

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO GEORGETOWN COUNTY
Court of Common Pleas
Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-001689

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S.C. SUPREME COURT

Prentiss Wayne Love,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

- I. Did the PCR court properly deny relief due to Petitioner's failure to show prejudice where Counsel did not object to hearsay identifying Petitioner where the identity of the subject of the allegations was not in meaningful dispute?
 - a. Presented by Petitioner as Issues I, II, and III
- II. Did the PCR court properly deny relief due to Counsel's non-objection to Shannon Bellamy's testimony about discovering text messages between Victim and Petitioner on Victim's cell phone, where Counsel did object and successfully exclude cell phone records on authentication grounds and where Bellamy did not testify to the contents of the text messages she discovered?
 - a. Presented by Petitioner as Issues IV-VIII
- III. Did the PCR court properly deny relief for Counsel's treatment of a juror who regularly closed his eyes throughout trial, where the issue was raised to the trial court, and where the juror denied sleeping during testimony?
 - a. Presented by Petitioner as Issues IX and X
- IV. Did the PCR court properly deny relief for Counsel's non-investigation of Petitioner's cell phone where neither the cell phone nor its contents were presented at the evidentiary hearing?
 - a. Presented by Petitioner as Issue XI
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 - a. Presented by Petitioner as Issues XII and XIII
- VI. Did the PCR court properly deny relief for Counsel's cross-examination of a minor witness where said cross-examination did not raise questions of legal consequences she faced for giving Victim prescription medication and what consideration she was offered for her testimony?
 - a. Presented by Petitioner as Issues XIV, XV, and XVI
- VII. Did the PCR court properly deny relief for Counsel's cross-examination of Victim where Counsel declined to explore every means by which Victim improperly acquired prescription medication?
 - a. Presented by Petitioner as Issue XVII
- VIII. Did the PCR court properly deny relief for Counsel's cross-examination of an investigator about information not retrieved from a cell phone where no evidence was presented to show any information was deleted by law enforcement?
 - a. Presented by Petitioner as Issue XVIII

- IX. Did the PCR court properly deny relief for Counsel's non-objection to the description of the forensic interviewer as a "forensic interviewer" where she was not presented, qualified, or questioned as an expert witness?
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a. Presented by Petitioner as Issue XXV
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a. Presented by Petitioner as Issue XXVI
- XIV. Did the PCR court properly deny relief for Counsel's closing arguments which compared the matter to the Salem Witch Trials, but which did not directly argue Victim's motive was to escape trouble after being caught with prescription medication?
a. Presented by Petitioner as Issue XXVII
- XV. Did the PCR court properly deny relief for Counsel's non-objection to the State's closing arguments presenting evidence in the record in the light most unfavorable to Petitioner?
a. Presented by Petitioner as Issue XXVIII
- XVI. Did the PCR court properly deny relief for Counsel's non-objection to testimony that Petitioner and his wife knew of Victim's improper possession of prescription medication, where the evidence demonstrated the inappropriate relationship of secrecy between Petitioner and Victim, and where the evidence provided additional testimony on Victim's own improper actions.
a. Presented by Petitioner as Issue XXIX

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Petitioner was indicted at the May 2011 term of the Georgetown County Grand Jury for criminal sexual conduct with a minor, second degree (2011-GS-22-00431), and lewd act on a minor child (2011-GS-22-00432). J. Eric Fox, Esq., represented Petitioner, and Candice A. Lively, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On April 23, 2012, Petitioner proceeded to trial before the Honorable D. Garrison Hill and a jury. The jury found Petitioner guilty of lewd act on April 26, 2012.¹ Judge Hill sentenced Petitioner to imprisonment for a term of 15 years.

Petitioner filed a notice of appeal and a direct appeal was perfected by Kathrine H. Hudgins, Esq., filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed Petitioner's appeal by unpublished opinion. State v. Love, Op. No. 2014-UP-195 (S.C. Ct. App. filed May 21, 2014). The Remittitur was issued on June 16, 2014.

Petitioner filed his application for post-conviction relief on February 24, 2015 (2015-CP-22-00209). He amended his application by filing on November 15, 2016, substituting the original with 35 allegations. (Appx. 564-70). Respondent made its return on June 25, 2015, and an evidentiary hearing into the matter was convened on November 16, 2016, before the Honorable Brooks P. Goldsmith. Petitioner was present at the hearing and represented by Tara Dawn Shurling, Esq. Patrick Schmeckpeper, Esq., of the South Carolina Attorney General's Office, represented Respondent. Both parties submitted memoranda in lieu of oral arguments after the evidentiary hearing. By written order dated April 24, 2017, and filed May 4, 2017, Judge Hill denied and dismissed the application.

¹ Petitioner was acquitted on the CSC charge.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I. THE PCR COURT PROPERLY DENIED RELIEF DUE TO PETITIONER'S FAILURE TO SHOW PREJUDICE WHERE COUNSEL DID NOT OBJECT TO HEARSAY IDENTIFYING PETITIONER WHERE PETITIONER'S IDENTITY AS THE OBJECT OF THE ALLEGATIONS WAS NOT IN MEANINGFUL DISPUTE

Counsel's lack of objections throughout trial to questions and testimony tending to elicit or otherwise imply hearsay testimony identifying Petitioner as the perpetrator of lewd acts on Victim was of no consequence because identity was not the issue in dispute at trial. The trial was not a case of "who done it" but rather "did it happen?" Because identity was not in dispute, the lack of objections did not prejudice Petitioner, and the petition should be denied.

"The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Vail v. State, 402 S.C. 77, 84, 738 S.E.2d 503, 507 (Ct. App. 2013) (quoting Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006)). However:

In a CSC case, the testimony of a witness regarding the Victim's out-of-court statement is *not* hearsay when: "The declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged Victim and the statement is limited to the time and place of the incident."

Id., 402 S.C. at 84-85, 738 S.E.2d at 507 (quoting Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 631-32 (2010); Rule 801(d)(1)(D), SCRE) (emphasis excluded). "Any other details or particulars, including the perpetrator's identity, must be excluded." Id., 402 S.C. at 85, 738 S.E.2d at 507 (quotation omitted). "[A] harmless error analysis should be employed when reviewing the admission of hearsay testimony that improperly corroborates the victim's testimony in a sexual assault case." Thompson v. State, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018) (citations omitted). Therefore, "in a PCR case, trial counsel's deficient failure to object to

such testimony does not remove an applicant's burden to prove prejudice." Id. "As part of the prejudice analysis, the PCR court and the reviewing court must therefore consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object." Id. "[T]he admission of improper evidence is harmless where it is merely cumulative to other evidence." State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

a. Anthony Carter testified to time, place, and identity, as well as the discovery of Victim's possession of cigarettes and a pill

At trial, the State first called Anthony E. Carter, "stepfather"² to Victim. Carter explained Victim was caught by in possession of a cigarette and a "little white pill[.]" and was in trouble with her parents. (Appx. 81-82). Victim disclosed shortly thereafter. The State sought to elicit Rule 801(d)(1)(D), SCRE, Carter,:

Q. All right. At any point in time, you can't tell me specifics, I just want to know a simple yes or no, at any point in time did [Victim] disclose to you anything regarding contact between her *and the defendant*?

A. Yes.

(Appx. 84, ll. 19-24) (emphasis added). Following up, Carter testified when he was able to sit down with Victim and discuss the matter, she disclosed three different instances of contact: "In the river, in the boat, *between him and her*, once on New Year's Eve at his house, and on 9/11 in my house." (Appx. 85, ll. 8-18). Carter also testified that when he first arrived home, Victim ran out and, crying, told him "Mama's going to kill Wayne[;]" the Court sustained Counsel's timely objection. (Appx. 86, ll. 1-9). On cross-examination, Counsel immediately asked about the cigarette and pill Victim was caught with. (Appx. 87, ll. 17-21). After addressing other matters, Counsel returned to the cigarette and pill at the end of cross, and Carter admitted the disclosures did not occur until after Victim was caught. (Appx. 94-95).

² Carter was engaged to Victim's biological mother, Shannon Bellamy, at the time of trial. (Appx. 60-61).

b. Shannon Bellamy testified to time and place of abuse, as well as the discovery of Victim's possession of cigarettes and a pill

The State again sought to elicit Rule 801(d)(1)(D), SCRE testimony through its next witness, Shannon Bellamy, Victim's biological mother, who confronted Victim after discovering text messages between her and Petitioner on Victim's phone shortly after placing Victim on restriction for possessing a cigarette and a pill. (Appx. 115-17; Appx. 132-34). Victim disclosed a "first event" occurred on New Year's Eve 2009 at Petitioner's house; a "next time" during a fishing tournament when Victim was alone with Petitioner in his boat; and a final "inappropriate event" on September 11, 2010, in Bellamy's home. (Appx. 134-35). On cross-examination, Counsel elicited testimony identifying Victim's illicit prescription pill as Vicodin and that Victim got it from her friend (hereafter "Minor").

c. Victim testified to a total of five instances of inappropriate touching, to getting caught with the cigarettes and pills, and to additional instances of personal misconduct not divulged to her parents

Victim testified thereafter. (Appx. 144-76). Victim immediately admitted to getting the pill and cigarettes from Minor in order to "[e]xperiment." (Appx. 144-45). Victim denied she had been "in trouble like that before[.]" (Appx. 145, ll. 23-25). Victim testified that on New Year's Eve 2009 at Petitioner's house, Petitioner kissed her and attempted to reach up her shirt, and again "in the middle of the night." (Appx. 149-52). Victim testified Petitioner also started kissing her and ventured his hand beneath her clothes while the two were together on Petitioner's boat during a fishing tournament. (Appx. 153-55). Importantly, Victim told Minor, her best friend, about the contact, but nobody else because she was scared. (Appx. 155, ll. 9-18). Victim testified to a second instance of inappropriate touching by Petitioner on his boat at another fishing tournament at a later date. (Appx. 155-56). Victim testified to another instance of Petitioner kissing her and touching her breasts at a third fishing tournament. (Appx. 157, ll. 8-

22). Finally, Victim testified Petitioner repeatedly asked her for a nude picture on September 11, 2010, and that evening kissed her, stuck his hand up his shirt, penetrated her digitally, and ejaculated in her presence while he masturbated. (Appx. 158-63). Victim explained she did not reveal the lewd acts to her parents until after Bellamy found the text messages between Victim and Petitioner on Victim's phone after Victim was busted with the cigarettes and pills. (Appx. 163-65). Victim also noted that Petitioner at some point orally contacted her breasts. (Appx. 167, ll. 5-13). On cross-examination, Victim admitted to not telling her parents about other times she had Vicodin, and admitted to initially denying any impropriety with Petitioner. (Appx. 172-73). Counsel finished cross-examination eliciting an additional admission by Victim that she'd taken pills, cigarettes, and alcohol. (Appx. 175, ll. 7-11).

d. Victim's best friend, Minor, testified to time, place, and identity disclosures occurring prior to the revelation of Victim's pill and cigarette possession and subsequent punishment and disclosures to her parents

The State elicited further Rule 801(d)(1)(D), SCRE testimony from Minor, Victim's best friend, but framed the questions as: "Will you please tell me if [Victim] discussed with you a time and place where something happened between her and the defendant?" (Appx. 179, ll. 2-9). Minor affirmed as much and testified to Victim's disclosure of abuse at Petitioner's House on New Year's Eve, twice on Petitioner's boat, and once more on September 11. (Appx. 179-85). Minor explained Victim acted as though she liked Petitioner, and that she treated Petitioner like a boyfriend. Id. Minor admitted to giving Victim Vicodin, that Victim got in trouble as a result, and that "[i]t was when she got in trouble she told everything." (Appx. 185-87).

e. Diane Nordeen, the forensic interviewer, testified to time and place disclosures made during the forensic interview

The State elicited still further Rule 801(d)(1)(D), SCRE testimony from Diane Nordeen, a forensic interviewer with the Children's Recovery Center. Nordeen was neither qualified as an

expert nor was the video recording of the forensic interview with Victim admitted. Nordeen indicated Victim “was able to provide coherent and detailed statements to the questions that I asked her.” (Appx. 207, ll. 3-9). Nordeen reported Victim disclosed the time and place of five incidents: New Year’s at Petitioner’s home; September 11th, 2010, at Victim’s home; and three incidents between those dates on Petitioner’s boat while upon the Intracoastal Waterway. (Appx. 208-09). Nordeen described Victim as “anxious and fidgety,” but that she was able to provide the details. (Appx. 209, ll. 5-9).

f. Investigator Ginger Pop reports upon the reports of time, place, and identity while explaining the non-existence of DNA or fingerprint evidence

Investigator Ginger Pop later testified to the course of the investigation. Pop testified to receiving the video recording of the forensic interview, and explained: “[a]fter reviewing the interview on that audio-video disc of the CRC interview it revealed several incidents that the child had revealed to the interviewer of events between the defendant and the child.” (Appx. 219, ll. 12-20). Pop repeated the time-place disclosures that were provided to her. (Appx. 223-24). After discussing the geography of the Intracoastal Waterway, Pop explained the time between the disclosure and the incidents disclosed foreclosed any usefulness in attempting to recover any DNA evidence from Victim. (Appx. 223, ll. 8-18). Pop additionally explained the close familial relationship between Victim’s family and Petitioner made searching for fingerprints pointless. (Appx. 233-34). Counsel again elicited the time and location of the incidents on cross-examination. (Appx. 235, ll. 5-15).

g. Counsel, at the evidentiary hearing, testified tersely to the allegations but ultimately noted that identity was not a matter of dispute at trial

At the evidentiary hearing, Counsel’s testimony was restrained, and confronted with the various instances of hearsay as to Petitioner’s identity as the perpetrator of the lewd acts, he simply replied “I did not object.” (Appx. 592-93). Counsel expressed that he could not go back

to recreate his reasoning from the moment of trial. (Appx. 593, ll. 7-9). Confronted with the State's questioning of Victim about the contents of her statements to the forensic interviewer, Counsel explained he thought "they could have gotten the same place by a different route, so I didn't object. I think they could have gotten the same exact information from a different route if that, in fact, was objectionable." (Appx. 607-08). Confronted with the testimony by Minor describing how Victim described Petitioner, Counsel noted the testimony was separate from the reporting and, technically, wasn't about the assault, but rather the picture of the relationship between Petitioner and Victim. (Appx. 608-09). On cross-examination, the State offered Counsel that the target of the allegations was pretty obvious, to which Counsel plainly replied: "Identity was not an issue." (Appx. 667, ll. 1-20).

- h. The record considered as a whole, the inappropriate references to Petitioner as the perpetrator were not prejudicial because the identity of the alleged was not in meaningful dispute, and because in inappropriate references were merely cumulative to other testimony as to identity**

Though Counsel could have successfully objected to the various instances of inappropriate hearsay testimony as to the perpetrator's identity, evidence exists in the record to support the PCR court's determination that Petitioner was not prejudiced by Counsel's non-objections. First, as Counsel simply noted, identity was not at issue. All present in the courtroom knew who the alleged perpetrator was, and the circumstances of the case foreclosed any reasonable dispute on that point. As noted at the outset of this section, the case did not hinge on who abused Victim, but whether Victim was abused at all. No inappropriate particulars other than identity were provided by way of the potentially objectionable testimony, distinguishing the present matter from, for example, State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989). In Barrett, the objectionable testimony included details as to time, place, identity, *and* additional details as to the defendant's fondling and penetration of the victim. The Court thus found the

extensive testimony to details of sexual abuse to be “devastating[.]” Id., 299 S.C. at 487, 386 S.E.2d at 243. Similarly, in Thompson, the forensic interviewer testified to details that the victim disclosed vaginal penetration, anal penetration, and oral sex in addition to the identity of the perpetrator. Thompson, 423 S.C. at 240, 814 S.E.2d at 489. The Court quoted Barrett, and again found the detailed testimony to be devastating. Thompson, 423 S.C. at 248-49, 386 S.E.2d at 494. Here, without the particulars and details of abuse which provided to energize the prejudicial effect as in Barrett and Thompson, the testimony was little more than the dry observation that the man sitting at the defendant’s table was the person accused of impropriety.

Second, as indicated by Counsel in addressing the forensic interviewer’s testimony, the State could have readily elicited the same information by other means, such that there is no reasonable probability objections would have changed the outcome of the trial. Counsel is not obliged to make objections which, in his judgment, serve to provide no meaningful benefit to his client. Counsel is entitled to exercise his good strategic judgment to weigh what testimony is harmful and what testimony is comparatively inconsequential, and direct the focus of his attention and his objections to that testimony which may have a real prejudicial effect. Any attorney who has participated in or otherwise reviewed the record of a trial in which every conceivable objection is made can attest to the counterproductive effect thoughtlessly zealous advocacy can have. Further, as noted below, the State did otherwise elicit the same information.

Third, in light of the pervasive implication against Victim of improper motive to fabricate allegations after getting caught with cigarettes and Vicodin, Minor’s hearsay testimony of Victim’s statements made *prior to getting caught with the cigs and pills* was admissible under Rule 801(d)(1)(B), SCRE. Minor’s testimony provided evidence that Victim disclosed Petitioner’s lewd acts, and identified Petitioner as the perpetrator of lewd acts, such that the other

potentially objectionable hearsay identifications were merely cumulative. Petitioner contests the applicability of the section, arguing the testimony providing the implication was elicited by the State, but there is no authority of which Respondent is aware to provide that the State must first attempt to “hide the ball” and be defeated in that effort before it may avail itself of 801(d)(1)(B). The Rules of Evidence cannot be read in such a way as to force prosecutors to weigh its obligations of honest openness with the jury against its need to submit testimony under a particular exception or other rule.

Fourth, the jury’s verdict clearly reflects the absence of the sort of “cumulative effect which enhances the devastating impact of improper corroboration.” See Barrett, 299 S.C. at 487, 386 S.E.2d at 243. The jury evidently found neither Victim nor Petitioner to be fully credible, as they acquitted Petitioner on the more serious CSC charge while convicting him for lewd acts.

Petitioner’s emphasis that the evidence was not overwhelming is of no consequence. Indeed, Respondent agrees the evidence was not overwhelming. The Order of Dismissal does not assert that evidence was overwhelming. The finding that there is no prejudice is not premised upon an “overwhelming evidence” analysis, but rather simply that in the circumstances taken as a whole there was no reasonable probability that objections to the fleeting, if repeating, hearsay as to time, place, and identity would have changed the outcome of trial.

“Reasonable probability” is not “any probability,” and in the context of post-conviction relief, reasonable minds may well differ as to the practical impact of different portions of evidence and testimony, as well as the practical impact of actions and non-actions of counsel. The PCR court’s finding of no prejudice is entitled to deference, and there are plenty of reasons and evidence for that finding. Accordingly, the petition for writ of certiorari should be denied.

II. THE PCR COURT PROPERLY DENIED RELIEF DUE TO COUNSEL'S NON-OBJECTION TO SHANNON BELLAMY'S TESTIMONY ABOUT RECORDS DESCRIBING THE VOLUME OF TEXT MESSAGES BETWEEN VICTIM AND PETITIONER'S CELL PHONE, AS COUNSEL DID OBJECT AND SUCCESSFULLY EXCLUDE CELL PHONE RECORDS ON AUTHENTICATION GROUNDS AND THE TESTIMONY AS TO THE VOLUME OF COMMUNICATIONS WAS MERELY CUMULATIVE

Any evidence exists to support the PCR court's denial of relief because Counsel successfully objected to the introduction of the substance of Victim's cell phone records, and because Bellamy's testimony describing the volume of communications between Petitioner and Victim was merely cumulative to other testimony providing the same. "[T]he admission of improper evidence is harmless where it is merely cumulative to other evidence." Blackburn, 271 S.C. at 329, 247 S.E.2d at 337 (1978); see also Thompson, 423 S.C. at 245-46, 814 S.E.2d at 492 (acknowledging harmless error analysis should be applied to improper corroborative evidence in a sexual assault case, acknowledging overruling of Jolly v. State, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)).

At trial, Bellamy testified that after going through Victim's phone she "went on the computer and checked the phone record," to see who all Victim was texting. (Appx. 117-18). Bellamy explained that from that record "[y]ou can see incoming and outgoing calls and texts. You can't actually see the text message but you can see the incoming and outgoing phone numbers." (Appx. 118, ll. 11-14; Appx. 121, ll. 18-23). Bellamy testified she found "[t]here were quite a number of incoming and outgoing text messages between [Victim] and defendant Wayne Love." (Appx. 122, ll. 9-11). The State refreshed Bellamy's recollection with the records, and Bellamy testified there were hundreds of messages between the two for the month of September 2010. (Appx. 122-23). Counsel did not object to testimony about the records.

However, when the State sought to admit the records themselves as an exhibit, Counsel objected, arguing that without a records custodian from T-Mobile, the State could not offer the

phone records into evidence. (Appx. 124-25). After substantial argument outside the presence of the jury, the Court sustained Counsel's objection. (Appx. 125-30). The State thereafter inquired about the appropriate parameters of questioning Bellamy about the number of text messages, arguing the number of text messages "was the premise for her going to the daughter and saying, 'What in the world is this all about,' and then that is where [the allegations of lewd acts] came out." (Appx. 131, ll. 1-19). The Court replied plainly "that testimony about the volume has already come in." (Appx. 131, ll. 20-21). The jury was returned to the courtroom and Bellamy again testified she discovered hundreds of text messages between Victim and Petitioner. (Appx. 132-33). Counsel cross-examined Bellamy on the subject of the number of text messages, and successfully elicited confirmation that Petitioner "was far from the only person [Victim] was in contact with on her phone through calls or texts[.]" (Appx. 138-39). On redirect, the Bellamy denied seeing in the records "hundreds of text messages between Victim and any other 30 [year] old man[.]" (Appx. 143, ll. 3-6).

Victim also testified to her texting with Petitioner, explaining they had "[a] good bit" of contact and that she texted "maybe ten or twenty" times daily. (Appx. 156-57). Victim testified that on September 11, 2010, she and Petitioner texted one another hundreds³ of times. (Appx. 163, ll. 10-15). Minor testified to Victim texting with Petitioner. (Appx. 180, ll. 7-25). Minor recalled that on September 11, Victim texted with Petitioner "all night." (Appx. 184-85).

Tabitha Love, testifying for Petitioner, indicated she, Petitioner, and Victim "texted and called a lot[.]" and estimated a volume of "at least twice a day and it could be three times back and forth, which would mean probably six at a time. Sometimes on the weekend more." (Appx. 273, ll. 5-16). Tabitha acknowledged Victim and Petitioner communicated back and forth, and

³ The redacted appendix provided by Petitioner obscures a portion of line 15, such that it reads "Hundr." The unredacted copy in Respondent's possession states: "Hundreds."

explained Petitioner “treated her like [a] sister.” (Appx. 275, ll. 5-14). Tabitha noted that she and Petitioner both had access to Petitioner’s phone, and that she would use Petitioner’s phone if it was more convenient. (Appx. 275-76). On cross-examination, the State confronted Tabitha with a count of “[o]ver 140 messages” sent on September 11, to which Tabitha replied that not all of them were between Victim and her. (Appx. 288, ll. 13-23). Tabitha later testified she “did not realize it was a hundred times in a day. I did realize they did text an awful lot because he would sit there and text her in my living room with me right there next to her.” (Appx. 292, ll. 12-19).

Petitioner testified Victim “would text numerous times. She would text me while she was at school, she would text me after school.” (Appx. 350, ll. 8-13). Petitioner indicated the volume of texts varied. (Appx. 350-51). Petitioner agreed that he was “pretty consistent” in responding to Victim’s texts. (Appx. 372, ll. 1-10). Petitioner expressed surprise hearing he had texted Victim over a hundred times on September 11, 2010, and denied ever texting Victim that much. (Appx. 376-77).

At the evidentiary hearing, Counsel acknowledged he did not object to the testimony about the records, explaining he believed Bellamy could testify to her “firsthand knowledge in investigating some of those things[.]” (Appx. 604-05). Counsel acknowledged that some of the testimony referred to the records. (Appx. 605, ll. 4-13).

As to the records themselves, Respondent will not belabor the point—Counsel objected to their admission and that objection was sustained, so there’s no deficiency or prejudice resulting from the records in and of themselves.

As to the testimony communicating in part the contents of the records—the volume of texts between Petitioner and Victim—the same information was properly elicited through

Victim, Minor, Tabitha, and Petitioner's testimony, each of whom either (1) was directly involved in the communications, or (2) directly observed the communications as they occurred. Or both. Though the prosecution was relying on the records in determining what it should ask Tabitha and Petitioner on cross-examination, there is no rule prohibiting as much.

Petitioner prognosticates an argument "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." (Petition at 20). Respondent declines to adopt that argument.

The PCR court also found the testimony as to the contents of the records was not offered for the truth of the matter asserted, but rather was offered for the purpose of explaining how Bellamy became suspicious of Victim's relationship with Petitioner, such that it was not hearsay. But see State v. King, 422 S.C. 47, 66-67, 810 S.E.2d 18, 28-29 (2017) ("[W]e caution against the use and admission of 'investigative information.' While it may be couched in terms of explaining an officer's conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state's rules against hearsay.").

III. THE PCR COURT PROPERLY DENIED RELIEF FOR COUNSEL'S TREATMENT OF A JUROR WHO REGULARLY CLOSED HIS EYES THROUGHOUT TRIAL, AS THE ISSUE WAS RAISED TO THE TRIAL COURT, AND THE JUROR DENIED SLEEPING DURING TESTIMONY

The PCR court properly denied relief for Counsel's treatment of a juror who regularly closed his eyes, as the juror denied sleeping, affirmed he was paying attention, and the trial court gave a curative admonition to all jurors to pay attention as a cautionary measure. "Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case." State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 266 (Ct. App. 1999) (quotation and citations

omitted). “The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence.” Id.

At trial, the State was informed by a victim advocate and reported to the trial court that a juror appeared to be napping during testimony early in the trial, and requested the trial court address the issue; Counsel joined in the request. (Appx. 99-100). The trial court so admonished. (Appx. 103-04). The State raised the matter again later in trial, indicating “that several people keep reminding me or telling me they have noticed a certain juror has continued to nod off[.]” (Appx. 242, ll. 20-23). The juror in question was brought out and, upon inquiry by the trial court, indicated he was paying attention but that his eyes were messing with him. (Appx. 245, ll. 4-14). The juror admitted to being tired, but affirmed he was not asleep, that he was paying attention, that he had not missed any of the proceedings, and that he availed himself of some Coca-Cola for caffeine during breaks. (Appx. 245-46). Both parties thereafter affirmed their satisfaction and the trial court, citing Smith, found no juror misconduct and deemed the juror’s testimony credible. (Appx. 247, ll. 1-18). At the evidentiary hearing, Counsel considered that he could have asked for a mistrial, but indicated he tries to avoid seeking one if possible, and did not feel the juror needed to be removed. (Appx. 595, ll. 10-14).

There is no evidence in the record to show either a deficiency in Counsel’s treatment of this issue, or any prejudice to Petitioner therefrom. Smith is instructive—the trial court needed take no further action upon determining the juror was awake and listening with his eyes closed. See 338 S.C. at 73, 525 S.E.2d at 267. There is no evidence to show the juror was actually asleep. As such, the PCR court properly denied relief, this issue should be rejected, and the petition should be denied.

IV. THE PCR COURT PROPERLY DENIED RELIEF FOR COUNSEL'S NON-INVESTIGATION OF PETITIONER'S CELL PHONE AS NEITHER THE CELL PHONE NOR ITS CONTENTS WERE PRESENTED AT THE EVIDENTIARY HEARING

Petitioner's argument the PCR court erred in denying relief for Counsel's lack of investigation into Petitioner's phone is meritless. Petitioner presented no evidence of what, if anything, investigation of Petitioner's cell phone would have revealed had counsel done so. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (Admonishing yet again that mere speculation cannot, by itself, satisfy the applicant's burden of showing prejudice.). The PCR court properly denied relief, this issue is meritless, and the petition should be denied.

V. THE PCR COURT PROPERLY DENIED RELIEF FOR COUNSEL'S NON-OBJECTION TO TESTIMONY INDICATING PETITIONER WAS ARRESTED AFTER AN INTERVIEW WITH AN INVESTIGATOR

Petitioner's argument the PCR court erred in denying relief for Counsel's lack of objection to testimony about the timeline of the investigation is meritless as it is premised entirely on an inference and implication that does not exist. Testimony that a suspect was arrested subsequent to an interview (Appx. 232, ll. 18-22) does not support an inference that the suspect must have said something incriminating in the interview preceding arrest. As Counsel noted, such testimony occurs in every trial where law enforcement speaks to a suspect before arresting that suspect. (Appx. 612, ll. 13-24). Accordingly, the PCR court properly denied relief, this issue is entirely meritless, and the petition should be denied.

VI. THE PCR COURT PROPERLY DENIED RELIEF FOR COUNSEL'S CROSS-EXAMINATION OF A MINOR WITNESS BECAUSE THERE IS NO EVIDENCE THE MINOR WITNESS EVER FACED ANY LEGAL JEOPARDY OR THAT SHE WAS EVER OFFERED ANYTHING FOR HER TESTIMONY

Petitioner's proposition that the PCR court erred because Counsel was ineffective for not crucifying Minor is *facially* without merit. There is no evidence to show what, if anything,

cross-examining Minor on whether she was facing charges for giving Victim the Vicodin or whether she was offered anything in exchange for her testimony would have revealed. See Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (Mere speculation does not cut it). Indeed, Counsel testified at the evidentiary hearing that “there was [not] any indication that she would be prosecuted for that, for either possessing or distributing it, handing it to somebody. That is not something that would typically be awarded for someone in that age in Georgetown County at that time.” (Appx. 613-14). Counsel additionally articulated his strategic reasoning, such that no ineffectiveness can be found, that drilling Minor (or Victim for that matter) for stealing the Vicodin would have made the witness more sympathetic to the jury, to Petitioner’s detriment. (Appx. 615-16); see Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)) (“[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.”). Accordingly, the PCR court properly denied relief, this issue is entirely meritless, and the petition should be denied.

VII. THE PCR COURT PROPERLY DENIED RELIEF FOR COUNSEL’S CROSS-EXAMINATION OF VICTIM WHERE COUNSEL DECLINED TO EXPLORE EVERY MEANS BY WHICH VICTIM IMPROPERLY ACQUIRED PRESCRIPTION MEDICATION

Petitioner’s proposition that the PCR court erred because Counsel was ineffective for not crucifying Victim over the pills is entirely without merit. Counsel articulated his strategic reasoning, such that no ineffectiveness can be found, that drilling Victim for stealing the Vicodin would have made her more sympathetic to the jury, to Petitioner’s detriment. (Appx. 615-16); see Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)) (“[W]hen counsel articulates a valid reason for

employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.”).

Additionally, Petitioner errs in asserting Counsel’s strategy was “to demonstrate that Victim never made these claims against him until she got caught with Vicodin[.]” (Petition at 31). Counsel’s strategy was not quite so narrow. Counsel described his strategy as:

Innocence. It wasn’t going to be one of these they-can’t-prove-the-elements kind of thing. . . . [T]he [credibility] of the witnesses, particularly the little girl, Victim, and Mr. Love, because he did testify. It was going to be – that was it. There was a lot of testimony – well, the short answer is innocence.

(Appx. 659, ll. 19-25). Counsel’s strategy was not narrowly limited to excoriating Minor and Victim, and did not foreclose the necessity or wisdom in judiciously weighing how zealously he should have attacked *the children* for nicking prescriptions. In any event, as noted in the more exhaustive fact statements in Section I, above, the issue of Victim and Minor’s pill theft and experimentation was repeatedly and firmly presented to the jury. Accordingly, the PCR court properly denied relief, this issue is entirely meritless, and the petition should be denied.

VIII. NO EVIDENCE WAS PROVIDED TO SHOW ANYTHING WAS DELETED FROM VICTIM’S CELL PHONE, AND TESTIMONY ON THAT SUBJECT WAS IN THE CONTEXT OF THE LIMITATIONS OF LAW ENFORCEMENT TECHNOLOGY, SUCH THAT THE PCR COURT PROPERLY REJECTED A PLAINLY MERITLESS GROUND FOR RELIEF

Petitioner’s argument the PCR court erred because Counsel was ineffective in not questioning the supposed deletion of materials from Victim’s phone is meritless—there is no evidence to show anybody, by misfeasance or malfeasance, deleted any information from Victim’s phone. Petitioner reads malicious intent into innocuous testimony explaining the limitations of law enforcement’s investigative technology. (Appx. 199, ll. 7-17; Appx. 231-32). Victim did not have a smart phone from which deleted messages could be recovered, but rather

only had an inexpensive, “average teenager’s phone.” (Appx. 229-30).⁴ Additionally, Petitioner offered nothing to show what, if anything, would have been elicited by further questioning on the subject. See Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (Mere speculation does not cut it). To offer reasonable speculation in response, the likeliest outcome would have been more evidence to show the volume of texting Petitioner believes Counsel should have more vociferously endeavored to exclude. Accordingly, the PCR court properly denied relief, this issue is entirely meritless, and the petition should be denied.

IX. THE PCR COURT PROPERLY DENIED RELIEF FOR COUNSEL’S NON-OBJECTION TO THE DESCRIPTION OF THE FORENSIC INTERVIEWER AS A “FORENSIC INTERVIEWER” WHERE SHE WAS NOT PRESENTED, QUALIFIED, OR QUESTIONED AS AN EXPERT WITNESS

Petitioner’s argument that the PCR court erred in failing to object to the description of Diane Nordeen as a forensic interviewer is meritless—a forensic interviewer is a forensic interviewer. Indeed, Petitioner successfully defeats his own argument: “The State introduced nothing in qualification of this [witness] 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.” (Petition at 35). The evolution of our caselaw as to forensic interviewers provides that they’re not to be qualified as experts at all. See State v. Kromah, 401 S.C. 340, 357 n.5, 737 S.E.2d 490, 499 n.5 (2013) (“[W]e can envision no circumstance where their qualification as an expert at trial would be appropriate.”). Petitioner is evidently not satisfied by this development, and seeks to ding Counsel’s performance for the prescient⁵ treatment of the forensic interviewer

⁴ How readily we apparently forget the exceedingly limited storage capacity of mobile phones in the pre-smart phone era. Text messages and mobile data on a “dumb” mobile phone is as quickly lost as physical evidence of a sex crime, as such devices would quickly grind to a halt if not regularly cleared of data.

⁵ Trial occurred in April 2012, many months before Kromah was argued to the Supreme Court, let alone ruled upon.

as a lay witness, and prescribes the concerns of Kromah to a condition and description different from expert qualification. There is no rule now, let alone at the time of trial, to provide that one cannot call a forensic interviewer a forensic interviewer. Nor should there be, lest the Court seek to redefine an entire professional field to address the ephemeral complaints of defendants who do not like the witnesses against them to be presented for what they are.

Petitioner's argument that the PCR court erred in failing to find ineffectiveness for Counsel's lack of object to the description "therapist or doctor" (Appx. 173, ll. 20-25) during Victim's testimony is also meritless. In addition to Nordeen, Victim saw Dr. Carol Ann Rahter at the Children's Recovery Center, who performed both a forensic interview and medical exam (Appx. 255, ll. 8-18), so it is not error to indicate that she saw a doctor at the Children's Recovery Center.

Petitioner's argument that the PCR court erred in failing to find ineffectiveness for Counsel's lack of objection to Dr. Rahter's testimony that she was trained as a forensic interviewer is astoundingly meritless. Contrary to Petitioner's belief, as indicated above, the record indicates that Dr. Rahter wears two hats at the center. As for Petitioner's attempt to connect the qualifications of Dr. Rahter back to Nordeen and somehow draw ineffectiveness therefrom (Petition at 36), it appears to be another inference that does not exist, or at minimum is so attenuated that the undersigned cannot figure out how the two are related in any way. It is a non-sequitur.

Petitioner's argument that the PCR court erred in failing to find ineffectiveness for Counsel's lack of objection to Bellamy's testimony that she asked for a referral for counseling for Victim (Appx. 137, ll. 10-18) is, again, entirely meritless. The testimony does not provide for the inference that either Bellamy or the employees of the CRC believed Victim; indeed, it

stands to reason that a parent would just as readily seek counseling for a child who appeared to be a compulsive, dangerous liar. Furthermore, Kromah does not stand for the proposition offered.

For all of the reasons above, the PCR court properly denied relief, these issues are entirely meritless, and the petition should be denied.

X. PCR COURT PROPERLY DENIED RELIEF FOR COUNSEL'S NON-OBJECTION DURING THE STATE'S OPENING STATEMENT WHERE THE STATE EXPLAINED PETITIONER MET AND ACTED UPON VICTIM WHEN SHE WAS 13, WHEN THE FACTS AT TRIAL SUPPORTED THE ASSERTION

Petitioner's argument that the PCR court erred in not finding Counsel ineffective for failing to object to the State's remark in opening statements regarding Victim's age is without merit. In opening, the prosecutor stated: "The evidence will show and [Victim] will tell you that at the age of thirteen she met the defendant." (Appx. 52, ll. 2-4). The State thereafter argued that "the evidence will show that during the time when [Victim] knew when she was thirteen, until September, October, or September of 2010 he did commit sexual battery on her. She had turned fourteen by that time but still that is what I have to show you." (Appx. 52, ll. 14-20).

Carter testified he met Petitioner in 2009 through Ducks Unlimited. (Appx. 61-62). Bellamy testified she and the family met Petitioner when Victim was "[t]welve or thirteen." (Appx. 107, ll. 18-20). Victim testified that on New Year's Eve 2009 she was thirteen years old. (Appx. 149, ll. 17-19). Victim testified to lewd acts by Petitioner later that night. (Appx. 149-52). Victim testified her birthday was in February. (Appx. 168, ll. 11-12). The last instance of alleged abuse occurred on September 11, 2010. (Appx. 85, ll. 8-18; Appx. 134-35; Appx. 158-63; Appx. 179-85; Appx. 208-09). Therefore, the opening statement was supported by the evidence later established in the record, and no basis for objection there existed. Petitioner's

assertions to the contrary misconstrue the record. Accordingly, the PCR court properly⁶ denied relief, these issues are entirely meritless, and the petition should be denied.

XI. THE PCR COURT PROPERLY DENIED RELIEF FOR COUNSEL'S QUESTIONS ELICITING THAT VICTIM REPORTED TO PETITIONER AND HIS WIFE ERRATIC, SUICIDAL BEHAVIOR WHERE THAT EVENT AND THEIR REACTION TO IT WAS PROVIDED TO UNDERMINE VICTIM'S CREDIBILITY

The PCR court properly found no ineffectiveness of counsel and denied relief where Counsel elicited testimony about Victim's erratic, drug-addled behavior, because Counsel's strategic reasoning is evident from his use of the testimony in closing argument and from his testimony at the evidentiary hearing. "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

First, at trial, Minor testified to a relationship of confidence and close friendship with Victim, and affirmed that she did not want to see anything bad happen to Victim, and would protect Victim if she could. (Appx. 187-88). Minor thought the relationship was not a good thing, but never mentioned it to anybody. (Appx., 188, ll. 2-13).

Counsel called Tabitha Love as a witness and asked what she thought of Victim, to which Tabitha replied that Victim was "[a] very sweet, loving girl that had some emotional problems that she confided in me about but besides that, a straightforward girl." (Appx. 271, ll. 1-4). Tabitha described a relationship of trust and confidence, and that Victim would tell her about anything. (Appx. 271, ll. 5-18). Tabitha noted that in the course of this close relationship and its

⁶ To the extent the PCR court may have erred, it was in implying the abuse began when Victim was fourteen and that the prosecution corrected an erroneous statement. The abuse began when Victim was thirteen, and ended when she was fourteen, such that the prosecution's opening statement was accurate to the record in its entirety. (Appx. 800).

confidential discussions, two things gave her concern: “[o]ne was [Victim] doing pills and another was that she was on a roof about to jump off.” (Appx. 271-72). Victim stole pills from her father’s prescription bottles and from her friend, Minor. (Appx. 272-73). On one occasion, Victim texted Tabitha that she was going to jump off of the roof of *Minor*’s house. (Appx. 273, ll. 17-25). Tabitha threatened to contact Victim’s mother and contacted Petitioner, who then called Victim and talked her out of it. (Appx. 274, ll. 1-9; Appx. 284-85). Tabitha didn’t report to Victim’s parents the problems Victim disclosed to her because the confidential relationship was what Victim wanted. (Appx. 274, ll. 13-23). Tabitha didn’t call the police during the claimed roof event because she did not believe they would take the call seriously. (Appx. 285-86). Tabitha finally disclosed the roof event to Bellamy when confronted about Victim’s cigarette and pill. (Appx. 286, ll. 20-24).

Petitioner testified in his own defense. Petitioner also described himself “like a big brother” to Victim. (Appx. 348, ll. 13-18). Petitioner described a relationship of confidence. (Appx. 348, ll. 19-25). Like Tabitha, Petitioner testified to receiving texts “about taking pills and being on a roof, and it hurt a lot to know she was doing that.” (Appx. 349, ll. 1-6). Petitioner reported Victim explained her behavior as a reaction to “the family fighting and the argument.” (Appx. 349, ll. 6-10). Petitioner testified he talked Victim off the roof and that she thereafter quit taking pills. (Appx. 349, ll. 14-20). Petitioner did not much follow-up on the event, and expressed that the situation was something new to him. (Appx. 349-50). Petitioner felt he responded to the situation “as a big brother,” and admitted that not disclosing the events to Victim’s parents was a mistake. (Appx. 365-66).

In closing arguments, Counsel conceded the relationship between Petitioner and Victim might be a little strange, but noted it was not unusual for teenagers to want to confide in

somebody other than their parents. (Appx. 448-49). Counsel argued the relationship between Victim and Petitioner was not sinister, not one of a puppet to a puppeteer, and that the decision to keep Victim's confidence about the pills and roof event "may have been dumb, even immature, but it wasn't criminal." (Appx. 449-50). The State replied in its own closing that if Petitioner "was truly a big brother" he would have called the police and parents. (Appx. 486, ll. 9-16).

Counsel rejected the characterization that the testimony reflected Victim's suicidal ideation and that the cold record didn't capture the context. (Appx. 624, ll. 10-23). Counsel explained "this young girl was, for whatever reason, less than credible. There were other ways to attack her." (Appx. 624, ll. 23-25). Counsel also rejected the idea that he needed to offer an alternative explanation to suicidal ideation, arguing: "I find it can be a trap to offer [an] alternative explanation, because although it is not proper, the jury thinks he didn't prove that, so the State's theory must be correct." (Appx. 625, ll. 9-21).

The testimony, arguments, and Counsel's testimony at the evidentiary hearing, taken together, provide the "any evidence" necessary to support the PCR court's finding that "[t]he record reveals that [Counsel] was, in fact, using the incident to attack the victim's credibility." (Appx. 801). Put more simply, Counsel provided a hook upon which the jury might see fit to hang potential doubt. That Victim was actually upon a roof is not clearly established by the testimony. What is established is that Victim *claimed* to be upon a roof. Neither Petitioner nor Tabitha took it seriously enough to call law enforcement. Minor never mentioned it, though it ostensibly occurred on the roof of her house. Where a jury may be inclined to lend credibility to Petitioner and/or Tabitha, Victim's claims to be on a roof become less of an actual suicide attempt and more of a form of attention seeking behavior from a child living in an unsettled home. The inferential question then available to the jury becomes "are the allegations against

Petitioner just more attention-seeking behavior?” If nothing else, the testimony provided to support Petitioner’s argument that the relationship was not sexual, but merely one of close confidence, involving not only Petitioner but also his wife, Tabitha.

Counsel’s explanation that the cold record fails to reflect his tone, tenor, and the reactions of the jury during the course of the testimony is a valid observation as to the impact of the testimony and his questions eliciting as much. We cannot know at this late stage whether the hints, cues, and feedback from the jury was to Petitioner’s benefit or detriment in the course of this testimony, which is precisely why we defer to Counsel’s judgment in wading into dicey waters. Nor can we know what, if any, prejudice this testimony may have had. Accordingly, the record possesses evidence to support the PCR court’s finding, and lacks evidence to conclude otherwise, such that this issue and the petition should be denied.

**XII. THE PCR COURT PROPERLY DENIED RELIEF FOR COUNSEL’S
DECISION TO NOT FURTHER EXPLORE THE DETAILS OF
PETITIONER’S PRIOR CONVICTION DURING MITIGATION WHERE
PETITIONER PLED TO ASSAULT AND BATTERY OF A HIGH AND
AGGRAVATED NATURE FOR ENGAGING IN A THREESOME INCLUDING
A SEVENTEEN-YEAR-OLD GIRL**

But for the fact Petitioner was sentenced to the maximum for lewd act on a minor, any attempt by Counsel to further explore the details of Petitioner’s conviction for assault and battery of a high and aggravated nature would have been an absolutely disastrous decision, such that the PCR court could have never found Counsel ineffective for failing to bring it up. Again, “when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith, 386 S.C. at 567, 689 S.E.2d at 632 (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517).

During sentencing, the State mentioned in that Petitioner’s ABHAN “did involve a minor in that case” and that the fact that Petitioner “had pled guilty to something involving indecencies

with a female which fits the ABHAN from 2006, of course that raised my concerns greatly.” (Appx. 510-11). The “details” of the ABHAN left out were that Petitioner and Tabitha got an underage girl drunk and high, and then engaged in a threesome with the minor the following day. (Appx. 686). Petitioner and Tabitha defended themselves by arguing the victim had come on to them, presented herself as 17 years of age, and that everything was consensual. (Appx. 684-85). The ABHAN victim told law enforcement “that she was not forced in any way and that she did willingly participate, however, she was scared not to.” (Appx. 686).

Counsel, at the evidentiary hearing, wisely offered that he didn’t “think it was really worth reminding the Court that my client, you know, had allegations of being with a young woman consensual or not.” (Appx. 652-53). After noting consent was irrelevant, Counsel further asserted he “did not see any points to be gained by reminding the Court or suggesting that what happened in Lexington was okay.” (Appx. 653, ll. 2-12). Counsel also observed that prosecutors give strong treatment to CSC minor cases, and that he believed the trial judge could “read between the lines, between what was charged and what was pled to[.]” (Appx. 650-51).

Counsel’s articulated reasoning is entirely valid, and Petitioner’s assertion that he offered no such reasoning (Petition at 42) is bizarrely inaccurate. The PCR court properly denied relief as to this ground, ample evidence exists both in the record to support its ruling, and the petition should be denied.

XIII. THE PCR COURT PROPERLY FOUND NO INEFFECTIVENESS WHERE COUNSEL DID NOT OBJECT TO THE STATE’S CROSS-EXAMINATION OF PETITIONER ON HIS PRIOR CONVICTION FOR BREACH OF TRUST, WHERE COUNSEL HAD ALREADY ELICITED TESTIMONY ACKNOWLEDGING THE CONVICTION ON DIRECT EXAMINATION

Petitioner’s argument that the PCR court erred in finding no ineffectiveness in Counsel’s lack of objection to the State’s cross-examination of him on his prior conviction for breach of trust after Counsel had already brought the issue out on direct examination is entirely without

merit. “For the purpose of attacking the credibility of a witness, . . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.” Rule 609(a)(2), SCRE. Breach of trust with fraudulent intent requires, as an element, dishonesty or false statement. State v. McCann, 167 S.C. 393, 166 S.E. 411, 415 (1932) (“Proof beyond a reasonable doubt of a fraudulent intention is necessary before the crime of breach of trust is complete.”). “However, the details of the crime of which the witness has been convicted, whether the details could be considered mitigating or aggravating, are not admissible; the witness has already been afforded the opportunity to defend himself against that charge and his conviction is conclusive.” State v. Joseph, 328 S.C. 352, 361, 491 S.E.2d 275, 280 (1997) (quotations and citations omitted).

Anticipating its use on cross-examination at the end of direct examination, Counsel elicited from Petitioner his prior conviction for breach of trust, less than \$5,000, and assault and battery of a high and aggravated nature. (Appx. 363, ll. 5-11). Counsel did not ask whether the breach of trust was a felony or a misdemeanor. The State immediately returned to the subject on cross-examination, confirming Petitioner was a felon. (Appx. 363, ll. 17-21). At the evidentiary hearing, Counsel explained that, save where fighting for a mistrial is appropriate, objecting only emphasizes the unwanted question and answer. (Appx. 634, ll. 7-16). Counsel hedged that he could not specifically recall his thinking at the moment in time at trial. (Appx. 634, ll. 22-25).

The misdemeanor-versus-felony distinction broached by the State on cross-examination is not a “detail of the offense” as conceptualized by our law, but rather constitutes a general characteristic of the offense itself. For example, breach of trust comes in both misdemeanor and felony flavors, and the jury cannot be assumed to know which breaches are misdemeanors and which are felonies. See S.C. Code Ann. § 16-13-230 (providing both misdemeanor and felony

forms of breach of trust). In any event, Respondent can find no authority to support the proposition that the softball, preemptive treatment of prior convictions on direct examination serves as a perfect and complete inoculation against the more scornful impeachment on the same convictions by the State. Furthermore, given the jury acquitted Petitioner on the more serious charge, it can hardly be sustained that the jury was impermissibly driven to convict by the State's accurate description of Petitioner as a felon. Accordingly, the record possesses evidence to support the PCR court's finding, and lacks evidence to conclude otherwise, such that this issue and the petition should be denied.

XIV. THE PCR COURT PROPERLY DENIED RELIEF WHERE COUNSEL'S CLOSING ARGUMENTS, WHICH COMPARED THE MATTER TO THE SALEM WITCH TRIALS, BUT WHICH DID NOT DIRECTLY ARGUE VICTIM'S MOTIVE WAS TO ESCAPE TROUBLE AFTER BEING CAUGHT WITH PRESCRIPTION MEDICATION, WAS GUIDED BY THE STRATEGIC BALANCING OF HOW AGGRESSIVELY HE SHOULD ATTACK THE VICTIM

The PCR court's denial of relief is supported by any evidence because Counsel articulated valid strategic reasons to not more vociferously attack Victim and argue that she only brought allegations against Petitioner to try and deflect attention from her own drug use. Again, "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith, 386 S.C. at 567, 689 S.E.2d at 632 (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517).

At the evidentiary hearing, Counsel testified that while the "fear of punishment" could be an explanation for false allegations, Counsel opined "sometimes it is a trap for a lawyer to go there. Juries seem to put the burden of proof on you." (Appx. 664, ll. 15-20). Instead, Counsel testified and argued at trial that he "didn't know why she lied, little girls lie sometimes for their own reasons, and I don't have to prove to you why she lied, but look at other things." (Appx. 664-65).

That strategic consideration articulated, Petitioner's present and continuing insistence that another strategic approach would have been preferable is of no consequence, and explicitly to the contrary of our standard of deference to counsel. As acknowledged by the PCR court, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Appx. 804) (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)). Accordingly, the record possesses evidence to support the PCR court's finding, and lacks evidence to conclude otherwise, such that this issue and the petition should be denied.

XV. THE PCR COURT PROPERLY DENIED RELIEF WHERE COUNSEL DID NOT OBJECT TO THE STATE'S CLOSING ARGUMENTS PRESENTING EVIDENCE IN THE RECORD IN THE LIGHT MOST DISFAVORABLE TO PETITIONER

The PCR court's denial of relief is supported by "any evidence" where each of the elements of the State's closing argument now complained of by Petitioner were validly based on portions of the trial record. "A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (citing State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999)). However, "[a] solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Id. (citing Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998)). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

Petitioner takes issue with the State's remark in passing that Petitioner was "texting [Victim] hundreds of times a day." (Appx. 470, ll. 6-8). As explored in the facts provided in Section II, way above, multiple witnesses testified to Victim and Petitioner texting in excess of a hundred times on September 11, 2010, and more generally texting very frequently on days prior. Furthermore, the remark was made in the context of the State's argument that Petitioner had constant access to Victim in the course of their relationship, both by way of physical proximity and by cell phone text messages. (Appx. 469-70). And in any event, it strains credulity to believe that Petitioner would have been acquitted on all charges if only the prosecution had instead argued he was texting "dozens and up to over a hundred times a day," or some permutation thereof.

Petitioner takes issue with the State's observation that "[t]he Defendant Love is a convicted felon, breach of trust over a thousand and assault and battery of a high and aggravated nature." (Appx. 473, ll. 18-20). The State continued by observing "Tabitha Love, she's got a conviction for assault and battery of a high and aggravated nature." (Appx. 473, ll. 21-23). There is literally nothing inaccurate in either statement. Petitioner's attempt to parse and splice meaning from the absence of a comma in the cold transcript as though it is a thoroughly vetted piece of legislation is asinine. The PCR court properly observed the argument merely restated what was already established in the record, did not invite the jury to consider the criminal records beyond as applicable to credibility, and did not imply Tabitha had a felony conviction.

Petitioner takes issue with the State's observation that "[t]he State's witnesses, no one has a criminal record[.]" (Appx. 474, ll. 14-15). The PCR court did not specifically address this remark in the Order of Dismissal, and it was not otherwise insisted upon in Petitioner's post-trial motion. (Appx. 804-05; Appx. 808-11). The PCR court did broadly address "comments that are

allegedly not supported by the evidence[.]” and found that none of them rose to the level of “so infecting the trial with unfairness as to make the resulting conviction a denial of due process.” (Appx. 804) (quoting Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004)).

Given the jury implicitly did not find the State’s witnesses all that credible by way of acquitting Petitioner on the more serious charge and inquiring as to the possibility of consent as a defense to the lewd act charge, the PCR court’s off-hand dispensation with this ground is well-founded.

Petitioner asserts the State argued Victim’s phone was taken away on September 11, 2010. The portion of the transcript cited (Appx. 478, ll. 1-10) states that Victim got her phone taken away when “she got busted for cigarettes and a Vicodin[.]” In any event, it’s wholly tertiary to the facts providing for guilt and innocence.

Petitioner takes issue with the State’s characterization of Tabitha’s jail call to Petitioner as “I could get caught for perjury.” (Appx. 480, ll. 6-11). The State presented the exact and actual phrasing in the immediately preceding paragraph: “If you say you went with them I’m going to jail for perjury.” (Appx. 479-80). The argumentative reconstruction of Tabitha’s damning jail call is well within the boundaries of permissible argument.

Petitioner again takes issue with the State’s use of the term “forensic interview;” Respondent simply refers back to its arguments presented in Section IX, above, as though restated here.

Petitioner takes issue with the State’s erroneous recollection that Victim was afraid Bellamy “was going to kill her” upon discovering the contents of her phone. (Appx. 484, ll. 23-25). Given the strenuous insistence by Petitioner in so much of the rest of the petition that the only proper strategy was to argue Victim fabricated the allegations out of fear of consequences after being caught with the cigarettes and Vicodin, that this sub-allegation is raised beggars all

reason. That the prosecution flubbed in its recollection of testimony and made a permutation of the same argument Petitioner here insists upon was as likely to have helped Petitioner as hurt him. Furthermore, the argument as a whole—that Victim came clean about everything because she was afraid—was well established upon facts in the record.

Petitioner takes issue with the State’s remark that Victim “had already deleted some things” from her phone before her parents seized it. As the phone was only ever testified to being in Victim’s possession prior to its seizure by Victim’s parents, it was a reasonable inference for the State to conclude and argue that Victim, at some point, deleted something. Taken in the total surrounding context, it is clear the State was explaining that it could not get everything that had ever been on her mobile device, such that the argument taken as a whole was accurate.

Petitioner again takes issue with the State’s description of Petitioner as a felon. Respondent simply refers back to its arguments presented in Section VIII, above. Petitioner again argues the State presented Tabitha as a convicted felon, already addressed on Page 31 of this Return.

Finally, Petitioner claims the prosecutor expressed her personal opinion that Petitioner and Tabitha were liars. (Appx. 480, ll. 2-5). There is no indication of the State tipping the scales with its personal prestige, by reference to facts outside the record, or with personal opinion in the cited portion of the argument: “You can put whatever spin on it you want, they are lying to you, and why? Because they have a reason to lie, ladies and gentlemen.” *Id.* The State has the right to comment on the weight to be given to testimony. *Humphries*, 351 S.C. at 373, 570 S.E.2d at 166. That’s all the prosecutor did.

In sum total, the utter inanity of the above laundry list of persnickety protests demonstrates the validity of the PCR court's short disposition of so many of the grounds by simply observing they did not rise to the level of "so infecting the trial with unfairness as to make the resulting conviction a denial of due process." (Appx. 804). The overwhelming majority of the State's arguments were entirely accurate when read in the context of the argument as a whole and those portions that were not either didn't matter or were affirmatively helpful to Petitioner. More than "any evidence" exists to support the PCR court's ruling on these matters, and the petition for certiorari should be denied.

XVI. THE PCR COURT PROPERLY DENIED RELIEF WHERE COUNSEL DID NOT OBJECT TO TESTIMONY THAT PETITIONER AND HIS WIFE KNEW OF VICTIM'S IMPROPER POSSESSION OF PRESCRIPTION MEDICATION, WHERE THE EVIDENCE PROVIDED ADDITIONAL TESTIMONY ON VICTIM'S OWN IMPROPER ACTIONS AND DEFICIENCIES IN CREDIBILITY

The PCR court properly denied relief where Counsel did not object to testimony that Petitioner and Tabitha knew about Victim's possession of Vicodin. (Appx. 83-84; Appx. 274; Appx. 283-86; Appx. 364-66). The testimony was relevant to the *res gestae* of the crime; to wit: the generally inappropriate relationship between Petitioner and the victim. See State v. Wood, 362 S.C. 520, 527, 608 S.E.2d 435, 439 (Ct. App. 2004) (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)) (explaining and defining *res gestae*). Further, it was not admitted to prove the character of Petitioner, but instead the nature of his relationship with Victim, such that it would have been admissible under Rule 404(b), SCRE to show evidence of a common scheme or plan. Accordingly, Counsel had no basis for objection, the PCR court correctly denied relief, and this issue and the petition should be denied.

CONCLUSION

In conclusion, Petitioner argues the collective prejudice of all the allegations raised should entitle him to relief even if no one allegation is adequate. Cumulative prejudice was not ruled upon by the PCR court, nor raised in a motion to alter or amend, nor listed among Petitioner's 29 issues presented, nor presented in the body of Petitioner's argument. As such, it is not properly preserved. See Buckson v. State, 423 S.C. 313, 321, 815 S.E.2d 436, 441 (2018) ("While we seek to be flexible interpreting issue statements, '[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal.'").

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues *specifically identified by the Court*.

Respectfully submitted,

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Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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By: 
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16 Nov., 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO GEORGETOWN COUNTY

Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2017-000209

RECEIVED

NOV 16 2018

S.C. SUPREME COURT

PRENTISS WAYNE LOVE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

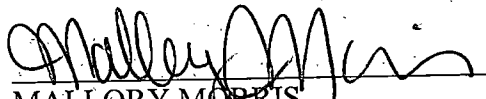
Respondent.

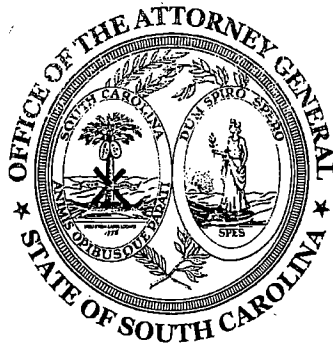
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, SC 29204

This 16th day of November, 2018.


MALLORY MORRIS
Legal Assistant for Respondent



RECEIVED

NOV 16 2018

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

November 16, 2018

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

RE: Prentiss Wayne Love v. State of South Carolina
Appellate Case No. 2017-001689
Lower Court Case No. 2015-CP-22-0209

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Tara D. Shurling, Esquire