STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-001689

PRENTISS WAYNE LOVE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
Second filing edited to meet page limit

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QUESTIONS PRESENTED

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XXI.

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XXVII.

Did the lower court err in failing to grant relief where the Petitioner met his burden of proof regarding his claim that Trial Counsel was ineffective, and failed to provide Petitioner with reasonable professional assistance of counsel, where he failed to summarize Petitioner's case in a manner consistent with his role as an advocate for the Petitioner by conceding matters in his closing argument that were adverse to his client's best interest and which weakened the Petitioner's defense?

A. Trial counsel argued "there is no logical explanation for it I don't have one for you. I don't have any reason why she would lie"

B. Trial Counsel actually argued against the only apparent motive the Victim had to lie.

C. Trial Counsel argued that he did not personally believe that the fact that the Petitioner's accuser had just gotten in trouble for possession of a narcotic was an explanation for why she would lie against Petitioner and thereby, bolstered the credibility of the prosecution's subsequent argument that "no one has a motive to lie".

Original Application, Allegation 1, 2 and 4; Amended Application, Allegation 31.

XXVIII.

Did the lower court err in denying Petitioner relief where he met his burden of proof by establishing that Trial Counsel was ineffective for neglecting to object to numerous portions of the State's closing argument in which the prosecution made improper and prejudicial arguments, improperly referenced matter is not in evidence and/or misrepresented the testimony adduced at trial in a manner that was particularly prejudicial to Petitioner.

A. "He is texting Brittany hundreds of times a day." App. p. 470, ll. 4 - 8; App. p. 473, ll. 9 - 11.

B. Argument essentially inviting the jury to find guilt based on Petitioner, and his wife's, prior record for a felony thereby violating the character evidence rule by asking the jury to find Petitioner guilty because he and his wife were bad people. App. p. 473, ll. 18 - 23.

C. Arguing that among the state's witnesses, "no one has a criminal record." App. p. 474,ll. 14 - 16.

D. Arguing that on September 11th the Victim's cell phone had been taken away from her for the cigarette and pill that she had been caught with where the record did not support that assertion.
App. p. 478, ll. 1 - 10.

E. Characterizing statements made by Petitioner's wife as telling him that if he made certain statements she could get "caught" for perjury where the record in fact indicated that the statement made by her was that, "if you say you went with them, I'm going to jail for perjury." App. p. 479, l. 21 - p. 480, l. 11.

F. References to the individual who interviewed the victim as conducting a "forensic interview" . App. p. 482 ll. 9 - 15.

G. Claims that the victim was afraid her mother "was going to kill her" and that "she was scared" arguing Victim had no reason to fabricate her claims. App. p. 484, ll. 20 - 25.

H. "She had already deleted some things". App. p. 480, ll. 3 - 5.

I. Improper argument that Petitioner was a convicted felon. App. p. 473, ll. 18-23.

J. Improper argument in which the prosecution implied that Petitioner's wife was a convicted felon. App. p. 473, ll. 18-23.

K. Improperly advising jury of his personal opinion that Petitioner and his wife were liars. App. p. 480, ll. 3-5.

Original Application, Allegation 1, 2 and 4; Amended Application, Allegation 32.

XXIX.

Did the lower court err in failing to grant relief where the Petitioner met his burden of proof regarding his claim that Trial Counsel was ineffective in failing to object to testimony from Anthony E. Carter, concerning the fact that Petitioner and his wife knew about Victim getting caught in possession of a pain pill and a cigarette by her step-mother and kept that information from him and Victim's mother, his fiancée, where said testimony bore no logical relevance to the issues before the jury and was highly prejudicial to Petitioner? App. p. 83, l. 16- p. 84, l. 12. (Carter); App. p. 274, ll. 13-23 and other witnesses, (T. Love); App. p. 283, l. 22- p. 286, l. 24 (T. Love); App. p. 364, l. 17- p. 366, l. 18 (Petitioner).

Original Application, Allegation 1, 2 and 4; Amended Application, Allegation 2.

STATEMENT OF THE CASE

Petitioner was indicted in May, 2011, for second-degree criminal sexual conduct with a minor (2011-GS-22-431) and lewd act on a minor (2011-GS-22-432). Jonathan Eric Fox, Esquire, represented Petitioner on these charges. On April 23, 2012, Petitioner proceeded to trial be jury before the Honorable Garrison D. Hill, at the conclusion of which Petitioner was found guilty of a lewd act on a minor and innocent of second-degree criminal sexual conduct with a minor. Petitioner was sentenced to a term of fifteen (15) years imprisonment. Petitioner filed a timely Notice of Appeal. The South Carolina Court of Appeals dismissed the appeal on May 21, 2014. *State v. Love*, Op. No. 2014-UP-195 (S.C. Ct. App. filed May 21, 2014). An Application for Post-Conviction Relief (hereafter PCR) was filed by Petitioner on February 24,

2015, an Amended Application was filed on November 15, 2016, and a Second Amended Application was filed on November 15, 2016. Respondent filed its Return on June 29, 2015. In his original PCR Application, Petitioner has alleged generally that he received ineffective assistance of counsel prior to and during his trial in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as, Article I, Section 14, of the South Carolina Constitution. In support of that claim he has two general allegations. **See, App.pp. 551-552.** Petitioner filed two Amended PCR Applications on November 15, 2016, in which he raised numerous specific additional Sixth Amendment claims. **See, App.pp. 564-573.**

Following an evidentiary hearing, an Order of Dismissal was filed by Judge Brooks P. Goldsmith on May 4, 2017. Petitioner filed a Motion to Alter or Amend, as timely on June 15, 2017, which had been timely served on Judge Goldsmith and Respondent on May 17, 2017. The lower court's Order denying Petitioner's 59(e) Motion was filed on July 10, 2017, however, it ruled that the motion had been timely filed. Petitioner's Notice of Appeal from said orders was filed August 14, 2017. This appeal followed. Petitioner submitted his Petition for Writ of Certiorari on February 1, 2018, along with a Motion to Enlarge Page Limitation for Petition for Writ of Certiorari. By Order entered on May 24, 2018, this Honorable Court granted Counsel's request to exceed the page limit set by Rule 243(e)(3) and authorized Counsel for Petitioner to submit a Certiorari Petition not to exceed fifty (50 pages.

STANDARD OF REVIEW

The standard of review in a PCR appeal is whether "any evidence of probative value" exists to support the PCR court's findings. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). The burden of proof on the Petitioner in a PCR proceeding is set forth in Petitioner's Memorandum in Support of PCR and is incorporated herein by reference. App. 689 at 696-698.

DISCUSSION
A.
Questions Presented I, II and III
FAILURE TO OBJECT TO HEARSAY
Original Application, Allegation 1, 2 and 4;
First Amended Application, Allegations No. 3, 4 and 12

At trial the State was allowed to introduce without objection, hearsay testimony concerning previous statements made by the Victim identifying Petitioner as the individual responsible for sexually assaulting her. The instances cited by Petitioner in his Allegations 3, 4 and 12 found in his first Amended Application are an illustrative, although by no means exhaustive, list demonstrating a pattern found throughout this trial. *See,* App. 84, l. 19- p. 85, l. 18, and App. p. 177, l. 1- p. 187, l. 10. During the testimony of the so-called "forensic interviewer", Dianne Nordeen, even she exceeded the permissible boundaries for such testimony by identifying the places where alleged assaults occurred as being at the property of the Petitioner. Later, this witness was allowed to testify that three incidents took place *"on Wayne Love's boat ... on the Intracoastal Waterway."* Thus, although the State instructed this witness to answer their questions *"without revealing anything other than time and place,"* this witness did exceed the boundaries of time and place. App. p. 208, l. 6- p. 209, l. 2.

Trial Counsel, hereafter Counsel, failed to object to any of the hearsay testimony in question. In his PCR testimony, Counsel acknowledged that various State witnesses testified to what the Victim told them about the incidents and identified Petitioner as the person who had sexual contact with her. PCR p. 10, l. 14- p. 11, l. 18. When asked if he ever considered objecting to this line of testimony, Counsel stated, *"I did not object."* PCR p. 11, l. 19 – p. 12, l.. Counsel then stated, "Truly, I couldn't tell you whether or not, but the record is clear I didn't object. The reasoning, I can't go back and recreate that moment." PCR p. 12, ll. 7-9.

Counsel did not assert any strategic or tactical reason for why he failed to object to this testimony. During the testimony of Victim's step-father, the Prosecutor expressly asked him if Victim had disclosed to him *"anything regarding her contact between her and the defendant?"* App. p. 84, ll. 19-24. After the witness responded, "yes" to that inquiry, the Prosecutor went on to ask, "Okay. Now, in that information she provided to you are you aware of timing and place regarding any type of *contact between her and the defendant*?" App. p. 84, l. 25- p. 85, l. 2. (Emphasis added). Once the witness answered that question affirmatively, the Prosecution went on to ask the witness to *"tell the jury just in relationship to time and place what she told you."* App. p. 85, ll. 3-5. (Emphasis added) The step-father's response to that question clearly asserted what the Victim told him about the identity of her assailant. App. p. 85, l. 6- p. 96, l. 19.

Counsel made an isolated objection on the ground of hearsay after the step-father quoted the Victim as telling him, ***"Mama's gonna kill Wayne."*** App. p. 86, ll. 4-9. That objection, which was sustained, evidences the fact that Counsel did not recognize the hearsay nature of the earlier testimony from this witness despite the Prosecutor asking the witness to tell the jury what Victim has said to him during a conversation the Prosecution characterized as being about ***"contact between her and the defendant."*** App. p. 84, ll. 21-23. In his hearsay objection to the testimony that the Victim said, ***"Mama's gonna kill Wayne,"*** Counsel stated, ***"we are getting into hearsay <u>now</u>."*** App. p. 86, ll. 6-7 (Emphasis added). This hearsay testimony continued after Counsel's one objection. App. p. 88, ll. 10-19. This testimony contains obvious direct references to knowing what Petitioner allegedly did based upon what Victim told him, and what the mother informed him Victim had told her, which would of course be hearsay on hearsay. The mother's testimony clearly asserts what her daughter told her had happened between her and Wayne, the Defendant. App. p. 134, l. 14- p. 135, l. 25. In the testimony of both the step-

father and the mother it was established that these claims of sexual contact with Victim where not reported to either of them by Victim until after she had gotten in trouble for being in possession of a narcotic pain pill and a cigarette. App. p. 81, l. 8- p. 84, l. 18, App. p. 115, l. 14- p. 124, l. 13 and App. p. 133, l. 14- p. 137, l. 9. Although Victim testified that the punishments imposed on her were not lifted after the claims of assault were made, Petitioner would note that her testimony did not negate the possibility that she had fabricated these claims in order to adopt the cloak of Victim in hopes of getting out from under punishments loath to any teenager; restriction, loss of her cell phone and loss of her iPad. App. p. 116, l. 23- p. 117, l. 5; App. p. 165, l. 21- p. 166, l. 4.

Ashley J. (Ashley), Victim's best friend, was also allowed to testify to hearsay statements attributed to Victim which identified Petitioner as someone with whom she had sexual contact. Her testimony is distinguishable from that of the step-father and mother in that she claimed Victim told her about the incidents shortly after they happened. App. p. 179, l. 2- p. 193, l. 1. She, like Victim, never reported these alleged incidents until after Victim got in trouble for having Vicodin which she herself gave Victim. App. p. 187, l. 15- p. 188, l. 20. Ashley testified that she was best friends with the Victim. Her testimony mirrored that of the Victim. She claimed Victim told her about her relationship with Petitioner as it unfolded. The State's cross-examination of this witness indicated that the Prosecution either did not fully understand the scope of the rules of evidence as they pertain to prior consistent statements, or, willfully flaunted them. The Prosecution asked questions of this witness framed as inquiries concerning time and place of the alleged sexual abuse, but conducted the examination in such a manner as to clearly identify Petitioner as the perpetrator within the questions posed to this witness. App. p. 179, l. 2 – p. 187, l. 11. Ashley admitted in her testimony that Victim had gotten in trouble for

having Vicodin that she had given her. She was asked by the Prosecution whether she got in trouble for this incident and she replied "yes." App. p. 185, l. 20 - p. 186, l. 6. Ashley was allowed to testify, without objection, that she knew that Victim had told her parents about the relationship between her and the Defendant. She testified that, ***"it was when she got in trouble she told everything."*** App. p. 186, l.17- p. 187, l. 4. On cross-examination Ashley admitted that she would do anything she could to protect Victim. App. p. 187, l. 15 - p. 188, l. 20.

State witness **Dianne Nordeen**, testified that she was employed by the Children's Recovery Center as a ***"forensic interviewer."*** App. p. 202, ll. 1-23. The Solicitor worded his questions of her in terms of ***"time and place"***, yet elicited testimony from this witness wherein she testified to having been told by Victim that two out of three of the reported incidents occurred on property identified as belonging to Petitioner; ***"The living room in the home of Wayne and Tabitha Love"*** and ***"which occurred on Wayne Love's boat." App. p. 208, ll. 6-17 and App. p. 208, ll. 18-25.*** **Investigator Ginger Pop**, testified that after the report of sexual assault involving a minor, she spoke with Victim's mother. She identified the suspect determined from that interview as Petitioner. She next recommended Victim for a quote ***"forensic interview"*** and proceeded to gather as much information as she could about the Defendant. App. p. 213, l. 25 - p. 218, l. 23. Without objection, she testified that her review of the audio tape of that interview, conducted by witness Nordeen, showed that Victim ***"revealed several incidents that the child had revealed to the interviewer of events between the Defendant and the child."*** App. p. 219, ll. 12-24. See also, App. p. 223, l. 8 - p. 226, l. 24.

Counsel stated that he was familiar with South Carolina case law addressing the latitude allowed concerning hearsay and reports made by victims in CSC cases. PCR p. 4, ll. 13 - 21. When asked why he did not object to hearsay testimony which exceeded the parameters set by

that case law, he simply testified that ***"I did not object."*** He admitted that the step-father testified to what Victim had told her mother, identifying Petitioner as the perpetrator. He nevertheless testified that he did not believe the testimony in question ***"went beyond what was permissible."*** PCR p. 10, l. 14 - p. 11, l. 13. He admitted that throughout the State's case various witnesses talked about Victim having informed them of details concerning the alleged sexual contact. When asked if this testimony was inconsistent with the parameters of allowable hearsay concerning sexual assaults under South Carolina case law, Counsel responded, ***"I did not object."*** PCR p. 11, l. 14 - 22. When asked whether he now believed he should have objected to the State being allowed to bolster the credibility of the Victim's testimony with hearsay, Counsel once again repeated, ***"I did not object."*** When asked whether he had considered making a motion, or an objection, at any time when the State's witnesses specifically addressed hearsay, Counsel stated, ***"[t]ruly, I couldn't tell you whether or not, but the record is clear I didn't object. The reasoning, I can't go back and re-create that moment."*** PCR p. 12, ll. 4-9. He admitted that Ashley testified, without objection, concerning what Victim had told her about sexual contact with Petitioner. PCR p. 27, l. 9- p. 28, l. 8

Counsel failed to provide Petitioner reasonable professional assistance of counsel by failing to object each and every time the State sought to introduce hearsay testimony concerning prior consistent statements attributed to the Victim which went beyond the permissible scope of such testimony. *State v. Munn*, 292 S.C. 497, 357 S.E.2d 461 (1987; PCR p. 11, ll. 2-13.

It has long been established in South Carolina that the rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies. *Munn, supra*; *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994). Testimony of other witnesses regarding a victim's identification of the defendant as the

perpetrator does not fall within the recognized exceptions of statements concerning time and place. *Munn, supra*; *State v. Barrett*, 299 S.C. 485, 386 S.E. 2d 242 (1989). In *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001), this Honorable Supreme Court found that "improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless." Id at 156, 551 S.E.2d at 263. In both *Dawkins, supra*, and *Jolly, supra*, this Court recognized that "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration."

As in *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010), the State's case against Petitioner was entirely contingent upon the credibility of the Victim. As in *Smith, supra*, there was a lack of otherwise overwhelming evidence of Petitioner's guilt. There was no physical evidence of sexual assault in this case. App. p. 261, ll. 16 - 25. There were no eyewitnesses to any of the improper conduct alleged by Victim. The trial testimony documented that Victim did not make her allegations until after she had gotten in trouble for possession of drugs.

In *Vail v. State*, 402 S.C. 77, 738 S. E.2d 503 (2013), the Court of Appeals reversed the order of the circuit court denying relief on this precise issue. There are remarkable correlations between the *Vail* case and Petitioner's. In *Vail*, as in Petitioner's trial, the State relied heavily on evidence of a large volume of cell phone communications between *Vail* and his alleged Victim. In his PCR testimony the trial attorney in *Vail* stated that "he had a '*huge mountain to overcome*' when the jury was presented with evidence of 30 hours of telephone calls between *Vail* and the victim, many of which were late at night." Id, 496 S.C. at 83. In Petitioner's case, the State relied heavily on testimony concerning a large volume of text communications between Victim and Petitioner

Assuming, for the sake of argument, testimony that the Victim did not report the behavior alleged until after she got in trouble for drug possession would suffice to give rise to an implication of fabrication, this testimony exceeded the parameters for admissible testimony under the exception to the hearsay rule found at 801(d)(1)(B), SCRE. There are two problems with Rule 801 (d)(1)(B), SCRE, being applied to the testimony in question. First, this testimony was introduced *by the State* during its direct examination of these witnesses and therefore, was not introduced in response to any effort to imply that the accusations were fabricated. Further, it was the State who first introduced testimony establishing that the accusations were not made until after the complaining witness got in trouble for drug possession. Importantly, in *Jolly, supra*, this Honorable Court expressly held that ***"because the witness is the Victim in the case, she could not have made the prior consistent statement regarding her assault before she had a "relation to the cause."*** *Id.*, 314 S.C. at 29, 443 S.E.2d at 568 (Emphasis added

As in *Vail, supra*, the evidence against Petitioner was far from overwhelming, and the jury heard testimony concerning what was alleged to be an inordinate amount of cell phone communication between Victim and Petitioner. As in *Vail* and *Dawkins*, the jury did not convict Petitioner of all the charges against him. The jury actually acquitted Petitioner of the most serious charge against him. Therefore, the fact that Petitioner was acquitted on the charge of second-degree Criminal Sexual Conduct with a Minor, is not an appropriate measure as to whether Counsel was ineffective. Petitioner would argue that his acquittal on that charge is an indication that the jury did not find Victim's testimony to be entirely credible. The improper corroboration of the Victim's testimony cannot be harmless on the facts of this case. This Court has consistently found that it is the cumulative effect of this type testimony which enhances the

devastating prejudicial impact of improper corroboration. *See, Jolly*, 314 S.C. at 21, 443 S.E.2d at 569; *Dawkins*, 346 S. C. at 157, 551 S.E.2d at 263; *Vail*, 402 S.C. at 90, 738 S.E.2d at 510.

For all the above reasons, Petitioner respectfully submits that he has met his burden of proof with regard to his allegations concerning Counsel's ineffectiveness for failing to object to the improper corroboration testimony introduced during his trial.

B.
Questions Presented IV, V, VI, VII and VIII
TRIAL COUNSEL'S FAILURE TO MAKE PROPER OBJECTIONS AND MOTIONS REGARDING CELL PHONE RECORDS GENERATED BY VICTIM'S MOTHER
First Amended Application: Allegations No. 6, 7, 8, 9 and 14.
Original Application, Allegation 1,2, 3 and 4

The Victim's mother testified that near the end of October, 2010, Victim had gone to see her father and got in trouble when she was found in possession of a cigarette and a pill. Following the discovery of this incident she went through her daughter's cell phone and accessed her cell phone records by computer. The testimony concerning what she found when she accessed her daughter's cell phone records by computer was not objected to by Counsel. The trial record establishes that the Solicitor elicited the testimony in dispute by questioning the mother concerning whether she had gone on the computer and pulled up the records for her daughter's phone. The mother was allowed to testify, without objection, concerning the content of these cell phone records. Her testimony addressed the hundreds of text messages which she claimed those records reflected were exchanged between her daughter and Petitioner in September, 2010. App. p. 117, 14 - p. 119, l. 8 and App. p. 121, l. 18 - p. 124, l. 18. Counsel did not object to any of the testimony concerning the content of these cell phone records until the Prosecution moved to introduce the print out of those records produced by the mother into evidence. Only then, did Counsel object on the ground that the records had not been

authenticated by the keeper of the business records in question. App. p. 124, l. 19 - p. 125, l. 5. The Prosecution was allowed to make a lengthy statement, without objection, concerning the content of the cell phone records before the jury was excused from the courtroom. App. p. 125, l. 6 - p. 126, l. 10. After lengthy debate, the trial court sustained Petitioner's objection to the print out of the cell phone records finding that these records were hearsay and inadmissible. App. p. 130, ll. 6-25.

In response to this ruling, the Prosecutor asked the Court for clarification concerning what testimony she would be able to elicit from the mother concerning the contents of the cell phone records that had been ruled inadmissible. The trial court correctly noted that previous testimony concerning the content of the cell phone records had already come into evidence without objection. App. p. 131, ll. 1-23. Without any further objection from Counsel the Prosecution resumed questioning of the mother concerning the content of these cell phone records. Thus, not only did Counsel neglected to object when the State first approached this line of questioning with the Victim's mother, but it also neglected to make any kind of argument against the Prosecution being allowed to ask further questions concerning what information the Mother claimed to have read in those records. App. p. 131, l. 1- p. 133, l. 18.

In Counsel's PCR testimony he acknowledged having given PCR Counsel access to his trial file and having provided her a complete copy of the discovery materials provided to him by the State. He stated that he did not object to the mother's testimony because he did not view her testimony about the content of those records to be objectionable despite his own position that the records themselves were inadmissible unless properly authenticated under the rules of evidence pertaining to business records. Counsel offered no basis for this belief. PCR p. 15, l. 25 - p. 24, l. 13. Counsel offered no explanation for failing to make a motion to strike any prior testimony

pertaining to the content of the records in question once they were found to be inadmissible. According to his testimony, he could not recall whether, ***"that played out in my mind or not, but I didn't make that objection or that request."*** PCR p. 24, ll. 14-21. Counsel could not recall his ***"thought process"*** in not objecting to additional testimony from the mother concerning the content of the records. PCR p. 24, l. 22 - p. 25, l. 23. Counsel was asked if, once cell phone records were ruled inadmissible, he ever considered objecting to the mother being allowed to give statistical testimony addressing the number of text communications between Petitioner and her daughter based upon the content of those records. In response, Counsel simply acknowledged that he did not object, saying, ***"again, I don't recall, but I did not."*** He admitted that the mother gave no testimony indicating any other basis for knowing the number of text communications that took place other than these cell phone records. PCR p. 28, ll. 9-22.

The State's case against Petitioner was far from overwhelming. The Victim did not report these alleged incidents until after she got caught in possession of a narcotic drug. She had by her own admission been using Vicodin prior to getting caught by her step-mother. There were no eye witnesses in this case to any inappropriate behavior between Petitioner and the Victim. There was no physical evidence tying Petitioner to these assaults, nor was there any forensic evidence that an assault had even taken place. The State's case relied heavily on the existence of the alleged inappropriate volume of cell phone communication between Petitioner and Victim.

It is Petitioner's position that Counsel was ineffective for failing to make a motion *in limine* asking the trial court to exclude from evidence any records, and testimony concerning the content of records concerning Victim's cell phone account, unless the State presented a witness to properly authenticate those business records. As noted, the lower court ultimately ruled that cell phone records accessed by Victim's mother on the computer were not admissible under the

business records exception to the hearsay rule. That ruling, however, was not made until after Victim's mother had already given significant testimony concerning the content of those records. The Prosecution was allowed to offer further testimony from this witness concerning the content of these records despite them having been ruled inadmissible, due to Counsel's failure to object when this witness first began to testify concerning the content of these records. Counsel was ineffective for neglecting to make a motion *in limine* to avoid the jury ever hearing anything about the records in question until if and when they were found to be admissible following proper authentication of these cell phone records. Counsel admitted that he had a copy of the contested records prior to trial. He could not remember when he became aware of the source of those records. The limited information the State's experts were able to download from Victim's phone was likewise contained in the discovery package. That information was ultimately introduced at trial as State's Exhibits No. 10 and 11, and was introduced during the PCR proceeding as Petitioner's Exhibits 3 and 4. PCR p. 90, l. 20 - p. 91, l. 4. It was clear from the cell phone reports provided in the discovery packet, that the information law enforcement had been able to obtain from Victim's cell phone contained a fraction of the information contained in the T-Mobile records ultimately marked as State's Exhibit 5 for ID at trial.

The discovery materials provided to Counsel gave him reason to explore the question of whether or not the State could properly authenticate the cell phone records found in the discovery materials. For example, the records marked State's Exhibit for ID No. 5, were dated September 29, 2010, Counsel would have known the date Petitioner was arrested from the arrest warrant. PCR Counsel noted that the records of the Clerk of Court reflected that Petitioner was not arrested until November 2, 2010. PCR p. 17, l. 3 - p. 18, l. 17. Thus, Counsel had reason to question the origin of these records based on their date and based upon the fact there was a

glaring discrepancy between the amount of information law enforcement had been able to produce concerning activity on this same cell phone account and what was contained in the T-Mobile records provided, without provenance, in the discovery materials. Counsel was also ineffective for allowing the State to argue its position concerning the admissibility of these records *in the presence of the jury* without objection. App. p. 124, l. 19 - p. 126, l. 10. Had Counsel filed a motion *in limine* asking the trial court to prohibit the State from introducing any cell phone records which were not obtained from T-Mobile and properly authenticated under Rule 803(6), SCRE, the jury would never have heard the discussion concerning these cell phone records. Counsel exacerbated the error by neglecting to object the first and every time the mother began to testify to the content of these records. Counsel further compounded the prejudice arising from this omission by neglecting to request that he be heard on his objection to the introduction of the printed records *outside the presence of the jury*. It was the trial judge who interrupted the discussion concerning the admissibility of these records and instructed the jury to retire to the jury room. App. p. 124, l. 19 - p. 126, l. 10. As a result of Counsel's error, the jury was not removed from the courtroom until after the Prosecutor had made a lengthy argument in favor of the reliability and admissibility of these records.

Respondent will likely argue that Counsel would not have wanted to make a motion *in limine* concerning these records for the reason that the motion itself may have provoked the State to obtain a witness to supply the authenticating testimony required by Rule 803(6), SCRE. This argument overlooks how unlikely it would have been for the State to have been able to procure such a witness from the cell phone provider on such short notice. Additionally, the record of the PCR hearing reveals that the more likely explanation lies in Counsel's apparent belief that the mother could testify to the content of these records regardless of whether the records themselves

were found to be admissible. App. p. 15, l. 25 - p. 20, l. 5. As a practical matter, if Counsel was going to allow the mother to testify to her recollection of what she read in these records, he may as well have not challenged the records at all.

South Carolina law clearly indicates that Counsel's understanding of the admissibility of the mother's testimony concerning the content of the cell phone records was erroneous. While the plain language of Rule 803(6) allows for the admission of business records which are properly authenticated by testimony of the custodian, or other qualified witness, the exception to the hearsay rule found at Rule 803(6), SCRE, does not apply to admit live testimony offered to prove the contents of a record containing hearsay when that record *is not admitted into evidence. Deep Keel, LLC v. Atlantic Private Equity* Group, LLC, 413 S.C. 58, 773 S.E.2d 607 (2015). Where the witness's testimony addressed a conclusion based only on statements he read in those documents, his testimony was offered to prove the truth of the statements made by the witness and the Court of Appeals found his testimony was inadmissible hearsay. While the *Deep Keel* case was decided after Petitioner's trial, the decision of the Court of Appeals rested on its earlier decision in *Twelfth RMA Partners, L.P.* v. *National Safe Corp.*, 335 S.C. 635, 518 S.E.2d 44 (Ct App 1999), wherein the court recognized that a person is a "qualified witness" under the meaning of Rule 803(6), if the testimony conveys information from a person "with knowledge" *at the time the records were created.* Id, 335 S.C. at 642, 518 S.E.2d at 48. Victim's mother clearly was not in possession of knowledge concerning the content of the record in question at the time the record was created.

In *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987), this Honorable Court addressed an appeal from a General Sessions ruling concerning the application of the business records exception to the hearsay rule to evidence offered in a criminal trial. In the *Rich* decision, this

Court relied on *State v. McFarlane*, 279 S.C. 327, 306 S. E.2d 611 (1983), for the fact that the exception to the hearsay rule found in the business records exception did not absolve the offering party from the usual requirements of authentication. South Carolina case law provides that an individual qualified to testify concerning the content of a business record must be conveying information from a record of which he had knowledge at the time the record was created. *Twelfth RMA Partners, supra.* Victim's mother clearly would not have qualified as an authenticating witness under Rule 803(6). Accordingly, her testimony concerning data which was directly drawn from these cell phone records was inadmissible hearsay. Her testimony was offered for the truth of the matter asserted inasmuch as this witness repeatedly asserted facts concerning the volume of text communications between Petitioner and her daughter based upon statistical information she acknowledged came from those records. As in *Rich, supra*, this witness "should not have been allowed to testify about data contained in an unauthenticated document." 293 S.C. at 174, 359 S.E.2d at 282.

Petitioner submits that he has met his burden of proof concerning the fact that Counsel was ineffective for neglecting to file an appropriate motion *in limine* prohibiting the Prosecution from introducing testimony concerning these records until such time as they had been properly authenticated. Any argument that Counsel would not have wanted to file such a motion for fear that he would prompt the Prosecution to produce such a witness, is simply not supported by this record. There were, as noted above, telltale signs that the records in question may not have come directly from the cell phone service provider. The fact that Counsel was not appropriately concerned about the jury hearing about the content of these records is apparent from Counsel's failure to raise any objection to the mother's testimony concerning the data she obtained from those very records. It is obvious from Counsel's PCR testimony that he did not adequately

research the law concerning the business records exception to the hearsay rule prior to Petitioner's trial in anticipation of the State's predictable desire to introduce these records.

The prejudice to Petitioner arising from these errors and omissions by Counsel cannot be overstated. The weight of the entire case for the Prosecution rested almost entirely on the credibility of Victim. The only other evidence produced by the Prosecution which even arguably tended to support the State's theory of the case, was the existence of what was characterized as an abnormal level of communication between Victim and Petitioner, a close family friend, by text message. Due to Counsel's deficient performance, the State was able introduce testimony from the mother concerning the fact that there were hundreds of text messages between her daughter and Petitioner during September, 2010. Because of the manner in which Counsel handled the legal debate concerning these records, the jury was left to infer that there were in fact cell phone records available which supported the mother's assertions, but that the defense had succeeded in keeping that information out of evidence.

Ironically, due to the deficient manner in which Counsel handled the issues surrounding these cell phone records, the State ultimately ended up with the best of both worlds. The mother was able to testify that these records revealed that hundreds of text messages had been sent between her daughter and Petitioner in the month of September, 2010. While the jury heard this testimony, without objection, they did not have for their review a copy of the cell phone records in question. Those records were ultimately marked as State's Exhibit No. 5, for ID only, after being excluded from evidence. While those records would have indicated that there were hundreds of individual text transmissions between Petitioner and Victim during this time period, a review of the records would have demonstrated the fact that the emphasis placed on the *number of transmissions* was extremely misleading. For example, *a string of a dozen* text transmissions

within a few minutes, would indicate *a single* short conversational text exchange between two parties and would not be the equivalent of 12 separate conversations. When these records are analyzed in terms of how many groups of texts going back and forth between Victim and Petitioner took place in the space of mere minutes, it is readily apparent that the raw numbers, concerning the number of text transmissions, do not fairly reflect the duration and frequency of these communications between Petitioner and his alleged Victim. In addition, a review of the records themselves would have revealed the fact that many, if not the majority, of these text conversations were in fact initiated by the Victim, not Petitioner.

For all the above reasons, Petitioner respectfully submits that he met his burden of proof in the PCR Court with regard to his allegations addressing the deficient representation he received in connection with the issues in his case relating to Victim's cell phone records. Petitioner respectfully submits that he should have been granted relief on these grounds.

C.
Questions Presented IX and X
Trial Counsel's Failure to Make Proper Objections and Motions Concerning Revelations that Multiple Jurors Were, or Appeared to be, Sleeping during Petitioner's Trial.
Original Application, Allegations 1,2 and 4;
First Amended Application, Allegations No. 5, 15

Early in Petitioner's trial, the State informed the Court that their Victim Advocate had informed the Prosecution that a juror on the front row was taking a nap during Petitioner's trial. The Prosecution asked that the Court address the issue and noted that the following day the jury would be hearing lengthy testimony all day long. Both Counsel and the State deferred to the Court's judgment on how to address the problem, but joined in a request that the jury be admonished. The following day the trial judge admonished the entire jury panel concerning how important it was to pay attention and remain alert. The Court also asked that everyone pay

attention and make note if "your neighbor" is having trouble focusing. The Court instructed the jury that if they noticed a fellow juror having trouble focusing ***"you can certainly maybe assist them in maintaining alertness throughout the trial."*** App. p. 103, l. 9 - p. 104, l. 8.

After a significant amount of testimony had been heard, the Prosecutor once again advised the Court that several people kept bringing it to her attention that ***"a certain juror has continued to nod off."*** The Prosecutor asked that the Court bring that juror back and question him concerning the fact that he was shutting his eyes during the testimony. Counsel indicated that he had not observed the problem with this juror, but admitted he may have been too focused on what he was doing to notice. He acknowledged that Petitioner had written him a note saying that ***"it was more than one person"*** who appeared to be sleeping. The Court questioned one juror, Franklin Lincoln, concerning this issue. He responded that he was ***"just kind of tired."*** He claimed he was ***"paying attention but my eyes have been messing with me."*** He claimed, ***"I wasn't sleeping, I wasn't sleeping, but my eyes were closed, I was paying attention."*** App. p. 246, ll. 15-16. Counsel was asked if there was anything further he wish to add on this issue, and he said ***"no, your honor, that's sufficient."*** The trial judge then ruled that this juror had not been engaged in any kind of "juror misconduct" and noted that the juror had stated that he had heard all the testimony. App. p. 247, ll. 1-18. Despite his client's note, Counsel did not ask that the entire jury panel be questioned concerning whether any of them were having difficulty remaining awake during the trial testimony. Juror Lincoln was not admonished that he needed to not only *listen* to the testimony, but *watch* the witnesses as they presented their testimony. Counsel did not request that the Court investigate further to determine whether any of the other jurors were having difficulty remaining awake during Petitioner's trial. During the jury instructions given at the trial, this jury was instructed concerning its role in deciding the

credibility of the witnesses. App. p. 491, l.10 - p. 492, l.22. The Trial Court referenced earlier instructions given to them at the beginning of the trial concerning their role in determining witness credibility. In that earlier instruction, the Court had expressly instructed the jury concerning some of the factors that they could take into account in determining the credibility of witnesses. Among those factors, the jury was instructed that, ***"you can consider their demeanor on the stand."*** App. p. 45, l. 14 - p. 46, l. 9.

Counsel's PCR testimony indicates that he recalled the incident involving the sleeping juror and remembered the issue being raised again later in the trial. Counsel admitted that someone listening to testimony with his eyes shut, ***"would certainly shut off any visual cues in,"*** but offered no explanation for why he had not asked for the juror in question to be replaced, or, for a mistrial. Counsel did not offer any explanation for why he did not request that *the entire jury* be questioned concerning whether anyone was having difficulty remaining awake. PCR p. 12, l. 13 - p. 15, l. 22. It is significant to note that it was the Prosecutor who actually brought to the Court's attention the fact that ***"my Victim's family and other individuals actually tell me"*** about one certain juror who continues to nod off during the trial. App. p. 242, l. 20 - p . 243, l. 8. Petitioner now respectfully submits that Counsel was ineffective in the manner in which he handled the subject of one or more jurors sleeping, or at minimum listening to testimony with eyes closed, during his trial.

Petitioner asserts the Counsel's representation on this issue fell short of the standard of reasonable professional assistance of counsel required of attorneys representing clients in criminal matters in South Carolina. For that reason, Petitioner argues that the PCR Court should have granted his Application for PCR on these grounds

D.
Question Presented XI

Failure to Investigate use of Petitioner's Cell Phone as Tool for the Defense.
Original Application, Allegations 1,2 and 4;
Amended Application, Allegation 16

Counsel acknowledged that Petitioner's cell phone was taken from him at time of his arrest and was put in with his other personal effects at the jail. When asked if he considered using Petitioner's cell phone to establish the innocent nature of Petitioner's text communications with Victim, Counsel recalled discussing with Petitioner what might be seen on his cell phone. Counsel admitted that Petitioner at no point indicated that there was anything in any of his text messages with the Victim to be afraid of. PCR p. 29, ll. 4-25. Counsel could not recall whether he ever discussed with Petitioner whether his cell phone was a "smart phone" or whether his phone may have stored text messages for a long time. He recalled discussions with Petitioner concerning the relationship he had with the girl who was accusing him of these things. He acknowledged that, ***"he certainly said it was innocuous"*** but couldn't recall discussing specific points about the phone with Petitioner. PCR p. 30, ll. 1-25. Counsel offered no explanation for not pursuing the use of Petitioner's phone to support his claim of the innocent nature of his relationship with the Victim. At the time of the PCR proceeding, that phone was not available for inspection. Given the emphasis the State placed on the text message communications between Petitioner and Victim, Petitioner submits that Counsel was ineffective for neglecting to discuss using information potentially retrievable from his cell phone to combat the negative inferences the jury might draw from the testimony the State was likely to produce concerning the volume of text communications between Petitioner and Victim. Petitioner now asserts that the PCR Court should have granted relief on this ground.

E.
Questions Presented XII and XIII
FAILURE TO OBJECT TO IMPROPER IMPLICATION THAT PETITIONER HAD MADE ADMISSIONS WHICH PROMPTED HIS ARREST.

Original Application, Allegations 1,2 and 4;
Amended Application, Allegations 18 & 19

Investigator Pop testified that despite having otherwise completed her investigation in this case, an arrest warrant for Petitioner's arrest was not obtained *until after her interview with him* on November 2nd. App. p. 232, ll. 10-23. She testified that she did not get a warrant and arrest Petitioner until *after* her interview with him. App. p. 232, l. 10-22. Her testimony *did not* inform the jury that Petitioner had consistently denied any improper relationship or physical contact with Victim. She did not testify to anything said by Petitioner during the interview. Counsel acknowledged that Petitioner had always described his relationship with Victim as innocuous. Petitioner was listed in the contacts on Victim's phone as "Big Brother." App. p. 235, l. 19- p. 237, l. 4. In his PCR testimony, Counsel was questioned concerning Investigator Pop's testimony in which she asserted that she did not get a warrant for Petitioner until after her interview of him. When asked if he considered objecting to this testimony on the ground that it improperly raised the inference that Petitioner had made admissions during the interview which prompted his arrest, and where that inference was totally inconsistent with the evidence in the discovery and before the Court, Counsel responded, ***"I don't recall thinking that. It certainly perhaps could. I didn't see that as the issue. I get that in almost every trial, and I guess I should object in every trial, where they talk to him. He was going to be arrested before she ever talked to him. No, I don't recall thinking that, and I certainly didn't make the objection."*** PCR p. 31, ll. 18-24.

After **Investigator Pop's** direct testimony, Counsel did not cross-examine her concerning the fact that Petitioner's statement to law enforcement had in fact had nothing to do with the decision to arrest, nor did he question her concerning the fact that Petitioner had vehemently denied any improper contact with the Victim. When questioned about these omissions during

the PCR hearing, Counsel stated, ***"[N]o, that just wasn't – - it is a point, but that wasn't a point I was pursuing. ...I do not recall. It would be very apparent in the transcript." PCR p. 31, l. 25- p. 32, l. 10.*** Petitioner respectfully submits that Counsel was deficient in his representation of Petitioner where he failed to object to this testimony which implied that the decision to arrest Petitioner was not made until after his interview by Investigator Pop. Her testimony could easily have been erroneously interpreted by the jury to reveal Petitioner made admissions during this interview. Counsel was ineffective for neglecting to object to this testimony. At minimum, Counsel should have cross-examined this witness in such a manner as to establish that Petitioner had made no admissions of improper conduct with Victim and had always vehemently denied any sort of improper relationship with Victim; a close friend's daughter. In a case that was a true, "she said, he said" situation, any suggestion that Petitioner had said things in his interview with law enforcement which cinched their decision to arrest him, was prejudicial. That implication was totally unfounded. It was the obligation of Counsel to object and to set the record straight. Petitioner most respectfully asserts that he PCR Court erred in failing to grant him relief on these grounds.

F.
Questions Presented XIV, XV and XVI
FAILURE TO CROSS-EXAMINE STATE WITNESS, ASHLEY, REGARDING POTENTIAL IMPEACHMENT INFORMATION.
Amended Allegations 20, 21 &22

Ashley admitted giving Victim Vicodin; a narcotic pain pill. She testified, on direct examination, that she and Victim had ***"gotten in trouble"*** over the incident. Counsel did not question her concerning the legal consequences she could have faced as a result of her distribution of this controlled substance to Victim. Neither did Counsel question this witness concerning what consideration she had been given on that potential charge in exchange for her

testimony. When questioned concerning his failure to pursue this line of inquiry, Counsel initially brushed off the question with the blanket claim that such a charge just would not have been pursued against someone in Georgetown County for ***"either possessing or distributing it, handing it to somebody."*** He admitted that he did not interview Ashley prior to Petitioner's trial, and acknowledged she was not questioned about this subject at trial. Counsel admitted that he had no basis for knowing whether or not this witness had been told she could be charged for distributing Vicodin to Victim. PCR p. 32, l. 18-p. 33, l. 22.

An accused's right to confront all the witnesses against him is fundamental. Cross-examination of government witnesses has been recognized ***as "the principal means by which the believability of a witness and the truth of his testimony are tested."*** *Davis v. Alaska*, 415 U.S. 308, 316 (1974). In *Delaware v. VanArsdall*, 475 U.S. 673 (1986), the high court recognized that infringement on the accused's right to cross-examine a witness against him, like all other Confrontation Clause errors, is subject to harmless error analysis under *Chapman v. California*, 386 U.S. 18 (1967). It is well established law that an accused is entitled to cross-examine a witness against him with evidence of consideration given to that witness in exchange for their testimony. *Gigglio v. United States*, 405 U.S. 150 (1972). This witness's testimony was prejudicial to Petitioner inasmuch as she was the only witness that claimed Victim told her about the alleged misconduct by Petitioner *before* Victim got in trouble for drug possession. Petitioner respectfully submits that the PCR Court should have granted relief on this ground.

G.
Question Presented XVII
FAILURE TO QUESTION VICTIM CONCERNING HER THEFT OF VICODIN FROM HER FATHER
Original Application, Allegations 1,2 and 4;
Amended Application, Allegation 23
App. p. 144, l. 23 - p. 145, l. 22; App. p. 164, ll. 9-25; App. p. 172, l. 23 - p. 174, l. 4, App. p. 174, l. 25 - p. 175, l. 6; App. p. 272, ll. 1 - 22.

Counsel admitted that he did not question Victim concerning the fact that she had not only gotten Vicodin from Ashley, but had also been stealing that same drug from her mother's fiancé; also referenced as her step-father. He admitted that he did know why he didn't question Victim concerning that issue, but testified that he felt there is nothing to be gained by attacking a young victim. PCR p. 33, l. 25- p. 35, l. 18. The trial record in this case shows that the only real defense strategy employed by Counsel was to emphasize that Victim never contemporaneously reported her claims and only ultimately did so after getting in trouble for possession of a Vicodin pain pill. Through the testimony of the parents, it is reported that Victim got in trouble for possession of a single pill and a cigarette. App. p. 81, l. 8 – p. 84, l. 18; App. p. 115, l. 14 – p. 116, l. 17; App. p. 139, ll. 4 – 19. The mother denied knowing whether there were any other instances where Victim had Vicodin. She admitted asking Victim if this was an ongoing issue, but oddly claimed she could not remember her daughter's answer. App. p. 139, l. 20 – p. 140, l. 4. Testimony from Petitioner's wife, in whom Victim often confided, indicated that Victim was getting this same pain medication from multiple sources and that the single pain pill her father's wife had caught her with was not an isolated incident. App. p. 272, l. 2 – p. 274, l. 23.

Given the defense strategy to demonstrate that Victim never made these claims against him until she got caught with Vicodin, it was crucial to establish just how much trouble she was facing, not just with her parents, but potentially with law enforcement as well. It was crucial that Counsel question her about the fact that she was getting Vicodin from her step-father's prescription, as well as from Ashley, in order to establish the seriousness of "the trouble" she was in. The defense needed to emphasize the very real possibility that her claims were fabricated to shift attention away from her drug use and to cast herself in the more sympathetic role of victim. Her admission that she had in fact been using Vicodin would have, in and of

itself, given the jury another reason to question the accuracy of her recall concerning the events in question, in addition to her strong incentive to lie to cover up her own wrong doing. Petitioner submits Counsel's failure to cross-examine Victim concerning her theft of Vicodin from her step-father was highly prejudicial and therefore, could not constitute harmless error. The PCR Court erred in failing to grant relief on his ground.

H.
Question Presented XVIII
TRIAL COUNSEL'S FAILURE TO PURSUE THE QUESTION OF WHO DELETED INFORMATION ON VICTIM'S PHONE AND WHY.
Original Application, Allegations 1,2 and 4;
Amended Application, Allegation 25

During the PCR hearing, Counsel recalled the testimony of Investigator John Gregory concerning the fact that the type of phone involved has a lot to do with whether or not they can retrieve deleted items. He testified that he did not recall that the information Investigator Gregory had been able to retrieve from Victim's phone contained none of her communications with Petitioner. PCR p. 35, l. 19- p. 36, l. 9. Investigator John Gregory would subsequently testify, *"the data recovery off the phone was very limited in this data recovery report* ***so it was not able to give us, you know, everything that had been deleted or anything like that."*** App. p. 232, ll. 1-4 (Emphasis added). The two State's Exhibits containing the limited information Investigator Gregory was able to download from the Victim's phone reflect suspiciously little data particularly in light of the amazing volume of text messaging the records the State tried to introduce reflected. *See*, State's Trial Exhibits No. 10 and 11, introduced during the PCR hearing as Petitioner's Exhibits 3 and 4 and State's Trial Exhibit No. 5, for ID only. Counsel's explanation for failing to cross-examine State witnesses concerning who deleted the alleged large volume of text communications between Victim, and when and why it was done, was as vague as

the majority of his testimony. PCR p. 36, l. 19- p. 37, l. 1. He did concede that getting to the bottom of the question of who deleted all of the text messages between Victim and Petitioner, and why it was done, could have been a valuable tool for the defense. PCR p. 37, ll. 2-7. Victim's mother testified that she took her daughter's cell phone and iPad away from her when she got in trouble for possessing a cigarette and a pain pill. App. p. 115, l. 14- p. 119. l. 8. Victim expressly denied getting off restriction after she reported the incidents involving Petitioner stated that she had ***"no phone, no iPad, nothing"*** for the two months she was on restriction. App. p. 166, l. 25- p. 167, l. 4. No one however, questioned the Victim, concerning when, why and by whom, thousands of text messages had been deleted from her phone.

In order to fairly assess the potential prejudice arising from this issue, it is necessary to closely examine the trial record and the exhibits from the trial. Victim's mother testified that after she found out Victim's stepmother had caught her daughter with a cigarette and a pain pill, she put her on restriction and took away her cell phone and iPad. She said that she looked through her daughter's phone to see who all she had been communicating with. She testified that Victim, ***"being a typical teenager"*** had erased most of it from her phone. She did not state how she knew data had been deleted from Victim's cell phone. The mother testified that she next accessed the cell phone records for her daughter's phone number on the computer and was amazed to see the number of text messages between Victim and the Defendant. App. p. 115, l. 14 - p. 119, l. 8 and App. p. 132, l. 13 – p. 134, l. 4. She testified to seeing hundreds of text messages between Victim and Petitioner in the cell phone records she accessed. App. p. 132, l. 17 - p. 133, l. 13. She acknowledged that in a typical month her daughter had ***"thousands"*** of phone calls and text messages on her account. App. p. 138, l.7 – p. 139, l. 3. On redirect, the Prosecution asked the mother whether Victim was exchanging hundreds of text messages with

any other 30-year-old man. The mother responded, ***"no"*** to that question. App. p. 142, l. 22 - p. 143, l. 6. Counsel did not question the mother concerning how she knew that her daughter was the one who had erased large volumes of data from her phone. Counsel did not question this witness as to whether *she herself* had personally deleted any additional text messages on her daughter's phone. Neither did Counsel question how she supposedly knew that none of the thousands of other text messages on her daughter's account reflected communications with other older men. The mother did testify that the record she was able to access *did not* provide the content of the communications reflected on the statement. She confirmed that the only way she was able to identify the number of incoming and out going text messages between her daughter and Petitioner was because she knew his cell phone number. App. p. 121, l. 18 – p. 122, l. 17. She was not even asked if she recognized any of the other phone numbers reflecting extensive contact with her daughter during the same time period. Petitioner asserts that he should have been granted relief on these allegations.

I.
Questions Presented XIX, XX, XXI and XXII
"FORENSIC INTERVIEWS"
Amended Allegation 26, 27, 28 and 10

State witness, **Dianne Nordeen** testified that she was employed by the Children's Recovery Center as a ***"Forensic Interviewer."*** She was not qualified as an expert witness of any sort prior to her testimony. She testified generally concerning the concept of a ***"forensic interviewer,"*** however, she did not testify to her educational background or any training she had received which qualified her to conduct such interviews. App. p. 201, l. 9- p. 213, l. 21. Throughout Petitioner's trial multiple references were made to witness Nordeen as a ***"forensic interviewer"*** and to the ***"forensic interview"*** conducted in this case. Counsel was ineffective for neglecting to object to the characterization of witness Nordeen as a ***"forensic interviewer"*** and to

the interview she conducted as a ***"forensic"*** interview. It is Petitioner's position that this characterization of this witness, and the interview she conducted, improperly bolstered the credibility of this witness's testimony by attributing to her, and the interviews she conducted, a level of scientific discipline, methodology, technique and education totally unsupported by the record in Petitioner's case. The very use of this label likely caused the Petitioner's jury to attribute to her testimony, and her previous recommendations concerning Victim, a level of expertise for which there was no foundation. The Oxford Dictionary defines the adjective form of the word forensic as, "of, relating to, or denoting the application of scientific methods and techniques to the investigation of a crime." The noun, is defined as, "scientific tests or techniques used in connection with the detection of crime." The State introduced nothing in qualification of this witnesses in connection with the subject of so-called "forensic interviews" which in any way supported the assertion that there was a basis for assigning scientific reliability to this process or the individuals associated with conducting the interviews in question. For that reason, Counsel was deficient in neglecting to object to the use of this powerful phrase at Petitioner's trial. This label was repeatedly used by State witnesses in a manner which suggested a level of heightened reliability and scientific accuracy which was simply not supported by the evidence. It is significant to note the number of times this jury heard this term used at Petitioner's trial in connection with his accusor's interview for this organization. The term ***"forensic interview"*** was used twenty-nine (29) times, ***"forensic interviews"*** was used two (2) times, ***"forensic interviewing"*** appears once (1) and the term ***"forensic interviewers"*** was used five (5) times. Therefore, there were a total of thirty-seven (37) uses of the word ***"forensic"*** in connection with this interview process.

The prejudice arising from the use of the term ***"forensic"*** when attributed to this witness and her work was no doubt exacerbated by several additional errors by Counsel. Counsel neglected to object to when the Prosecution characterized the person who conducted the Victim's interview at the Children's Recovery Center as ***"the therapist or doctor"*** who was the only person in the room with the Victim when she was interviewed, despite the fact that there was no evidence that Nordeen was either a therapist or a doctor. App. p. 173, l. 24- p. 174, l. 1. Counsel reinforced the prejudice arising from the State's misleading use of the term ***"forensic"*** in connection with the Victim's interview by witness Nordeen, where he himself referenced the person who interviewed Victim at the Children's Recovery Center as a ***"forensic interviewer."*** App. p. 211, ll. 12-16.

Counsel neglected to object to the testimony of Dr. Carol Rahter, the medical director at the Children's Recovery Center, concerning her own training as a ***"forensic interviewer"*** where this record clearly established that she *was not* the individual from the Center who conducted the Victim's interview in this case and there was no evidence that Nordeen was equally trained. App. p. 250, l. 5- p. 251, l. 7. This testimony was totally irrelevant to the education, training and experience level of Nordeen, and should have been objected to as both irrelevant and prejudicial where the jury may have inferred that Nordeen must have been equally qualified in order to perform the same function.

Counsel failed to object to the mother's testimony that after Victim's interview at the Children's Recovery Center, the Center recommended that she receive counseling where said testimony could have been interpreted by the jury to infer that those dealing with her daughter at the Center *believed her statements to them to be truthful.* Evidence that such an interviewer believed a complaining witness has been found to be improper. App. p. 136, l. 1-p. 148, l. 5. *State*

v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 49, 499-500 (2013). As previously argued, witness Nordeen was allowed to testify, without objection, that the Victim identified Petitioner as the person who sexually assaulted her.

For all these reason, Petitioner asserts that he has met his burden of proof with regard to his allegation that Counsel was ineffective for failing to object to the use of the term ***"forensic"*** and ***"forensic interview"*** in connection with the interview process and the individual who conducted Victim's interview. The PCR Court clearly erred in failing to grant relief on these allegations. The law in this area is now abundantly clear and Petitioner's judgment and sentence should have been reversed on these grounds.

J.
Questions Presented XXIII
FAILURE TO OBJECT TO STATE'S OPENING ARGUMENT.
Original Application, Allegations 1,2 and 4;
Amended Application, Allegation 1

The State's opening argument set the groundwork for portraying the Petitioner as a predator who began victimizing the young girl involved in this case beginning when he first met her when she was 13. That assertion is not supported by the trial record. Although the statement in question was made before the introduction of testimony, Counsel could and should have known from the discovery materials that the chronology documented therein did not support that claim. The testimony of Victim's stepfather verifies that Petitioner was a close family friend, and that their two families did a great deal together before Victim ever made the accusations which resulted in criminal charges against Petitioner. His testimony indicates that Petitioner lived only about a half mile away from Carter's house, and that he had a "daily relationship" with the entire family. App. p. 59, l. 4 - p. 68, l. 8. Petitioner would respectfully submit that this inaccurate and prejudicial statement by the Prosecutor encouraged the jury to view Petitioner as

an opportunistic predator. The argument was prejudicial in that the jury could easily have inferred from these remarks that the prosecution believed that Petitioner initiated his friendship with the step-father in order to gain access to Victim.

In his PCR testimony, Counsel said he did not recall this opening argument. He acknowledged having read the argument in the transcript of the trial proceedings and admitted that the statement was not consistent with the evidence as it had been revealed to him in pretrial discovery materials. When asked if he would have objected to this argument if he had noticed this particular statement, he responded ***"yes, if I had thought that is what was being implied, that from the day he met her he was doing inappropriate things, certainly."*** PCR p. 5, l.20 - p. 8, l. 1. Petitioner submits that the statement was plain and required no particular interpretation. It submitted in unequivocal terms that Petitioner began abusing this girl as soon as he met her; as claim which was not supported by the evidence and should have been objected to by Counsel. Relief should have been granted on this allegation in the PCR Court.

K.
Question Presented XXIV
TRIAL COUNSEL'S INTERJECTION OF UNSUPPORTED IMPLICATION THAT VICTIM WAS SUICIDAL
Original Application, Allegations 1,2 and 4;
Amended Application, Allegation 29

During Counsel's direct examination of Petitioner's wife, she testified to her knowledge that the Victim had been taking Vicodin pain pills which she got *both* from her best friend, Ashley and her from her step-father. In this portion of her testimony, this witness indicated that she had a close relationship with Victim and that during that time period, Victim confided in her concerning various matters including what was going on in her home. She said they communicated like siblings or friends.

This witness testified that Victim once called her from Ashley's house and told her that she was up on the roof, high on pills and was going to jump off. App. p. 271, l. 2 - p. 274, l. 16. During this testimony, Counsel asked, ***"problems in her life, and even at least suggesting she was open to the idea of suicide, you never went to her mother or step-dad?"*** This witness testified that she kept Victim's confidence because that was what she wanted. App. p. 274, ll. 17 - 23. There was no previous testimony from this witness to support the inference that her threat to jump off the roof was indicative of suicidal intent. Victim did not testify to the incident in question and was never questioned about it by Counsel.

Petitioner asserts that there were other explanations for the incident testified to by Petitioner's wife. One of the most obvious possible explanations being the reckless behavior of a teenager high on drugs and thinking she could fly. Counsel's actions in interjecting an assertion that Victim was suicidal, constituted ineffective assistance of counsel where this statement was totally unsupported by the record and could readily have been interpreted by Petitioner's jury as evidence that Victim was an emotionally distraught victim of sexual abuse. He respectfully submits he should have been granted relief on these allegations.

L.
Question Presented XXV
FAILURE TO ADEQUATELY REPRESENT PETITIONER DURING SENTENCING.
Amended Allegation 34

As is typical in a sentencing proceeding, the Prosecutor at this trial reviewed Petitioner's prior criminal record for the presiding judge. App. p. 510, l. 4 - p. 513, l. 2. During that summary of Petitioner's very limited criminal record, the State reported his prior judgment for breach of trust with fraudulent intent and particularly emphasized his judgment for assault and battery of a high and aggravated nature concerning an incident in 2004 for which he was sentenced on March 15, 2006. The State not only informed the judge of the existence of this

prior judgment, but advised the Court that the lead investigator in the current case, Ginger Pop, had investigated the Lexington County ABHAN case and had obtained a copy of the incident reports connected with that case. The Court was informed that Petitioner was originally charged with criminal sexual conduct with a minor. The State then proceeded to urge the Court to sentence Petitioner harshly noting that even though Petitioner had pleaded to the lesser charge of assault and battery of a high and aggravated nature, the original offense did involve a minor and that the existence of this prior ***"raised the level of concern for the State in regards to whenever I was in plea negotiations and whenever I was dealing with how to resolve this case, just the idea this, he had pled guilty to something involving indecencies with a female which fits the ABHAN from 2006, of course that raised my concerns greatly."*** App. p. 510, l. 11 - p. 511, l. 8. The Prosecutor went on to state,***"[s]o, the State definitely has a concern about this particular defendant and his propensity to commit such a crime."*** App. p. 512, ll. 22-24.

In his own remarks to the Court, Counsel made a vague reference to the fact that, ***"from the little bit he knew"*** the facts in the ABHAN case were different from the case before the Court. App. p. 515, ll. 15 - 25. He did not advise the Court of just how different the facts in that case were. In sentencing Petitioner to fifteen (15) years for Lewd Act on a Minor, the maximum sentence for that offense pursuant to S.C. Code Ann §16-15-140, the Court expressly noted that it was ***"taking into account the jury's verdict and the circumstances of his prior record".*** App. p. 516, ll. 12 - 15. During the PCR hearing, Counsel was questioned concerning why he did not distinguish the facts in the 2004 incident from those before the Court in the 2010 trial. His response was to say that he felt the judge could ***"read between the lines"*** because the Criminal Sexual Conduct with a minor charge had been reduced to ABHAN. He did ultimately admit however, that there were many factors which might come into play in the decision to reduce a

charge and that the fact of the reduction, in and of itself, would not have given the judge any idea as to why the Prosecutor in that case ultimately decided to reduce the charge. Counsel admitted seeing two incident reports concerning the Lexington County ABHAN case in the discovery materials. Those incident reports were introduced as Petitioner's Exhibits No. 1 and 2 during the evidentiary hearing.

In his PCR testimony Counsel acknowledged that the Lexington County charge arose out of an incident where Petitioner and his wife met a girl in a bar who ended up going home with them and having a consensual threesome. The incident reports indicated that Petitioner and his wife subsequently found out that the girl was under 17. App. p. 65, l. 14 - p. 68, l. 18. Petitioner's Exhibit 2 documents the fact that the victim in that case ***"stated that she was not forced in any way and that she did willfully participate, however, she was scared not to."*** These two incident reports revealed that the Lexington County incident took place in June, 2004, approximately ***six years*** before the alleged conduct addressed in Petitioner's current case. Thus, that incident was not only factually distinguishable from the one before the Court, but additionally the incident itself took place when Petitioner was much closer to the age of the young woman in the previous case. The Solicitor during the sentencing phase of his trial, although technically truthful, were misleading in that without further explanation, they would lead the listener to believe that Petitioner had previously engaged in conduct factually similar to that for which he had just been convicted. Petitioner respectfully acknowledges that any sexual activity with a minor is punishable by law regardless of whether it was consensual. The distinctions between the factual circumstances surrounding the Lexington County charge, and the facts in this case, are however significant, and Counsel was deficient for neglecting to make

those facts known to the sentencing judge. The record establishes that the sentencing judge did in fact take ***"the circumstances of his prior record"*** into account in sentencing Petitioner.

For all the above reasons, Petitioner respectfully submits that he has met his burden of proof with regard to his claim that Counsel was deficient in his representation of Petitioner during the sentencing phase of his trial. Counsel has offered no tactical or strategic explanation for his failure to mitigate the damage done by the State's emphasis on his prior Lexington judgment for ABHAN. Where the record confirms that this information was taken into account in sentencing Petitioner to the maximum sentence for his judgment, relief should have been granted on this allegation.

M.
Question Presented XXVI
IMPROPER IMPEACHMENT OF PETITIONER CONCERNING DETAILS OF HIS PRIOR RECORD
Original Application, Allegations 1,2 and 4;
Amended Application, Allegation 35

It is well-established law in South Carolina that when a witness is impeached with his prior record, he may not be questioned about the details of offenses used for impeachment purposes. *State v. Bryant,* 369 S.C. 511 633 S.E.2d 152 (2006). On direct-examination, Petitioner had acknowledged that he had a prior judgment for breach of trust with fraudulent intent and a prior judgment for assault and battery of a high and aggravated nature. App. p. 363,ll. 5 - 11. On cross-examination, the Prosecution asked Petitioner, ***"Mr. Love, let's be clear. Your prior convictions make you a felon, isn't that correct, you're a convicted felon?"*** Petitioner accurately responded, "[c]orrect, for the breach of trust, yes, ma'am." App. p. 363, l. 17 - 21. Thus, Petitioner had already admitted on direct examination the full scope of information permitted for impeachment purposes pursuant to Rule 609(a)(1), SCRE. Clearly, the only purpose to be served by the State's subsequent cross-examination of Petitioner was to portray

him as a dangerous criminal more likely to have committed the crime for which he was charged because of his status as a convicted felon. It is precisely that type of evidence which is prohibited by the character evidence rule found in Rule 404 (b), SCRE.

Petitioner submits that Counsel was deficient in his representation where he failed to object to this improper line of cross-examination by the State. Counsel acknowledged in his PCR testimony that there was no basis in the rules for questioning a witness about whether a prior conviction is a felony. When asked whether there was any reason why he did not object to this improper line of impeachment, Counsel specifically testified that, ***"there is no reason I shouldn't have done that."*** App. p. 51, l. 2 - p. 52, l. 1.

The credibility of the complaining witness, as compared to the credibility of Petitioner, was the central issue in this trial. The Solicitor attempted it to get Petitioner to acknowledge that his *convictions*, plural, made him a convicted felon. Fortunately, Petitioner was astute enough to respond that his conviction for breach of trust did. App. p. 363, ll. 17-21. The modern definition of a felony under South Carolina law encompasses hundreds of crimes, some of which are relatively minor and do not carry lengthy prison terms. *See*, S.C. Code Ann. §16-1-90. Petitioner would argue however, that when used in the manner it was invoked by the State in his case, it conjures images more consistent with the definitions found in Webster's Dictionary; villain, one who is cruel or evil. Counsel was ineffective for failing to object to this improper line of impeachment by the State. The fact that the State chose to revisit the issue of Petitioner's record in this manner is clear evidence that the State sought not to "impeach" Petitioner, but to portray him as someone likely to be guilty because of his prior record. When questioned about why he did not object to this line of questioning by the Prosecution, Counsel, noted, "[t]he record

is clear, I did not, and I think that is outside of the scope of the rules." App. p. 53, ll. 7 – 25. The PCR Court erred in failing to grant relief on this ground.

N.
Question Presented XXVII
DEFICIENT REPRESENTATION IN CLOSING ARGUMENTS TO THE JURY.
Original Application, Allegations 1,2 and 4;
Amended Application, Allegation 31, A-C

App. p. 456, ll. 7 – 10; App. p. 453, ll. 13 - 28; App. p. 455, ll. 7 – 13 and App. p. 474, ll. 10 - 18.

Petitioner respectfully submits that Counsel's closing argument effectively abandoned his role as an advocate. Throughout Petitioner's trial, Counsel emphasized the fact that Victim did not report any of the actions for which Petitioner was criminally charged until *after* she got into trouble for possession of drugs. A close reading of this trial record shows that the only defense advanced by Counsel, on the charge for which Petitioner was convicted, was the presentation of testimony which invited the inference that this young girl lied about Petitioner's behavior to deflect attention away from her drug use. Petitioner argues that his own lawyer's closing argument effectively argued against the only apparent motive Victim had to lie.[1] App. p. 453, ll. 13-28 and App. p. 455, ll. 7-14. During his closing argument to the jury Counsel came right out and stated ***"there is no logical explanation for it I don't have one for you. I don't have any reason why she would lie."*** App. p. 456, ll. 7-10. Counsel went so far as to advise the jury that he personally just did not believe that Victim getting caught with Vicodin was an explanation for why she would lie about these incidents. App. p. 454, ll. 6-18. Then, as if to compound the prejudice to Petitioner, Counsel went on to note that there had been ***"some testimony that maybe there was [sic] some family issues",*** but expressed the opinion that ***"again it doesn't sound like really any more than normal teenage stuff."*** App. p. 454, ll. 19-21.

[1] Petitioner does not concede that there were no other reasons why Victim may have fabricated these claims, but rather notes that this particular motive should have been obvious to the jury from the testimony presented at his trial.

The credibility of this Victim was the pivotal issue in this case. He urges this Court to recognize that these errors were highly prejudicial to Petitioner and that there exists a reasonable probability that the outcome of his trial would have been different but for Counsel's errors during the closing argument for the defense. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Counsel's deficient closing argument additionally prejudiced Petitioner in that it bolstered the credibility of the Prosecution's subsequent argument that ***"no one has a motive to lie."*** App. p. 474, ll. 10-18. Relief should have been granted where he met his burden of proof with regard to these allegations concerning Counsel's closing argument to the jury, and he established the prejudicial impact of this line of closing argument.

O.
Question Presented XXVIII
Failure to object to improper closing arguments by the Prosecution.
Original Application, Allegations 1,2, 3 and 4;
Amended Application, Allegation 32

It has long been the rule that, "[i]t is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and no part of the evidence to be presented," *Dunn v. United States*, 307 F.2d 883, 885-886 (CA5, 1962); *United State v. Rodriques*, 585 F.2d 1934 (CA5, 1978). Petitioner respectfully submits that the Prosecutor in his case crossed these well recognized boundaries in multiple portions of the State's closing argument and that Counsel neglected to make appropriate objections in response to these improper arguments. *See*, page references above to portions of the record where improper arguments are found.

In every criminal case there is the danger that the Solicitor will compromise his role as a seeking of justice when in the heat of trial he becomes too engrossed in his role as a Prosecutor seeking a conviction, and thereby violates the accused's right to a fair trial. *See*, e.g., *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 6299, 79 L.Ed. 1314 (1935); *People v. Talle*, 111 Cal. App. 2d 650, 245 P.2d 633 (1952); *Rowe v. Commonwealth*, 269 S.W.2d 247 (Ky. 1954); *State v.*

Davis, 239 S.C. 280, 122 S.E.2d 633 (1962). In reversing a now classic case of such prosecutorial misconduct, Mr. Justice Sutherland, in 1935, explained the duties of the prosecutor and the danger of overzealous prosecution. In his eloquent opinion, he warned, "Consequently, improper suggestions, insinuations and, ***especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.*** *Berger v. United States*, 55 S.Ct. 629, 633, 79 S.E.2d. 1314, 1321 (1935). (Emphasis added)."

The errors committed by the Prosecutor in Petitioner's case irreparably prejudiced the Petitioner's right to a fair trial and were not harmless. Counsel failed to protect his client's rights by neglecting to object to the following portions of the State's closing argument in this case. First, the Prosecutor argued that Petitioner was ***"texting Brittany hundreds of times a day."*** App. p. 474, 11. 10-18. There simply was no evidentiary basis for this argument in the trial record of this case. This argument was improper as it argued facts not in evidence.

The Prosecutor essentially invited the jury to find Petitioner guilty based upon his, and his wife's, prior record for a felony. This argument was not only improper, inasmuch as it violated the character evidence rule, but it additionally erroneously implied that Petitioner's wife, a witness for the defense, was a convicted felon as well. Specifically, the Prosecutor stated, "the Defendant Love is a convicted felon, breach of trust over a thousand and assault ***and*** battery of a high and aggravated nature. The structure of this portion of the State's closing argument was such that it suggested Petitioner would be a convicted felon because of *both* his conviction for breach of trust and his conviction for assault and battery of a high and aggravated nature. Assault and battery of a high and aggravated nature was not a felony in South Carolina at the time of Petitioner's trial. By implying that both his prior convictions made Petitioner a felon, the State invited the jury to believe his wife, a witness for the defense, was also a convicted felon. Thus, there are three reasons why Counsel should have objected to this portion of the State's

closing argument. The argument itself obviously invites the jury to convict Petitioner based on his prior criminal record and therefore was improper. The argument also erroneously implied that both Petitioner and his wife had felony convictions and finally, it interjected an important detail about Petitioner's prior record which went beyond the scope of permissible impeachment under Rule 609(a)(1).

The Prosecutor also argued that among the State's witnesses, ***"no one has a criminal record."*** App. p. 14-16. In so arguing, the Prosecution stated facts not in evidence. The State's witnesses were not questioned concerning whether they had prior criminal records. There being no evidence introduced concerning the prior records of the State's witnesses, the Prosecutor clearly improperly bolstered the credibility of those witnesses by advising the jury that ***"no one has a criminal record."*** The prejudice arising from this improper argument is particularly acute where the State effectively argued for Petitioner's conviction based on his prior criminal record. The state improperly argued that on September 11th the Victim's cell phone had been taken away from her for the cigarette and pill that she had been caught with where the record did not support that assertion. App. p. 478, ll. 1 - 10. This portion of the State's closing argument is factually incorrect.

Characterizing statements made by Petitioner's wife as telling him that if he made certain statements she could get ***"caught"*** for perjury where the record in fact indicated that the statement made by her was that, ***"if you say you went with them, I'm going to jail for perjury."*** App. p. 479, l. 21 - p. 480, l. 11. In a phone call recorded from the detention center Petitioner questioned his wife about the accuracy of his memory concerning whether he had gone back out to a bar on September 11th and that she in turn stated, ***"if you say you went with them, I'm going to jail for perjury."*** Her statement, more accurately indicated that if Petitioner second guessed

himself about whether he had gone back out that night, he was going to make her, out to be a liar and that, hence, she was "***going to jail for perjury.***"

The State made improper references to the individual who interviewed the Victim as conducting a ***"forensic interview."*** App. p. 482 ll. 9 - 15. For all the reasons asserted, *supra*, Petitioner asserts that this characterization of Victim's interview by the Center was highly improper, bolstered the credibility of the interviewer and Victim and prejudiced Petitioner where the interviewer was allowed to testify to prior consistent statements of Victim.

State erroneously claimed that Victim was afraid her mother ***"was going to kill her"*** and that ***"she was scared"*** in arguing against Victim having a reason to fabricate her claims. App. p. 484, ll. 20 - 25. This portion of the State's closing argument was improper for two reasons. First, it is factually inaccurate. Victim was quoted by her step-father as saying her mother was ***"going to kill Wayne",*** not her. App. p. 85, l. 25 – p. 86, l. 5. Secondly, the Prosecutor used this inaccurate statement to improperly bolster Victim's credibility by implying that, despite her fear that her mother ***"was going to kill her",*** she told the truth and implicated Petitioner.

The Prosecutor improperly argued that, ***"She had already deleted some things".*** App. p. 480, ll. 3 - 5. While the record reflects that Victim's mother apparently assumed Victim had deleted some things, there was no competent evidence introduced at trial which proved this claim. The State improperly argued that Petitioner was a convicted felon. App. p. 473, ll. 18-23. Petitioner has already argued, *supra*, the reasons why it was improper for the State to impeach Petitioner with questions concerning the details of his prior record. It was improper also for the State to argue this point in closing arguments.

The State made an improper argument in which it implied that Petitioner's wife was a convicted felon. App. p. 473, ll. 18-23. As discussed previously, there is no evidence that

Petitioner's wife was a convicted felon and it was therefore, highly improper for the State to attempt to trick the jury into believing she was. Even if she had possessed a felony record, it would have been improper for the state to argue that classification as a detail of her prior record.

The prosecutor also improperly advised the jury of his personal opinion that Petitioner and his wife were liars. App. p. 480, ll. 3-5. Rule 3.4 (e) of the South Carolina Rules of Professional Conduct, Rule 407, SCRAP, provides, in relevant part, that ***"a lawyer shall not...state his personal opinion as to the... credibility of a witness... ."*** Counsel did not testify to any reason for neglecting to object to these highly improper closing arguments by the prosecution. App. p. 53, l. 1 – p. 64, l. 6. The PCR Court erred in failing to grant Petitioner's prayer for relief on these allegations where the record before the Court strongly supported these claims.

P.
Question Presented XXIX
FAILURE TO OBJECT TESTIMONY CONCERNING A PRIOR BAD ACT NOT RELEVANT TO CASE WHICH DID NOT INVOLVE CRIMES OF MORAL TURPITUDE.
Original Application, Allegations 1,2 and 4;
Amended Application, Allegation 2
App. p. 83, l. 16- p. 84, l. 12. (Carter); App. p. 274, ll. 13-23 and other witnesses, (T. Love); App. p. 283, l. 22- p. 286, l. 24 (T. Love); App. p. 364, l. 17- p. 366, l. 18 (Petitioner).

The testimony in question, found listed above, was not relevant to the charges against Petitioner. It was not relevant to any exception to the character evidence rule, and was obviously introduced for the sole purpose of portraying Petitioner as a bad person. The PCR Court erred in failing to grant relief on this ground.

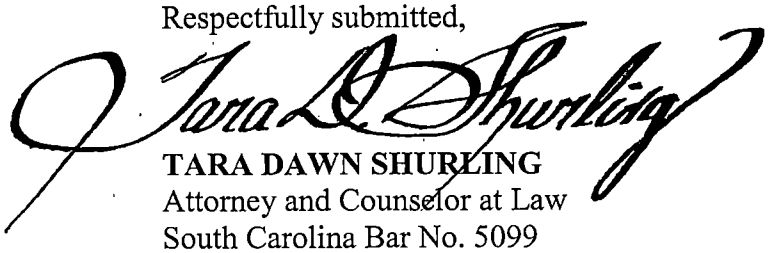
CONCLUSION

Petitioner asserts that he has demonstrated multiple errors and omissions on the part of Counsel which, standing alone, were sufficiently prejudicial to warrant the grant of relief on his

Application for PCR. The record before this Honorable Court clearly demonstrates that the errors and omissions of Counsel adversely affected his ability to receive a fair trial. *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999). He would assert, however, that the collective prejudice arising from of many of the allegations addressed herein is such that they warrant reversal and the grant of a new trial on the basis of cumulative error. Petitioner recognizes that the question of whether the grant of relief on collateral review may rest on the cumulative impact of multiple Sixth Amendment claims remains an open question in South Carolina. *Lorenzen v. State*, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n.3 (2008). While he asserts that several of the issues raised in this case warrant reversal on their on individual merit, he would respectfully assert that if the Court is inclined to find no one issue warrants reversal, the collective prejudice arising from the multiple errors and omissions presented in this case certainly does and he urges this Honorable Court to so rule. PCR Counsel is confident this case presents this Honorable Court with an ideal opportunity to settle the outstanding question of whether cumulative error may provide the basis for reversal on collateral review.

For the reasons stated herein, the Petitioner asks this Honorable Court to grant the writ, dispense with further briefing, reverse his conviction and sentence and remand his case for a new trial. Alternatively, he would ask that the writ be issued and that he be granted the opportunity to more fully brief the issues summarized herein.

Respectfully submitted,



TARA DAWN SHURLING
Attorney and Counselor at Law
South Carolina Bar No. 5099
ATTORNEY FOR PETITIONER

This 11th of June, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-001689

PRENTISS WAYNE LOVE, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Second filing of the Petition for Writ of Certiorari, as edited to meet page limit set by order of the Supreme Court, in the above-entitled case has been served upon opposing counsel this the 12th day of June, 2018 by mailing one (1) copy in a stamped envelope properly addressed to:

Johnny E. James, Jr.
Assistant Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211

The Appendix was hand-delivered to opposing counsel at the Office of the Attorney General on at the time of the original filing in January, 2018.

Tara D. Shurling

TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 12th day of June, 2018.

Suzanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/24

LAW OFFICE OF

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S.C. SUPREME COURT

June 12, 2018

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Prentiss Wayne Love v. State of South Carolina
Appellate Case No. 2017-001689.

Dear Mr. Shearouse:

Attached for filing please find the original and six copies of the Petition for Writ of Certiorari and Certificate of Service in the above captioned case. This version has been reduced to fifty (50) pages in length. I thank the Court for allowing me to exceed the normal page limit in this very complicated case. I attach one (1) extra copy of the Petition for Writ of Certiorari with the Certificate of Service and would appreciate having it clocked and given to my runner. Thank you for your assistance in this matter. I remain,

Sincerely yours,

Tara Dawn Shurling
Attorney and Counselor at Law

TDS/sg
Enclosures
cc: Johnny J. James, Jr., Assistant Attorney General (w/enclosure)
Prentiss Wayne Love, #315271 (w/enclosure)
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