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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Dorchester County

Honorable Robert E. Hood, Circuit Court Judge

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CESAR O. PORTILLO,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001741

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PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

Whether appellate counsel was ineffective for abandoning the issue of the forensic interviewer's improper testimony that the child exhibited signs of post-traumatic stress disorder (PTSD) where the forensic interviewer did not have the expertise to diagnose it?

## STATEMENT

Petitioner was indicted by the Dorchester County Grand Jury in March of 2010 for criminal sexual conduct with a minor in the first degree. App. 504 – 505. On July 19, 2011, Petitioner proceeded to trial before the Honorable Diane Schafer Goodstein and a jury. App. 1. Petitioner was represented by Mitchell E. Farley and Mary LeMatty, the state was represented by Meghan Hall and Russell Hilton. App. 1. Petitioner was convicted as indicted and Judge Goodstein sentenced Petitioner to twenty-five years imprisonment. App. 405, ll. 4 – 5. On appeal Petitioner was represented by Katherine Hudgins. App. 427, ll. 21 – 23.

The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence on April 9, 2014. App. 427, ll. 23 – 24. The South Carolina Supreme Court granted certiorari and in an unpublished opinion filed February 25, 2015 the Court affirmed Petitioner's conviction, but vacated a portion of the Court of Appeals' opinion. App. 428, ll. 2 – 4.

On May 24, 2017, Petitioner filed an application for post-conviction relief (PCR). App. 408 – 415. The PCR hearing was held before the Honorable Robert E. Hood. Petitioner was represented by Rodney D. Davis, the state was represented by Ruston W. Neely. App. 423. By an order filed on July 5, 2017, Judge Hood denied Petitioner relief. He filed notice of appeal. App. 494 – 503. This petition follows.

## ARGUMENT

Appellate counsel was ineffective for abandoning the issue of the forensic interviewer's improper testimony that the child exhibited signs of post-traumatic stress disorder (PTSD) where the forensic interviewer did not have the expertise to diagnose it.

### **Relevant Facts**

Dr. Donald Elsey's, the forensic interviewer, testimony was critical in Petitioner's criminal sexual conduct trial. In camera, the state moved to qualify Elsey as an expert in "child sexual assault cases" and "child sexual assault forensic interviewing." App. 96, ll. 17 – 20. After hearing testimony outside the presence of the jury during a pretrial hearing, the judge found Elsey qualified as an expert. App. 100, ll. 10 – 12.

On the morning of the second day of the actual trial, defense counsel renewed his objection Elsey's qualification as an expert in forensic interviewing based on State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009). App. 150, ll. 1 – 15. The court said it would make that decision when the State sought to qualify Elsey in the jury's presence. App. 151, ll. 3 – 4.

The state moved, now in front of the jury, to qualify Elsey as an expert in child sexual assault cases and child sexual assault forensic interviewing. App. 282, ll. 19 – 22. Defense counsel renewed his objection again. App. 283, l. 1. The judge overruled the objection and qualified Elsey as an expert in child sexual assault cases and child sexual assault forensic interviewing. App. 283, ll. 3 – 7.

Defense counsel objected to Elsey's testimony that the child showed symptoms of PTSD, "with regard to his opinion regarding posttraumatic stress disorder, I believe he said that he saw symptoms of that. He did not provide any diagnosis for this child at any point along the way. I think, since he did not diagnose her with that particular affliction or any other affliction, it wouldn't be

proper for him to testify as to her showing signs of such a thing. I think it would, in essence mislead, the jury in terms of dealing with that particular set of issues.” App. 275, ll. 8 – 16.

The trial judge overruled the objection and stated, “I understand. I really think that – that what you’re – that what you’re addressing now goes to the weight on cross-examination, rather to the admissibility of his ability to testify to that. I think that – that is an area for cross-examination.” App. 275, ll. 17 – 21.

Elsy testified that, “There were concerns about her having some behavior changes they’ve noticed since she originally disclosed these things happening: not being able to sleep; some nightmares; affecting her school work, her ability to focus in school.” App. 307, l. 23 – 308, l. 2. Elsey also testified that the symptoms described could be part of PTSD but admitted that it would be “inappropriate” for him to make that diagnosis at that point in time because he saw the child witness relatively soon after the incident and a PTSD diagnosis requires symptoms to be present for at least 30 days. App. 308, ll. 17 – 22.

On April 9, 2014, the Court of Appeals affirmed Petitioner’s conviction and sentence. App. 427, ll. 23 – 24. The Court of Appeals found that Elsey’s testimony regarding PTSD symptoms exhibited by the minor was a harmless error and, even if it was not harmless, that Petitioner’s appellate counsel had abandoned the issue. App. 436, ll. 14 - 16. However, this Court granted certiorari to vacate the Court of Appeals ruling that the testimony regarding the PTSD symptoms exhibited by the minor as harmless error because the issue had been abandoned by appellate counsel and thus should not have been ruled on. App. Moreover, this Court found the other two issues raised on appeal had not been preserved for review. App. 429, l. 3 – 10.

Therefore, appellate counsel abandoned the sole appealable issue. This error by appellate counsel constituted deficient performance and that deficiency prejudiced Petitioner.

## Discussion

The proper standard for appellate review of a PCR court's grant of relief is whether, "any evidence of probative value," exists to sustain the PCR court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If any probative evidence exists to support the PCR court's decisions, the ruling *must* be upheld. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). The reviewing court must give great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005).

An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064. An attorney's performance is measured against prevailing professional norms. Id. at 688, 104 S.Ct. at 2065. "Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." Id. at 693, 104 S.Ct. at 2067. Claims of ineffective assistance of appellate counsel must meet the same standard. See Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005) (holding that to succeed on a claim of ineffective appellate counsel, the counsel's performance must have been deficient and the applicant must have been prejudiced by the deficiency).

However, although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (emphasis supplied). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise

every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy....” Jones, 463 U.S. at 754, 103 S.Ct. at 3314.

In Southerland v. State, *supra*, this Court cited with approval People v. Griffin, 178 Ill.2d 65, 227 Ill.Dec. 338 (1997), which held that a defendant who contended appellate counsel rendered ineffective assistance for failure to argue an issue must show that failure to raise the issue was objectively unreasonable. Southerland, at 616, 524 S.E.2d at 836. When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine “whether appellate counsel failed to present significant and obvious issues on appeal.” Gray v. Greer, 800 F.2d 644, 646 (1986). Generally, the *presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal.* Id. (emphasis added) In the instant case, appellate counsel abandoned the strongest issue because of the three issues on appeal the other two were found unpreserved.

In Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001), Ezell was convicted of distribution of crack and distribution of crack within proximity of a school. Id. at 313, 548 S.E.2d at 852. His convictions and sentences were affirmed on direct appeal. Id. Ezell applied for, and was granted, post-conviction relief for ineffective assistance of appellate counsel. Id. The state appealed and this Court affirmed. Id.

Ezell’s case involved an undercover drug transaction with a confidential informant. The informant wore a wire while he allegedly purchased crack cocaine from Ezell. Id. at 311, 548 S.E.2d at 853. The informant did not testify at trial, and over defense counsel’s objection, the tape was admitted to evidence and played for the jury. Id.

On appeal, Ezell's appellate counsel argued that the trial judge erroneously admitted the tape into evidence since it contained hearsay testimony identifying Ezell and this denied him his right to confront the informant. Id. at 314, 548 S.E.2d at 853. The Court of Appeals found that appellate counsel failed to provide a sufficient record for review since the audio tape was not included in the record on appeal and affirmed the lower court's conviction. Id.

This Court found that appellate counsel was ineffective and that the admission of the audio tape was not harmless because the rest of the evidence presented against Ezell did not show overwhelming guilt. Id. at 315, 548 S.E.2d at 853. Therefore, based on Southerland, Ezell was granted a new trial. Id. at 316, 548 S.E.2d at 854.

In Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991), this Court overturned petitioner's conviction for criminal sexual conduct with a minor in the first degree because petitioner's appellate counsel was ineffective.

Petitioner was sentenced to eight years for committing criminal sexual assault upon his eight-year-old daughter. Id. at 366, 401 S.E.2d at 142. At trial, his daughter gave no response or responded negatively to the Solicitor's repeated questions regarding sexual assault by petitioner. Id. Defense counsel attempted to cross examine her, but received no response as well. Id.

The child's guardian ad litem, Lillian Hammack, testified. Id. at 366, 401 S.E.2d at 143. Over trial counsel's objection, Ms. Hammack was allowed to testify to a conversation she had with the child regarding the alleged assault by petitioner. Id. Simpkins' appellate counsel perfected an appeal of his conviction but did not raise any issue regarding Ms. Hammack's testimony. Id. at 367, 401 S.E.2d at 143.

Simpkins then filed a PCR application that alleged appellate counsel was ineffective for failure to raise the issue of Ms. Hammack's hearsay testimony on appeal. Id. This Court found

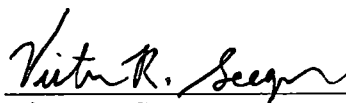
that “the mere fact that the declarant testified in this case [did] not cure the error in admitting Ms. Hammack’s hearsay testimony” because the child refused to accuse petitioner and in effect declined to admit the out-of-court statement attributed to her by Ms. Hammack. Id. at 368, 401 S.E.2d at 143. This Court found the deficient performance by appellate counsel prejudiced petitioner because appellate counsel failed to raise an issue that would have entitled petitioner to reversal on direct appeal. Id. at 368, 401 S.E.2d at 144.

In the instant case, appellate counsel abandoned the testimony on PTSD issue because she did not cite any supporting authority in her argument. “South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.” Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001).

At PCR, appellate counsel testified that she did not support her argument with any case law because she did not think it was necessary. However, after receiving the Court of Appeals ruling that she abandoned the issue, she stated she, “will not do that again.” App. 432, ll. 16 – 25. As in Ezell, without the improper testimony from the forensic interviewer, here Petitioner’s guilt was not overwhelming. Appellate counsel stated she believed the PTSD issue was meritorious and stressed the importance of Elsey’s testimony, “the testimony of this particular forensic interviewer was particularly damaging because it really did vouch for the credibility of the child witness.” App. 433, ll. 9 – 16. Therefore, appellate counsel provided ineffective assistance because she abandoned the sole meritorious issue that would have entitled petitioner to reversal on direct appeal. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052.

**CONCLUSION**

By reason of the foregoing arguments, Petitioner respectfully requests that a Writ of Certiorari be granted to allow a full briefing on this issue.

A handwritten signature in black ink, reading "Victor R. Seeger", written over a horizontal line.

Victor R. Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Dorchester County

Honorable Robert E. Hood, Circuit Court Judge

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CESAR O. PORTILLO,

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V.

STATE OF SOUTH CAROLINA,

RESPONDENT


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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Christian Saville, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Cesar Portillo, #346989, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 6th day of April, 2018.

  
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Victor R. Seeger  
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 6th day of April, 2018.

  
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(L.S)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023