>

On cross-examination, Dr. Friedlander admitted he sent his letter with his medical conclusion to Trial Counsel Snell before seeing Dr. Luberoff's photos, saying: "I had seen enough just from the sex abuse nursing examiner's report and from -- Well, her photos weren't helpful. And from this guy's confession and the - from what I had seen I reached this conclusion and I said I sure would like to see the -- I reached the conclusion that his testimony was essentially truthful and I said and I would sure like to see the rest of the photos." (App. 966-67, 968). While he still agreed with that conclusion after later reviewing Dr. Luberoff's photos, Dr. Friedlander admitted he never saw the actual victim during the process, never spoke to Dr. Luberoff directly, had not seen any photos of the Williams' fingers, and had not seen any photos of the Williams's teeth before reaching that conclusion. (App. 966, 970, 973-74).

He could see bruising in an arc pattern to the victim's pubic bone area, above the labia; scrapes going down from the clitoris; and bruising to the hymen. Dr. Friedlander agreed that when he received training on using his fingers around a toddler's vagina to provide medical care, he had been trained to use his fingers "with the greatest care." (App. 973-77).

Wayne Floyd testified he has approximately forty-two years of experience in criminal defense work and tried hundreds of cases. (App. 989, 990). He explained that Snell approached him the Monday before the trial started on Wednesday to ask him to help in the upcoming trial

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<sup>1</sup> Dr. Friedlander was paid five thousand dollars to testify at the PCR hearing. (App. 980).

for Williams. (App. 990). He agreed, reviewed discovery, talked with Snell, and met with Williams. (App. 990, 992). Floyd agreed he did not meet with any witnesses prior to the trial starting two days after he was hired. (App. 991). Floyd testified that although he would have liked more time, and that his role changed from second chair to conducting a large portion of the cross-examinations he did not feel that he needed a continuance either at the beginning of the trial or anytime during the trial. (App. 991, 1014, 1027).

Floyd did not have knowledge of Dr. Friedlander or his conversations with Snell. With the caveat that he was not sure what those conversations were and how it affected the decision to hire him, Floyd said he may have wanted Dr. Friedlander to testify after hearing his testimony at the PCR hearing because it may have helped Williams' case. (App. 1000-01, 1003, 1016). In his closing argument, Floyd was able to use State's witness, Dr. Luberoff's, testimony that cleaning fecal matter out of the genitals was medically necessary in his closing argument. (App. 1021). Had Dr. Friedlander also testified, he would have used that testimony in his closing as well. Id. Floyd, however, was not sure whether "the jury would have bought it." (App. 1003). Floyd agreed that his strategy was not to ignore his own witnesses' favorable testimony but to emphasize favorable testimony given by a State's witness. (App. 1024). Floyd also agreed that one of the theories they pursued in their directed verdict motion and with the jury was that there had not been penetration as required under the statute. (App. 1024-26, 1042-45). Floyd agreed he used testimony he had elicited from the State's witness, Dr. Luberoff, to support that theory. (App. 1024-26). Floyd also agreed that Dr. Friedlander claimed he would not be able to testify that there was not an intrusion into the vulva of the child. (App. 1028-29).

Floyd agreed he objected to the drawings of the victim's genitals based on those being blown up, but he did not object to the photos. (App. 1018, 1026). He claimed to not have any

strategy for that decision except that he felt the drawings drew an objection because they were created by someone else. (App. 1017-18). Floyd agreed, however, that the State was required to prove as an element of one of the two pending charges or to defend against the defense's theory of the case that there was penetration into the genital area of the victim, the timeline of the case to show the victim's injuries came from Williams and not someone else, and the extent of the injuries in order to show that the injuries on the victim were not consistent with changing a child's diaper or removing feces from in between her vaginal lips. (App. 1030, 1031, 1032).

### ARGUMENT

This Court will not affirm a ruling that is "controlled by an error of law" or lacks factual support in the record. Brown v. State, 383 S.C. 506, 514-515, 680 S.E.2d 909, 914 (2009).

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984); Simpson v. Moore, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Id.

In order to prove deficient performance, the applicant must "show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. "' Harrington v. Richter, 562 U.S. 86, 104, 131 S.Ct. 770, 787 (2011), quoting Strickland, 466 U.S. at 687. "The standard for judging counsel's representation is a most deferential one." Id. at 788. "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." Butler v. State, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985), quoting Strickland, [466 U.S. at 690]. “[W]hile in some instances 'even an isolated error' can support an ineffective assistance claim if it is 'sufficiently egregious and prejudicial,' Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy.” Richter, 562 U.S. at 111, 131 S.Ct. at 791.

In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. See Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. See generally Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...,” and “we must consider the totality of the evidence before the jury.”). In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice. See Strickland, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699 (stating “a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”).

Smalls v. State, Opinion No. 27764, (S.C. Sup. Ct. filed Feb. 7, 2018, Shearouse Adv. Sh. No. 6 at 53).

**I. CERTIORARI SHOULD BE GRANTED BECAUSE THE PCR COURT ERRED IN CONCLUDING TRIAL COUNSEL WAS INEFFECTIVE FAILING TO INTERVIEW ANY STATE WITNESS. WILLIAMS FAILED TO SHOW THAT HE WAS PREJUDICED BY ANY ERROR OF COUNSEL IN THIS REGARD.**

The PCR Court erred as a matter of law in finding trial counsel was ineffective for failing to investigate State’s witnesses. Specifically, the PCR Court erred in its determination that Williams was prejudiced by counsel’s alleged failure to interview State’s witnesses prior to trial. Our appellate courts have long held a PCR applicant must present testimony or evidence that could have been found to establish prejudice to an allegation that trial counsel was ineffective for

failing to investigate. Porter v. State, 368 S.C. 378, 385, 629 S.E.2d 353, 357 (2006) (“Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result.”); Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998)(“Mere speculation and conjecture on the part of respondent is insufficient.”); see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (“The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.”); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (“This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original); Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (Ct. App. 2012)(finding applicant failed to establish prejudice where the applicant failed to present any testimony from the witnesses at the PCR hearing); Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)(failure to conduct an independent investigation does not constitute ineffective assistance when allegation is supported only by mere speculation as to the result).

In granting relief, the PCR Court ignored this long line of precedent. At the PCR evidentiary hearing, Williams presented no testimony from any of the State’s witnesses to demonstrate what additional information would have been gleaned had counsel had done a more thorough investigation prior to trial. He presented no testimony or evidence from these witnesses to show how cross-examination may have been different, or how further interviewing would have resulted in some change in the testimony that was presented at trial.

Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998) is particularly instructive. In Jackson, the applicant contended counsel was ineffective in failing to investigate

possible criminal backgrounds of certain victims and witnesses. Counsel admitted he did not do so at the PCR hearing and even “further admitted it was an error not to investigate the victims and witnesses.” 329 S.C. at 349, 495 S.E.2d at 770. The PCR court found counsel was deficient and the applicant was prejudiced. However, on appeal, the Supreme Court of South Carolina disagreed. Though agreeing probative evidence of record supported the finding of deficient performance, this Court found the applicant failed to carry his burden of proof on prejudice:

...there is no probative evidence to support the finding of prejudice. While the PCR judge was correct in finding the credibility of the eyewitnesses and victims “would have been critical,” no probative evidence was presented at the PCR hearing to show the eyewitnesses and victims were not credible. The only “evidence” that either the victims or eyewitnesses had criminal records were statements and questions by respondent's PCR counsel that one of the victims was incarcerated in another state at the time of respondent's trial and respondent's testimony that he knew this victim was in jail. Respondent failed to substantiate this allegation with any probative evidence. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial). Mere speculation and conjecture on the part of respondent is insufficient. Id.

329 S.C. at 349, 495 S.E.2d at 770.

Like the claim in Jackson, without any evidence to establish or even support a finding that Williams was prejudiced by trial counsel's alleged failure to interview fact witnesses directly and not through his investigator, the grant of relief was improper. Thus, there was no evidence in the record to support the PCR Court's finding that Williams established he was prejudiced from any error of counsel in not interviewing State's witnesses before trial.

The PCR Court also failed to address the presence of the overwhelming evidence of Williams' guilt in its prejudice analysis. When there is overwhelming evidence of guilt, a trial

counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); see also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001); Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991). Williams was not prejudiced by any alleged deficient representation because there was overwhelming evidence of his guilt. The State presented evidence of physical injuries to the victim's body, acute injuries to her vulva and her hymen, and evidence that there were no diapers with fecal matter in what they collected from the home. (App. 323, 330, 334-34, 343-45, 348). Williams admitted to law enforcement in a written statement that he caused the injuries, claiming he had no feeling in his hand, claiming he had been applying cream to the child's genital area, and then finally claiming he caused the injuries because he was angry while changing her diaper. Williams testified at trial that he caused the injuries to the child's genital area because he had *angrily* wiped her. (App. 501, 559-30, 535-36).

The PCR Court's reliance upon the presumption of prejudice afforded under United States v. Cronin, 466 U.S. 648 (1984), was misplaced. The United States Supreme Court has recognized, in both Strickland and United States v. Cronin, 466 U.S. 648 (1984), that there are a few circumstances where "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry . . . is not worth the cost." Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (citing Cronin, 466 U.S. at 658, 104 S.Ct. 2039); see also, Nance v. Ozmint, 367 S.C. 547, 551-52, 626 S.E.2d 878, 880 (2006) ("[P]er-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer '**entirely fails** to subject the prosecution's case to meaningful adversarial testing,' thus making 'the adversary process itself presumptively unreliable.'" (quoting Cronin, 466 U.S. at 659 (emphasis added))).

In Nance, this Court had the opportunity to review a case under Cronin's second scenario: *per se* prejudice due to constructive denial of counsel. In Nance, counsel was ill and on

medication, the petitioner was “in a drug-influenced demeanor during the entire trial,” trial counsel told the jury both he and co-counsel did not want to be there, and defense counsel failed to qualify his own expert witness. Id., 367 S.C. 556, 626 S.E.2d at 883. In addition, defense counsel elicited testimony from its own witnesses about petitioner’s prior bad conduct involving bad behavior in jail and killing his family’s pets and counsel themselves referred to petitioner as “a sick man” in closing argument. Lorenzen v. State, 376 S.C. 521, 527 n.2, 657 S.E.2d 771, 775 n.2 (2008) (summarizing the findings from Nance). The petitioner was convicted and received a sentence of death for murder, criminal sexual conduct in the first degree, assault and battery with intent to kill, burglary in the first degree, and armed robbery. The South Carolina Supreme Court found a “complete failure to conduct a defense by trial counsel,” holding counsel “failed to act as an adversary to the prosecution, but instead helped to reinforce the case against his client.” Id., 367 S.C. 558, 626 S.E.2d at 883.

The evidence before the PCR Court showed the defense had clearly articulated defense theories, and their cross-examination, witness selection, and opening and closing arguments reflected that strategy. Admittedly, trial counsel had a hard case to defend; Williams had confessed in writing. On the stand he reiterated he caused the victim’s injuries out of anger while disciplining her and then while wiping her due to a dirty diaper. (App. 501, 559-30, 535-36). In direct contrast to the facts of Nance, however, trial counsel Snell and Floyd in no way “failed to act as an adversary to the prosecution.” They challenged each witness through cross-examination, elicited helpful testimony from the State’s witnesses and their own, and used that testimony to support their argument to the jury.

Hiring and using a private investigator to contact fact witnesses (App. 834), interviewing law enforcement witnesses (App. 830), meeting with Williams over twenty times in the course of

a year (App. 819), hiring seasoned counsel for trial (App. 853-54), consulting with six expert witnesses (to include Dr. Friedlander) (App. 855-57, 898, 899, 902, 903), and preparing for multiple defense theories in a case where the client was changing his version of the story (App. 873, 877) and confessed in writing and on the stand is conduct that is well above the standard of a reasonable, competent lawyer. The record before the PCR Court did not support a finding that trial counsel “entirely fail[ed] to subject the prosecution’s case to a meaningful adversarial testing,” Cronic, 466, U.S. at 659. The presumption of prejudice was not warranted under Cronic. Certiorari should be granted, and this grant of relief should be reversed.

**II. CERTIORARI SHOULD BE GRANTED BECAUSE THE PCR COURT ERRED AS A MATTER OF LAW IN FINDING TRIAL COUNSEL WAS INEFFECTIVE IN MISUNDERSTANDING THE LAW AND FACT REGARDING THE DEFENSE THEORY AT TRIAL.**

The PCR Court’s finding that trial counsel labored under a misapprehension of law and fact was not supported by the record. First, the Order fails ignores Snell’s testimony that the medically recognized diaper change was one of their strategies. (App. 857, 876, 878, 879-80). Mr. Snell had an expert witness already prepped on that issue: Ms. Cindy Hurley, a registered nurse who was retained to review the records, discuss medical subjects with the attorneys, and testify if necessary. (App. 855-57). Further, Floyd’s cross-examination of the State’s expert, Dr. Luberoff, points directly to this being a key strategy of the defense. (App. 376-77, 909). This was presented during closing argument. (App. 554).

Second, Snell testified that not only did he have a year to work on the case before trial, he spent that year working with at least five different experts. The experts working on the case with Snell were (1) Ms. Cindy Hurley, a registered nurse who was retained to review the records, discuss medical subjects with the attorneys, and testify if necessary; (2) Dr. Abel, a medical doctor who spoke with the State’s expert witness and reviewed medical records she had prepared

on the victim and also advised on whether the victim may have required having cream rubbed on to her labia due to a medical condition; (3) someone to conduct a polygraph on Williams; (4) Dr. Watson, a forensic psychologist dealing with issues involving sexual offenses, who reviewed discovery, interviewed Williams several times, and provided answers on psychological issues that may or may not be present in the case; and (5) Dr. Burke, who has a Ph. D. in psychology and runs or did run the sex offender treatment program for Department of Probation who conducted an Abel Assessment on Williams to determine if he had any alternative sexual attractions. (App. 855-57, 898, 899, 902, 903). The decision not to call any of those experts was a strategy decision based on defense counsel's ability to get helpful testimony from the State's witness. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("Where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Furthermore, as explained in Question I, the PCR Court's finding that Williams was prejudiced was not supported by the record. The PCR Court improperly applied the presumption of prejudice afforded in Cronic, and further failed to consider whether Williams was prejudiced in light of the overwhelming evidence of guilt that was presented at trial. Altogether, the PCR Court erred in granting relief upon this claim. Certiorari should be granted, and the PCR Court's Order granting relief should be reversed.

**III. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO DR. LUBEROFF'S TESTIMONY UNDER RULE 5, SCRCRIMP.**

The PCR Court's determination that trial counsel was deficient in not objecting to Dr. Luberoff and Nurse Clary being qualified as experts when notice was not provided pursuant to

Rule 5 of the South Carolina Rules of Criminal Procedure that they would be testifying as experts, was an error as a matter of law.

Rule 5(a) of the South Carolina Rules of Criminal Procedure requires disclosure of statements made by the defendant, the defendant's prior record, documents, and tangible things, and reports of examination and tests. While the PCR Court correctly states that Rule 5 of the South Carolina Rules of Criminal Procedure only requires the disclosure of physical examination and scientific tests or experiments within 30 days of a request, it incorrectly relies upon subsection (e)(4) in finding counsel had a basis for objecting to the testimony of Dr. Luberoff and Ms. Clary. Petitioner would note that the provisions of Rule 5(e)(4) apply to the disclosure of witnesses relating to an alibi defense raised by a defendant and the prosecution's response thereto, and **not the disclosure of who will be designated an expert witness**. Thus, the PCR Court's Order incorrectly relied on the State allegedly identifying Dr. Luberoff as an expert witness "just five days before trial" and incorrectly focused on counsel not objecting "to Ms. Clary's expert designation." (App. 1217). The Order did not reference any failure by the State to disclose any reports or documents, and the testimony at the PCR hearing never suggested a failure to disclose a report. In fact, testimony by Trial counsel Snell was that he was aware of the two expert witnesses at issue, Mr. Clary and Dr. Luberoff, and even had the report by Dr. Luberoff reviewed by their own expert witnesses in advance of trial. (App. 837).

The PCR Court erred in granting relief upon this claim, and in relying upon this alleged error as support for its overall findings that Williams was prejudiced. Certiorari should be granted, and the PCR Court's Order granting relief should be reversed.

**IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE PCR COURT ERRED AS A MATTER OF LAW IN FINDING TRIAL COUNSEL WAS INEFFECTIVE IN NOT PRESENTING TESTIMONY FROM DR. FRIEDLANDER.**

The Order also improperly found Williams' conviction should be reversed because had Dr. Friedlander been called to testify, it "would have created a dispute of fact." (App. 1219). The Order suggests the jury would have found Williams not guilty if only they had heard Dr. Friedlander, instead of only the State's witness, testify that it was medically necessary to wipe fecal matter out of the vulva. Id. The grant of relief upon this basis is not supported by the record, and is the result of an error of law.

As an initial matter, the Order made no reference to the reasoning behind why Mr. Snell did not elect to hire Dr. Friedlander. The Order failed to acknowledge Williams' own role in the reason why Dr. Friedlander was not asked to testify.

Snell testified he provided some documents and materials to Dr. Ed Friedlander, reviewed a letter written by Dr. Friedlander discussing the case, and also had a phone conversation with Dr. Friedlander before ultimately deciding not to retain him. (App. 870).

At the time the defense were considering Dr. Friedlander, Williams was denying to Snell that his statement to police was correct and denying he had caused the injuries to the child's vagina because he was angry or upset. (App. 874). Snell testified that at the time he was talking to Dr. Friedlander, he discussed with Williams a defense that the victim's injuries were caused by a "rough diaper change," and Williams did not agree with that defense, claiming then that he was not angry and did not cause those injuries. (App. 877). Snell testified the theory of the case changed throughout his representation of Williams due to Williams's changing version of events. (App. 873). While Williams admitted to police that he intentionally caused the injuries to the victim, he denied doing anything to the victim's vaginal area when he first met with Trial Counsel Snell. Id. Based on Williams's version of events, the theory of the case was that someone else left the marks or that the injuries were not as extreme as the charges indicated.

(App. 873). Eventually, as trial approached, a few weeks out, Williams reverted back to his original statement and admitted to his counsel that he had intentionally caused the injuries to the victim, claiming they were caused by anger and not sexual gratification. (App. 877-78).

When Williams's story changed again, Snell testified he did not reach back out to Dr. Friedlander; he already had Nurse Hurley on retainer who could testify as to the injuries and how they related to a diaper change. (App. 857, 876, 878). However, despite having discussed potential testimony with Dr. Abel and Nurse Hurley, the ultimate decision was not to call either because the State's witness already admitted on the stand in front of the jury that cleaning feces out of the genitals was medically necessary. (App. 879-80). In fact, the trial record shows the State's witness, Dr. Luberoff, ended up testifying that she agreed with Floyd that touching genitals to clean for a diaper is appropriate, which was exactly what he was hoping to present through Nurse Hurley's testimony. (App. 376-77, 909).

The PCR Court also completely omitted the fact of Dr. Friedlander's own testimony at the PCR Hearing that he had been trained to treat the genitals "**with the greatest care.**" (App. 976). Dr. Friedlander would not have been able to, and at the PCR Hearing did not say, it was **medically necessary** to hold a child down with such force as to leave fingerprint<sup>2</sup> bruises across her pubic bone, rake his fingernails down the inside of her labia to leave fresh scratch marks, or use such force as to bruise the hymen in order to remove fecal matter and offer medically necessary aid to the child. (App. 953, ll. 9-19). It being medically necessary to change a baby's diaper and to do so with the force and violence Williams used are two wholly different things. Williams testified he caused these injuries in anger, and that he was responsible for causing these

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<sup>2</sup> This was Dr. Friedlander's explanation of the bruises; Friedlander reached this conclusion and rejected the State's expert's conclusion that these could have been teeth marks without seeing Williams' hands or teeth for comparison purposes.

injuries.<sup>3</sup> (App. 501, 559-30, 535-36). Altogether, the PCR Court's grant of relief upon this issue is not supported by the record, and fails to respect the strong presumption that counsel rendered adequate assistance. Strickland, 466 U.S. at 690. Thus, certiorari should be granted, and this grant of relief by the PCR Court should be reversed.

**V. CERTIORARI SHOULD ALSO BE GRANTED BECAUSE THE PCR COURT ERRED AS A MATTER OF LAW IN FINDING TRIAL COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO THE INTRODUCTION OF PHOTOGRAPHS**

The PCR Court also erred as a matter of law in granting relief upon Williams' claim that trial counsel was ineffective in not objecting to photographs of the victim's injuries that were presented at trial. Again, the PCR Court improperly found Williams was prejudiced by any error of counsel.

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. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). Under Rule 403, SCRE, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." To be classified as unfairly prejudicial, photographs must have a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (internal quotation omitted).

State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228-29 (2010). "It is well settled in this state that '[i]f the photograph serves to corroborate testimony, it is not an abuse of discretion to admit it.'" Torres, 390 S.C. at 623, 703 S.E.2d at 229 (quoting State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996); see also State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009)).

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<sup>3</sup> There was no testimony or evidence presented at the PCR evidentiary hearing that established it was medically necessary for Williams to change the victim's diaper while he was angry. Neither Williams, nor his witnesses, nor Dr. Friedlander indicated the time requirement for changing a child's dirty diaper.

“Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder.” State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014). In Collins, this Court reversed the Court of Appeals’ finding that pre-autopsy photographs of a mauled and partial eaten child were not admissible. This Court resolved that while it was understandable that the Court of Appeals panel would register “revulsion for the evidence,” the photographs were nonetheless admissible as “highly probative, corroborative, and material in establishing the elements of the offenses charged [and] its probative value outweighed its potential prejudice....” Id.

The allegations in this case involved several fresh bruises and scratch marks to an eighteen month old victim’s genitals. While the images were understandably difficult for most individuals to see, that does not render the photographs inadmissible. A trial court does not abuse its discretion if the photographs serve to corroborate testimony. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). Moreover, “[u]nfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.” State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). “All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (internal quotation marks omitted); State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997) (finding that: “Even if the descriptive testimony of the prosecution’s witnesses adequately conveyed the brutality and malice of the crime and these photographs were unnecessary, they were harmless surplusage.”)

At the PCR hearing, Trial counsel Floyd agreed he did not object to the photographs. He claimed not to have any strategy in not objecting. However, as recognized by Floyd, the photographs were highly relevant to the matters in dispute. The undisputed theory in the case as outlined by both trial counsel was to challenge whether an intrusion into the genital area had occurred and to argue the injuries had been sustained as part of a medically necessary diaper change. (App. 911-13, 1024-26, 1042-45). To support the theory and their directed verdict motion that there was no “intrusion” as the statute required, **defense counsel** used images of the child’s vulva and vaginal area to show the vagina was past the hymen. (App. 911).

Additionally, the State was required to prove as an element of the two pending charges or to defend against the defense’s theory of the case that there was penetration into the genital area of the victim (App. 1030), the timeline of the case to show the victim’s injuries came from Williams and not someone else (App. 1032), and the extent of the injuries in order to show that the injuries on the victim were not consistent with changing a child’s diaper or removing feces from in between her vaginal lips (App. 1031). Another defense theory as outlined by both defense counsel was to try and challenge the timeline of the case in order to suggest the injuries were caused by someone else. (App. 911-13). Before Williams took the stand and admitted to causing the injuries, the State had to narrow the timeline by highlighting how recent and acute the injuries were. The admission into evidence of any photographs of the victim's private parts, they could only reasonably be understood to be relevant to the charged criminal sexual conduct upon the minor and to illustrate testimony about the child's blood streaked diaper, abrasion and swelling in her genital area, petechiae which were consistent with trauma, bruises over the front of the pubic area, torn tissue just under the clitoris, bruising to her hymen, and injuries consistent with vaginal penetration. (App. 254-55, 266-70, 323-24, 340-42). Therefore, even if an

objection was made, it is not likely the Court would have sustained it based on the highly probative value of the photographs. Furthermore, the PCR Court again erred in its assessment of prejudice in light of the overwhelming evidence of guilt presented at trial.

Altogether, the PCR Court erred as a matter of law in granting relief upon this claim. Certiorari should be granted, and the grant of relief should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant this petition for writ of certiorari.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

February 12, 2018

By: 

Alphonso Simon Jr.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**RECEIVED**

FEB 15 2018

APPEAL FROM LEXINGTON COUNTY  
COURT OF GENERAL SESSIONS  
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

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S.C. SUPREME COURT

Appellate Case No. 2017-001877  
Circuit Court Case No.: 2014-CP-32-04769

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**CERTIFICATE OF SERVICE**

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I, Alphonso Simon, Jr., hereby certify that a true copy of the Petition for Writ of Certiorari has been served upon opposing counsel by depositing two (2) copies in the United States mail, postage prepaid, to each the following:

Richard A. Harpootlian, Esq.  
Richard A. Harpootlian, PA  
P.O. Box 1090  
Columbia, South Carolina 29202

and

Christopher P. Kenney, Esq.  
Richard A. Harpootlian, PA.  
P.O. Box 1090  
Columbia, South Carolina 29202

This 12<sup>th</sup> day of February, 2018.



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ALPHONSO SIMON, JR.  
Assistant Attorney General  
Counsel for Petitioner  
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**FEB 15 2018**

**S.C. SUPREME COURT**

ALAN WILSON  
ATTORNEY GENERAL

February 12, 2018

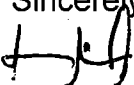
The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

Re: *Lance Austin Williams, #345477 vs. State of South Carolina*  
Appeal from Lexington County  
Supreme Court Case No. 2017-001877

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the Petitioner's Petition for Writ of Certiorari in the above-captioned case.

Thank you for your assistance in this matter.

Sincerely,  


Alphonso Simon, Jr.  
Assistant Attorney General

AS:trb

Enclosures

cc: Richard A. Harpootlian, Esq. (w/two copies of encls.)  
Christopher P. Kenney, Esq. (w/two copies of encls.)