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May 11, 2018
VIA HAND DELIVERY

The Hon. Daniel E. Shearouse
Clerk of Court, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

In re: Lance Austin Williams v. State of South Carolina
Case No. 2017-001877

Dear Mr. Shearouse:

Enclosed please find the original and eight copies of Respondent's return in opposition to petition for writ of certiorari in this matter. Please clock-in the original and copies and return two copies to my courier.

By copy of this letter, I am serving opposing counsel with a copy of the same.

Thank you for your assistance in this matter.

With warm personal regards, I am

Sincerely,

Christopher P. Kenney

/hm
Enclosures
cc: Alphonso Simon, Assistant Attorney General

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

RECEIVED

MAY 11 2018

S.C. SUPREME COURT

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

Lance Austin Williams, ...Respondent,

v.

State of South Carolina.....Petitioner.

RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT
LANCE AUSTIN WILLIAMS

May 11, 2018
Columbia, South Carolina.

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COUNTER STATEMENT OF THE CASE

Lance Austin Williams' lead trial counsel, James R. Snell, Jr., Esquire, never prepared his case for trial. Mr. Snell failed to understand predicate facts and relevant law necessary to defend his client. Counsel failed to contact any key fact witness. See App. 1211. A forensic pathologist opined the markings on the victim child were consistent with Mr. Williams' statements to the police and jury: that he was too rough when changing her diaper, but never molested the 15-month-old child. See App. 1197–98 & 1204–07. This available expert testimony was not only consistent with Mr. Williams' testimony, but also with other physical evidence like the *absence* of Mr. Williams' DNA on the child, her diaper, or her clothing. See App. 1199. Notwithstanding the probity of this testimony, trial counsel failed to call the expert (or any other expert) to testify at trial. See App. 1203. Concerned that trial counsel was unprepared to present a defense, Mr. Williams' family paid to retain a second, seasoned criminal defense attorney, Wayne Floyd, Esquire, who accepted the representation a mere 24 hours before trial. See App. 1206–07. No continuance was sought. Instead of assisting lead counsel, Mr. Floyd came to handle the pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing, cross-examine 11 of 13 State witnesses, and deliver closing argument. See App. 1207. He also failed to interpose timely objections to the admission of graphic images of the child's vagina, rendering the issue unreviewable on appeal, see State v. Williams, 405 S.C. 263, 281–82, 747 S.E.2d 194, 204 (Ct. App. 2013) ("Therefore, the admission of the photographs is not preserved for our review because Williams did not object to their admission."), and conceded no trial strategy informed the failure to object. See App. 1209.

The PCR court was rightly troubled by this record and trial counsels' "total failure to function as a meaningful State adversary[.]" See App. 1210. Based on detailed findings supported by the trial and PCR records (see App. 1196–1209), the PCR court identified three deficiencies

raising constitutional concern under the Sixth Amendment. First, the PCR court held that trial counsel's lack of factual and legal preparation was a specific, prejudicial error under Strickland v. Washington, 466 U.S. 668 (1984), as well as a systemic denial of constitutionally required adversarial testing as contemplated by United States v. Chronic, 466 U.S. 648 (1984). See App. 1210–18. Second, the PCR court held trial counsel's failure to call an available expert to establish the child's injuries arose during a "medically recognized treatment" was deficient under Strickland because it denied Mr. Williams a legal defense to the charge of criminal sexual conduct with a minor in the first degree. See App. 1218–20. Finally, the PCR court also agreed that Mr. Williams was prejudiced by counsel's failure to timely object to graphic images of the child's vagina that likely inflamed the passions and prejudices of the jury and invited it to reach a verdict on an improper basis. See App. 1220–23.

The State claims the PCR court erred in five ways. See Pet. 1. "A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. To justify certiorari review here, there would have to be no theory capable of justifying the PCR court's grant of relief. Because the State cannot point to one error, let alone five, the writ should not issue and the petition should be denied.

COUNTER STATEMENT OF FACTS

Critical errors in the State's factual rendition are noted below. In all other respects, the relevant facts are set forth in the PCR court's Order. See App. 1196–1209.

REASONS TO DENY CERTIORARI

The petition should be denied because it fails to identify *an* error, let alone a sufficient number to undermine the PCR court's four alternative grounds for granting relief. This Court "defer[s] to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018), reh'g denied (Mar. 29, 2018). Questions of law are reviewed *de novo*. Id.; see also Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). Mr. Williams concurs with the PCR court's factual findings, which are supported by record evidence. The State's best possible argument for certiorari is one that claims legal error—five are alleged here. For the reasons that follow, the Court should reject those arguments and deny the petition.

I. Counsel erred by failing to call a known, available expert whose testimony would have established a legal defense and corroborated Mr. William's statements to police and testimony before the jury.

The PCR court held that trial counsel was "ineffective in failing to call an available medical expert to offer testimony the child's injuries were consistent with a rough diaper change." App. 1218. The State contends the PCR court erred because its Order "suggests the jury would have found Williams not guilty" and granted relief on that basis. See Pet. 20. This is inaccurate and inconsistent with controlling precedent. In some criminal cases "the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1088 (2014) (quoting Harrington v. Richter, 562 U.S.

86, 106 (2011)). These cases still apply Strickland's analysis by evaluating constitutional deficiency under case-specific circumstances based on prevailing professional norms and then asking whether there is a reasonable probability counsel's errors affected the result. Id. at 1088 (quoting Padilla v. Kentucky, 559 U.S. 356, 366 (2010)). This is such a case and what the PCR court held was *not* that Dr. Edward Friedlander's testimony would have acquitted Mr. Williams, but that the failure to present it "was objectively not reasonable because it denied Applicant a defense." App. 1218.

Forensic evidence by two experts was central to the State's theory of criminal sexual conduct liability. That offense requires proof of a sexual battery with a victim less than 11-years old. See S.C. Code Ann. § 16-3-655(A)(1). A "sexual battery" is defined as "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." Id. § 16-3-651(h) (emphasis added). The statute does not require sexual gratification or vaginal penetration. See State v. Morgan, 352 S.C. 359, 365–73, 574 S.E.2d 203, 206–10 (Ct. App. 2002) ("Penetration of the vagina is NOT necessary or required." (emphasis original)). The State sought to establish these facts through two witnesses. Marlene Clary, a nurse examiner, testified she observed the child's swollen labia and an abrasion on the lips of the child's genitals, but was unable to determine whether the child's hymen was intact. See App. 1198–99 (citing App. 254 & 267–68). She offered the opinion her observations were consistent with trauma. App. 1199 (citing App. 267 & 270–71). Dr. Susan Luberoff, a pediatrician, testified as an expert in the field of child abuse pediatrics based on an examination she performed of the child. See App. 1200 (citing App. 310 & 313–17). She characterized the bruising observed by Ms. Clary as evidence of physical abuse. Id. (citing App.

321–22, 333). She also identified an "arc pattern" of bruising on the child's pelvis as "bite marks." App. 1200 (citing App. 323, 335 & 345). Dr. Luberoff also noted "bruising" on the child's hymen and an injury under the clitoris. See id. (citing App. 323). Notably, Dr. Luberoff's testimony suggested penetration of not just the genitals, but of the child's vagina as she opined 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 the child's genital area[,]" and that it was "extremely rare for [Dr. Luberoff] to find an injury to the child's hymen. Id. (citing App. 340–41). In her view, the arc pattern bruising on the child's pubic area and bruising on the hymen were "diagnostic of vaginal penetration." Id. (citing App. 342–43) ("...And the only way to get there is by penetrating into that area. So these were penetrating injuries.").

Prior to trial, lead counsel consulted, but never retained, Dr. Friedland—a medical doctor who teaches pathology and has been qualified as an expert witness on approximately 50 occasions. App. 1203. After reviewing the records, Dr. Friedlander opined that the victim's injuries were consistent with Mr. Williams becoming frustrated with the child while changing her diaper. App. 1204 (citing App. 870–72). However, Dr. Friedland also concluded 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. (citing App. 872). During the PCR hearing, Dr. Friedlander used the State's trial exhibits—graphic photography of the child's genitals—to illustrate how two "little scratch[es]" on the child's vulva, a bruise on the hymen, and three small bruises on the pubic area were consistent with Mr. Williams "holding her down too hard and he's opening the lips here [indicating] so he can with the other hand remove the feces and this is scratching probably by his nails." App. 1205–06 (quoting App. 950–51, 953 & 966–

67). Resolving a point of much confusion to trial counsel (see § II.A, infra), Dr. Friedlander explained the hymen, was *not* penetrated. App. 1206 (quoting App. 978 ("A. Okay. The vulva was penetrated. The hymen is not penetrated.")). Dr. Friedlander also testified that touching the child to clean feces off her genitals is a legitimate and medically necessary act that is part of a child's "basic medical care." Id. (citing App. 950, 958).

Dr. Friedlander also disputed Dr. Luberoff's conclusions in two critical ways. First, he criticized Dr. Luberoff's anatomical description of the child's genitals, explaining "[i]t's sloppy usage to call the vulva the vagina" because, the vulva is an exterior structure to the genitals, while the vagina is located behind the hymen—"it's common speech but it's not scientific." App. 1206 (quoting App. 947–48). Second, and more troubling, was Dr. Luberoff's speculation that the three small bruises on the child's pelvis were bite marks. Dr. Friedlander noted the absence of markings consistent with a bite and concluded they were a "good fit" for finger impressions, which was also consistent with holding the child too firmly while cleaning her and changing her diaper. See App. 1206 (citing App. 961–62 & 974). The PCR court found that Dr. Friedlander offered a "credible alternative theory of how the child sustained the genital injuries during a diaper change [and was] the only person to offer such a view." App. 1218. Based on this evidence, the PCR court correctly concluded that trial counsel's failure to call this witness to testify was "objectively not reasonable" and constituted ineffective assistance that prejudiced Mr. Williams by denying him an available defense. App. 1218–19.

Returning to the State's contention that the Order below "suggests the jury would have found Williams not guilty" (see Pet. 20), this claim is simply not accurate. The PCR court's prejudice finding pointed to two specific harms caused by the failure to call Dr. Friedlander. First, Dr. Friedlander's testimony was critical, not because it guaranteed an acquittal, but "because it

would have given the jury a choice between Dr. Luberoff's testimony and another opinion that corroborated Applicant's statements and testimony." App. 1219. This conclusion was bolstered by the testimony of Mr. Floyd who, notwithstanding the fact he was retained 24 hours before trial, the PCR court held in high esteem and described as "an experienced criminal defense lawyer with 42 years' experience during which he has tried 'hundreds' of criminal cases." See App. 1207 (citing App. 988–90). At the PCR hearing, Mr. Floyd testified that, in his mind, Mr. Williams' defense was a medically appropriate diaper change and Dr. Friedlander demonstrated how the child's injuries corresponded to that claim. Id. Mr. Floyd explained he "'would have emphasized that [testimony]' had he known about Dr. Friedlander because doing so would have created a dispute of fact." Id. (quoting App. 1021). The PCR court reasoned,

> 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.

Id. (emphasis added). Citing a jury note seeking a transcript of Dr. Luberoff's testimony and clarification concerning the law of criminal sexual conduct, the PCR court also highlighted the fact that the jury "*did* have serious questions ... concerning the interplay between Dr. Luberoff's testimony concerning penetration and the law." App. 1219–20 (citing App. 1004, 1006). Based on this evidence, the PCR court concluded "there is a reasonable likelihood the jury could have come to a different conclusion had Dr. Friedlander testified[,]" which is precisely what Strickland's prejudice analysis requires. See App. 1220.

The error in this case is more egregious than the habeas grant in Hinton v. Alabama. Unlike Mr. Williams' counsel, defense counsel in Hinton recognized the core of the prosecution's case was an expert linking the bullets to the gun. See Hinton, 571 U.S. 263, 134 S. Ct. at 1088. Defense

counsel's error, however, was the mistaken belief he was stuck with an inadequate defense expert because there was no procedural mechanism to obtain more than $1,000 to cover expert fees. See id. That belief was wrong because state law allowed for a funding order, but counsel failed to seek additional funds. See id. The U.S. Supreme Court held the decision not to replace an inadequate expert because of this mistaken belief "constituted deficient performance." Id. The Court explained further: "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Id. at 1089 (citing e.g., Williams v. Taylor, 529 U.S. 362, 395 (2000) (failure to investigate predicated on erroneous view that record disclosure was barred); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (failure to conduct discovery based on mistaken view that state disclosure was automatic)). Like Hinton, Mr. Williams' trial counsel acted on flawed assumptions; but this left Mr. Williams worse off than the defendant in Hinton because an inadequate expert is better than no expert at all.

Hinton also undercuts one of the State's theories ascribing error. The State suggests the PCR court should have lent credence to trial counsel's decision to consult, but not call, nurse Cindy Hurley as a testifying expert (see App. 876 & 878) 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." See Pet. 21. This misses the point. The significance of Dr. Friedlander's analysis is not limited to validating a diaper change as a medically necessary treatment recognized treatment—a point not reasonably in dispute at trial—but to explain the child's injuries were consistent with that explanation and inconsistent with State experts theorizing the child was molested. To suggest trial counsel made an informed decision not to call Dr. Friedlander based on the mistaken belief the medical necessity of a diaper change was all that mattered is no different than the failed argument

defense counsel in Hinton provided objectively reasonable representation when he decided not to retain a new expert based on the erroneous view he could not obtain more funding.

Mr. Williams offers three additional observations in response to the State's argument concerning Dr. Friedlander's retention. First, the State suggests the PCR court should have placed greater emphasis on testimony by Mr. Snell that Mr. Williams changed his version of events. See Pet. 20–21. The State's claim is overstated. For instance, the State claims Mr. Williams "deni[ed] he had caused the injuries to the child's vagina because he was angry or upset." Pet. 20 (citing App. 874). But while counsel claimed his client told him something other than "that I got angry or upset[,]" he conceded it is what Mr. Williams told police and was "the only written recorded version" of his statement. See App. 874. Similarly, the State claims Mr. Williams "did not agree" to pursue a rough-diaper-change defense. See Pet. 20 (citing App. 877). The record suggests otherwise:

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.
Mr. Harpootlian:	Okay. And he was not retained nor called by you?
Mr. Snell:	Again, at the time that this was discussed and presented, Mr. Williams would not have been in agreement with retaining a witness like this or presenting this type of defense.
Mr. Harpootlian:	Did you ask him?
Mr. Snell:	Yes.
Mr. Harpootlian:	And he said don't hire him?

Mr. Snell:	Mr. Williams said -- Mr. Williams version was I didn't cause it. It wasn't - it wasn't angry. It was -- You know, it wasn't done out of anger. It wasn't done by me.
Mr. Harpootlian:	Even though he had a written statement that he had given to the police saying exactly that?
Mr. Snell:	Correct.
Mr. Harpootlian:	And when you put him on the stand during trial, that's exactly what he said?
Mr. Snell:	Correct. Yes, sir.

App. 877 (emphasis added); see also App. 873–74 (same). At most, this testimony indicates Mr. Williams expressed some post-arrest disbelief concerning how rough he was with the child, not that he disputed what he told the police and, thereafter, the jury. Notably, the PCR court expressed some skepticism of lead trial counsel's testimony, noting counsel "was not clear as to why Dr. Friedlander was not retained." See App. 1204. To the extent the State's quarrel is with the PCR court's view of the facts, that view is entitled to deference. Smalls, 422 S.C. 174, 810 S.E.2d at 839. Even if counsel's equivocating recollection is to be believed, he conceded Dr. Friedlander's testimony would have been helpful to Mr. Williams (App. 871–72 ("Q. … Now, this seems to have some helpful information in it, does it not? A. It does.") and that he knew the substance of Mr. Williams' testimony "weeks or months" before trial, but never called Dr. Friedlander back to retain his assistance. See App. 878.

Second, the State improperly and misleadingly suggests a sexual assault—a claim for which there is *no evidence* whatsoever. Citing pages 877 through 878 of the Appendix, it claims "[e]ventually, 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.*" Pet. 21 (emphasis added). Mr.

Williams never claimed to "intentionally" injure the child. He told the truth: that he was "very wrong" when he "popped" her too hard while disciplining her, he was "rougher than [he] should have been" when changing her diaper, and his aggravation stemmed from unexpectedly having to watch her all day. See App. 497–505. So, while he accepted responsibility for his action, Mr. Williams did not think he harmed the child at the time (see App. 504–05) and the State's claim he intended to cause harm infers too much.

Conversely, there is no fair reading of this record to support the State's suggestion the child was sexually assaulted. To the contrary, the physical evidence indicates the *absence* of a sexual assault where DNA swabs of the child's genital area, diaper, and clothing failed to reveal any semen. See App. 242–43, 261, 271–74, 305. Suggesting otherwise in the absence of any evidence is improper. The State's liberal use of the record and casual relationship to the truth should further undermine its petition here and, in their zeal to hold on to this deeply flawed conviction, its lawyers ought to remind themselves that "[p]rosecutors are ministers of justice and not merely advocates." State v. Quattlebaum, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000).

Third, the State undermines its position in claiming the PCR court "completely omitted" Dr. Friedlander's testimony that cleaning a child's genitals should be done with great care because "[i]t 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." See Pet. 21. A rough diaper change was *not* the theory of liability presented by the State at trial. Now the State's appears to take issue with the PCR court, not for crediting Dr. Friedlander's interpretation of the physical evidence, but for failing to reach a conclusion no litigant presented at trial or during the PCR hearing. Cf. Pet. 22 n.3 ("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."). The

State's apparent willingness to disregard its trial theory and adopt a new one here is tantamount to a concession the conviction is flawed and the PCR court was correct to vacate it.

In sum, the State fails to offer a cogent theory to rebut the PCR court's legal conclusion that the failure to call Dr. Friedlander met both of Strickland's prongs. Compare Pet. 20–22, with App. 1218–20. Because this holding alone was sufficient to grant Mr. Williams post-conviction relief, the petition should be denied.

II. The failure to prepare an available legal defense, comprehend necessary law and facts, and interview any prosecution witness violates counsel's obligation to act as a meaningful state adversary and establishes presumptive and actual prejudice in an ineffective assistance claim.

The PCR court held lead trial counsel's "lack of preparation fundamentally undermined [Mr. Williams] trial in a manner that is actually and presumptively prejudicial." App. 1210.

There are two paths to establish the denial of effective assistance in violation of the Sixth Amendment. Cf. App. 1195. Under Strickland, an applicant for post-conviction relief must show (1) counsel failed to render effective assistance by prevailing professional norms and (2) the deficient performance prejudiced the applicant's case. Strickland, 466 U.S. at 687; Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In Chronic, the Supreme Court recognized a claim based on counsel's abject failure to meaningfully contest the State's case in a manner that fundamentally undermines the constitutional promise of an adversarial proceeding and renders the result "presumptively unreliable." See Chronic, 466 U.S. 648 at 656–59. The PCR court held Mr. Williams' lack-of-preparation claim satisfied Strickland and Chronic because (1) there was no reasonable investigation of a dozen State witnesses prior to their testimony; (2) counsel labored under a misapprehension of law and fact as to what constituted an available legal defense; and (3) Mr. Floyd's one day of preparation and Mr. Snell's misapprehension of fact and law left Mr. Williams without meaningful state adversaries. See App. 1210–18.

The State claims the PCR court erred "as a matter of law in finding [1] trial counsel was ineffective for failing to investigate [the] State's witnesses[,]" and [2] that prejudice is established by this deficiency. See Pet. 12–17. It also claims the PCR court was wrong to conclude trial counsel misapprehended the facts and the law because it "ignore[d] Snell's testimony that the medically recognized diaper change was one of [trial counsels'] strategies." See Pet. 17–18. The State argues further that to prevail on a lack-of-preparation claim, an 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." See Pet. 12–13 (citing, *inter alia*, Porter, 368 S.C. at 385, 629 S.E.2d at 357; Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998)). The State is half correct. Actual prejudice is required under Strickland, but not under Chronic—the PCR court's alternative grounds for relief on this claim. Nevertheless, both are established in the record below.

A. Trial counsel's preparation deficiencies are prejudicial within the meaning of Strickland, particularly where counsel mounted a defense based on a misapprehension of settled law and predicate facts.

The PCR court credited two arguments under the lack-of-preparation penumbra, the most problematic of which is trial counsel's misunderstanding of the relevant law and facts relating to his client's defense. See App. 1212–15.

At trial, Mr. Snell repeatedly highlighted the absence of vaginal penetration—a fact of no legal consequence to Mr. Williams' defense—while questioning key witnesses and moving the trial court for a directed verdict. Cf. App. 1212–13 (citing App. 449–51, 457–60, 955–57 & 1038–39). Mr. Snell mistakenly equated the child's genitals to the vagina, an error most clearly evidenced during his argument on Mr. Williams' motion for a directed verdict where counsel sought to contest *genital* penetration by citing the State's "medical testimony" and arguing, "there's been no evidence presented of any penetration in to the opening." App. 1213 (citing App. 449–50). The

trial court sought clarification from counsel who first explained he was referring to the "genital opening[,]" but continued 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. (citing App. 450–51). When the trial court asked, "What are you defining as the genital opening?", Mr. Snell responded, "[t]he vagina." Id. (App. 450–51); but see Morgan, 352 S.C. at 365–73, 574 S.E.2d at 206–10. During the PCR hearing, lead counsel conceded a diaper change is excluded from the definition of a sexual battery as a legitimate medical touching that was consistent with what Mr. Williams testified. Cf. App. 1214 (citing App. 875 & 880–81). But Dr. Friedlander's recollection of his consultation with Mr. Snell indicated Mr. Snell never asked him whether the removal of fecal matter from the genitals was a medically recognized treatment, but instead attempted to elicit an opinion there was no penetration of the vulva—something Dr. Friedlander explained was inaccurate. See App. 1212–13 (citing App. 956–58). Mr. Snell acknowledged his confusion stating: "basically a lot of folks got an anatomy lesson" from the State's expert during trial. App. 911–12. The PCR court weighed this evidence and concluded "[t]he record is uncontradicted that Mr. Snell's apparent view at trial was neither factually nor legally accurate." App. 1214; see also App. 1038–39 (Mr. Floyd conceding Mr. Snell's views were "not accurate" and he made "an inaccurate argument."). The PCR court found these deficiencies actually prejudicial, explaining Mr. Snell "fail[ed] to appreciate the significance of the medically recognized treatment defense" which "resulted in a reliance on inaccurate factual and legal claims to the exclusion of a potentially meritorious defense." App. 1215.

The PCR court also found lead counsel "objectively unreasonable" in failing to contact witnesses who were the sole basis to establish predicate facts. See App. 1211. These witnesses included persons necessary to place the child in Mr. Williams' care during the relevant time and

the state's lead expert, Dr. Luberoff. See App. 1211 (citing App. 910–11 & 1032); see also App. 831–32 ("Because 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."). Mr. Snell's failure to investigate lay witnesses reflected a "fail[ure] to act on the import ascribed by his own assessment[,]" and "abdicated [his] responsibility to investigate critical witnesses determinative of guilt or innocence." App. 1211. Compounding the problem, after just 24 hours on the case, Mr. Floyd was insufficiently familiar with the matter to handle the bulk of the trial work. See App. 1211. The PCR court found this circumstance "unusual", particularly given Mr. Floyd's practice of interviewing witnesses prior to trial. Id.

Actual prejudice attaches when counsel's performance "has adversely affected the defense[,]" Huffington v. Nuth, 140 F.3d 572, 578 (4th Cir. 1998), and the PCR court was correct to find that standard met here. Mr. Snell lacked a basic understanding of the law of criminal sexual conduct and the anatomy relevant to that claim. He should have appreciated the significance of Dr. Friedlander's assessment and the defense it afforded his client. He was unable to meaningfully cross-examine witnesses, in part because he had failed to investigate their testimony, but also because he misapprehended that eliciting testimony challenging vaginal penetration was no defense to a charge requiring the predicate act of genital penetration. This same misunderstanding rendered Mr. Williams motion for a directed verdict a futile act. "To guarantee his client effective assistance, trial counsel was obligated to arm himself with accurate information *before* trial." App. 1214 (emphasis original).

Likewise, because of Mr. Snell's inaction and Mr. Floyd's newness to the representation, no lawyer investigated Mr. Williams' case. 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. While the Sixth Amendment does not require a lawyer to investigate every possible witness, "most of the witnesses ... deemed 'crucial' were 'alibi witnesses or eyewitnesses critical to the determination of guilt,' such as self-defense witnesses." Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003) (citing Huffington, 140 F.3d at 580); see also App. 1210–11 (quoting same). Here, no witnesses, critical or otherwise, were investigated by counsel such that the PCR court was correct to conclude that counsels' deficiencies may have adversely impacted the result.

The State claims the PCR court "ignored ... precedent" like Jackson (see Pet. 13–14) and "failed to address the presence of the overwhelming evidence of Williams' guilt in its prejudice analysis." See Pet. 14–15. Both assertions are wrong.

The applicant in Jackson challenged trial counsel's failure to investigate witness backgrounds, call co-defendants to testify, present a defense, and adequately prepare. Jackson, 329 S.C. at 347–48, 495 S.E.2d at 769. The Court agreed counsel was unreasonable in failing to investigate witnesses' background, but found prejudice lacking given the absence of evidence suggesting the witnesses lacked credibility. See id. at 348–49, 495 S.E.2d at 770. The probity of this deficiency was speculative because "[e]ven assuming one of the eyewitnesses or victims had a criminal record, no evidence was presented to show the crime was one of moral turpitude which could be used for impeachment purposes[,]" and "because at the trial the victims did not testify and the State never attempted to establish the credibility of the victims, they could not be impeached with any prior records." Id. at 349–50, 495 S.E.2d at 770 (citing State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990)). Thus, the existence of impeachment evidence, its relevance, and its admissibility were all in question. That is not the case here where counsel failed to investigate *any* State witness, including witnesses essential to proving the State's case-in-chief. Cf. App. 1215 (noting the absence of "any meaningful investigation[.]").

The State also misunderstands the overwhelming evidence doctrine, claiming "[w]hen there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial." See Pet. 14–15. "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." Smalls, 422 S.C. 174, 810 S.E.2d at 844. Properly applied, a court must balance the impact of counsel's errors against all other *properly* admitted evidence. See id. (discussing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998) and Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007)). see also Thompson v. State, Op. No. 2014-001611, 2018 WL 1404480, at *5 (S.C. Mar. 21, 2018) ("...the overall strength of the properly admitted evidence of Petitioner's guilt does not overcome the individual impact of each instance of trial counsel's deficient performance."). Prejudice can attach even though there is overwhelming evidence of guilt if there is a reasonable chance counsel's errors affected the result. See Smalls, 422 S.C. 174, 810 S.E.2d at 844. Put differently, the impact of counsel's error can outweigh overwhelming evidence and necessitate a new trial. Thus, overwhelming evidence of guilt is merely one factor a PCR court considers, and is only a categorical bar when the evidence "include[s] something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that" it forecloses the possibility of reasonable doubt. See id. at 844–45. Here, there is no conclusive evidence of guilt and the so-called overwhelming evidence cited by the State—evidence concerning the child's injuries (see Pet. 15)—is precisely the evidence Mr. Williams was unable to properly dispute as a result of counsel's failure to retain Dr. Friedlander, investigate key witnesses, and formulate a legal argument consistent with settled law and basic anatomy. Under these circumstances, the overwhelming evidence doctrine never applies.

Finally, while total abdication of trial counsel's responsibilities also falls squarely within the type of deficiency recognized in Chronic, it cannot be correct that Strickland's reasonable-probability-to-effect-the-outcome standard affords no room to grant relief when counsel appears at trial without any preparation whatsoever. As the State correctly notes, Strickland analysis turns on a showing that "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Pet. 11 (quoting Harrington v. Richter, 562 U.S. 86, 104 (2011)). That is precisely what happened here as trial counsel's wholesale failure to prepare permeates all aspects of Mr. Williams' defense. The PCR court was rightly troubled by this and was correct to rely on Strickland as grounds to grant a new trial.

B. The PCR court correctly relied on Chronic in holding counsels' lack of preparation was presumptively prejudicial.

The PCR court was also correct to hold that Mr. Snell's "overall lack of preparation and legal understanding [was] presumptively prejudicial to Applicant." See App. 1215. In Chronic, the U.S. Supreme Court recognized that prejudice can be presumed where, in relevant part, there is a constructive denial of counsel evidenced by a counsel's failure "to subject the prosecution's case to meaningful adversarial testing[,]" which makes "the adversarial process itself presumptively unreliable." Cronic, 466 U.S. at 659. The State argues the PCR court's reliance on Chronic is "misplaced" because there are "few circumstances" where prejudice is presumed. See Pet. 15–17. Generally, this statement is correct, but this says nothing of its applicability here.

The PCR court credited a confluence of facts in support of its conclusion there was a constructive denial of counsel. Mr. Snell failed to investigate any fact witness and misapprehended settled law and predicate facts. See App. 1216. He also declined to challenge the State's failure to meet disclosure obligations under Rule 5, a challenge that would have entitled his client to exclusion of the evidence or, at least, a continuance to further prepare. See § IV, infra; see also

App. 1216–17. Mr. Floyd was retained 24 hours before trial, but came to handle 11 of 13 cross-examinations and presented closing argument.

The State points to Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) as an appropriate application of Chronic. See Pet. 15–16. Mr. Williams agrees that Nance warranted Chronic's presumption because it presented a troubling record in which counsel "abandoned his role as defense counsel and in fact helped to bolster the case against his client." Nance, 367 S.C. at 557, 626 S.E.2d at 883. But affirmative efforts to undermine the client's cause were not the only breakdown in adversarial testing. The Court cited the incapacity of lead counsel, the appointment of inexperienced co-counsel, the defendant's mother as the only witness interviewed, the presentation of no mitigation as evidence, the failure to qualify an expert, and unpursued mitigation theories as evidence supporting its conclusion. See id. at 553–58, 626 S.E.2d at 881–83. These considerations are also present here.

Moreover, the extreme lawyer conduct in Nance does not define the threshold for Chronic's presumption. The doctrine was recently applied to far less egregious, but still presumptively prejudicial, conduct where a lawyer slept through portions of his client's trial. See United States v. Ragin, 820 F.3d 609, 612 (4th Cir. 2016). The appellate court reasoned that Chronic's presumption recognizes that certain structural errors prevent a trial from "reliably serving its function as a vehicle for determination of guilt or innocence." Id. at 618 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). Accordingly, the court did not discern whether the portions of trial slept through were sufficiently important to grant relief; the fact that counsel was asleep meant the defendant was unable to defend against the government's charge. The PCR court found Mr. Snell's lack of preparation to meet this standard here.

III. Graphic images of the child's genitals were unfairly prejudicial where they invite an emotional response and were unnecessary to prove a contention in dispute.

The PCR court held trial counsels were ineffective in failing to make a contemporaneous objection to images of the child's genitals, which were not relevant to a matter in dispute and inflamed the passions and prejudices of the jury in a manner that invited a verdict on an improper basis. See App. 1220–23. Otherwise relevant evidence can be excluded by a trial court when its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. To show *unfair* prejudice, the evidence must have "a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010); see also State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (same); State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008) (same). These judgments must be made based on the entire record. Kirton, 381 S.C. at 24, 671 S.E.2d at 115 (citing State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000)). Accordingly, "[p]hotographs calculated to arose the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." Torres, 390 S.C. at 623, 703 S.E.2d at 228. Conceding trial counsels were ineffective in failing to interpose a timely objection, the State claims the PCR court "improperly found Williams was prejudiced by any error of counsel." See Pet. 22. This view is mistaken for three reasons.

First, the State's entire argument rests on its claim the photos are relevant (see Pet. 24–25), but Mr. Williams *concedes* they are relevant; their relevance is irrelevant here. If the photos were not relevant, they would be per se inadmissible. See Rules 401 & 402, SCRE; see also Torres, 390 S.C. at 623, 703 S.E.2d at 228 (prejudice-inducing photos warrant exclusion "if they are

irrelevant..."). What Rule 403 contemplates is that a trial court might need to exclude otherwise relevant evidence to protect a litigant from unfair prejudice.

Second, the proper analytical framework is the one used by the PCR court, which asks whether the images invite a decision on an improper basis. The PCR court reviewed the images, images and found them to be "graphic." See App. 1199. Indeed, even the State acknowledges the images are "understandably difficult for most individuals to see[.] See Pet. 23. As the PCR court correctly explained in its prejudice analysis, "[t]o 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." App. 1221. Based on its review, that test was met as the PCR court had "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." App. 1223. And while the PCR court's factual findings are entitled to deference here, the photos in question were placed in a sealed envelope, marked, and included in the record for the Court's consideration.

Third, admission of the photos was unnecessary to prove any core contention. See Torres, 390 S.C. at 623, 703 S.E.2d at 228 ("Photographs calculated to arose the sympathy or prejudice of the jury should be excluded if they are irrelevant or *not necessary to substantiate material facts* or conditions." (emphasis added)). The State offered two expert witnesses who testified that they conducted a forensic examination of the child. They described the injuries they found and the extent of the injuries was irrelevant to the criminal sexual conduct charge because all the State needed to prove was penetration. See App. 1222. Moreover, Mr. Williams' counsel never contested the nature or extent of those injuries. To aid the jury's understanding, the trial court admitted anatomical diagrams that Ms. Clary used during her testimony to identify their location

on the child's body. See id. As the Court of Appeals explained, "[t]hey 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 282, 747 S.E.2d at 204. While trial counsel entered a timely objection to the diagrams, failure to do the same with the photos meant neither the trial court nor the appellate court were able to consider this issue. See id. ("Williams only objected to the admission of the anatomical diagram enlargements. He did not object to the admission of any of the photographs. ... Therefore, the admission of the photographs is not preserved for our review because Williams did not object to their admission." (parenthetical and footnote omitted)). Thus, the only court to conduct a Rule 403 analysis is the PCR court, which held they invited a decision on an improper basis and were unnecessary to prove a core contention.

For these reasons, the Court should conclude the PCR court was correct to hold that the photographs were unfairly prejudicial or review the images for itself to consider whether the PCR court's Rule 403 analysis was clearly erroneous, i.e., without *any* evidentiary support. See State v. Scott, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013).

IV. The failure to timely disclose discoverable reports would have been grounds to exclude the State's experts or obtain a much-needed continuance and counsels' failure to object is further evidence of an overall failure to act as a meaningful State adversary.

Finally, the State has overstated the significance of the PCR court's Rule 5 analysis and disputes an otherwise accurate statement of law. It argues the PCR court made a "determination" trial counsel was deficient in failing to object to expert testimony of which Mr. Williams' counsel should have received notice under Rule 5 of the criminal rules. See Pet. 18–19. The State contends that "[w]hile the PCR Court correctly states that Rule 5 [...] 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[,]" because that subjection does not concern untimely expert disclosure. Id. at 19. In the State's view, the Order incorrectly focuses on the belated disclosure of Dr. Luberoff and complete failure to disclose Ms. Clary as witnesses instead of the failure to disclose their reports. See id. The State contends the PCR court "erred in *granting relief* upon this *claim*[.]" Id. (emphasis added). These assertions are inaccurate in two ways, and are not grounds for certiorari.

First, the PCR court's explanation—that belated disclosure or non-disclosure entitle a defendant to relief under Rule 5—is an accurate statement of law. Upon request, the rule requires the disclosure of reports of examinations. See Rule 5(a)(1)(D), SCRCrimP ("Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports of physical or mental examinations, ..."). The time for disclosure is "no later than thirty (30) days after the request is made, or within such other time as may be ordered by the court." Rule 5(a)(1)(3), SCRCrimP. "Where a party fails to comply with Rule 5, the court may order the noncomplying party to permit inspection, grant a continuance, prohibit introduction of the nondisclosed evidence, or enter such order as it deems just under the circumstances." Earley v. State, 418 S.C. 255, 267, 792 S.E.2d 226, 232 (2016) (quoting State v. Kerr, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998)). The consequence for the use of undisclosed evidence can include reversing a conviction. See, e.g., State v. Lawton, 382 S.C. 122, 127–28, 675 S.E.2d 454, 457 (Ct. App. 2009).

Mr. Snell filed a Rule 5 discovery request soon after Mr. Williams was arrested. See App. 1217 (citing App. 867). Ms. Clary compiled a discoverable report and relied on it during her testimony. See App. 238–40. Counsel first learned Ms. Clary would be offered as an expert when she took the stand. See App. 1216–17 (quoting App. 860–61 & 865). Notwithstanding awareness

of the State's disclosure obligation, trial counsel never objected (see App. 1216 (citing App. 859–60)), and neither of Mr. Williams' lawyers were able to point to a strategic reason for failing to object. See App. 1217 (citing App. 861–62 & 1008–10). The PCR court found this lack of adversarial testing instructive because "she was the witness through which the State sought and obtained the admission of photographs of the child's vagina into evidence." App. 1217. While the State did disclose a report by Dr. Luberoff, that disclosure came just five days before trial, which Mr. Snell conceded was "late" and grounds for a continuance. See id. (citing App. 867). Given these facts, the PCR court was correct to note that consequences for the State's failure to comply with Rule 5 could have included exclusion had an objection been made. See App. 1217.

Second, there is no Rule 5 "claim." Mr. Williams did not seek relief under a Rule 5 theory and the PCR court did not grant it on that basis. Instead, Mr. Williams alleged counsel rendered ineffective assistance because of their lack of preparation, which was prejudicial within the meaning of Strickland and presumptively prejudicial under Chronic. See App. 1185. Those are the theories the PCR court considered and on which it ruled. See App. 1194 & 1210–18. The PCR court's observations concerning trial counsels' failure to challenge these critical state witnesses based on the State's failure to timely disclosure as to one witness and failure to make any disclosure as to the other was cited as evidence informing the PCR court's lack-of-preparation analysis. See, e.g., App. 1216 ("This lack of adversarial testing is *evidenced* in other ways. For instance...") & 1217 ("Mr. Snell also agreed Dr. Luberoff's untimely identification would have been grounds to seek a continuance."). "When coupled with the other significant evidence detailed [earlier in the Order,]" these facts informed the Court's conclusion that "Mr. Snell failed to provide Applicant with the adversarial representation the Constitution requires such that prejudice must be presumed." App. 1217–18. Put differently, trial counsel's failure to assert Mr. Williams right to

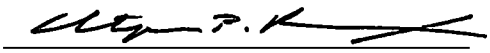
timely pre-trial notice of Dr. Luberoff and Ms. Clarey was simply further evidence of a breakdown in the system of adversarial testing the Constitution guarantees. In light of the significance these witnesses played in securing Mr. Williams' conviction, Mr. Floyd's need to get up to speed, and his recognition that more time might have been useful (see App. 1014), this is compelling evidence.

The State's complaint is that the PCR court's citation to Rule 5 should not have included a reference to subsection (e)(4) because that subsection is limited to alibi defense disclosures. See Pet. 19. The reference appears to be a scrivener's error, but that changes nothing because the underlying proposition—that a trial court can exclude undisclosed evidence—is an accurate statement of law. See Earley, 418 S.C. at 267, 792 S.E.2d at 232. Because there is no legal error and the State overstates the significance of the discover issue to the Court's analysis, there is nothing for this Court to correct by granting the petition.

CONCLUSION

The PCR court's grant of post-conviction relief is legally sound and factually supported. The petition should be denied.

Respectfully submitted,



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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

Lance Austin Williams, SCDC No. 00345477.....Respondent,

v.

State of South Carolina.....Petitioner.

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Respondent, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on May 11, 2018, served by having the below document placed in the mail, first class postage affixed thereto, to the following mentioned person:

Document: Respondent's return in opposition to petition for writ of certiorari

Served: Alphonso Simon, Jr., Assistant Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia South Carolina 29211-1549

Holli Miller
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