STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge

ORIGINAL

Appellate Case No. 2016-002387

TIMOTHY ALLEN LEMACKS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

BRIEF OF RESPONDENT

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SC Court of Appeals

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether the post-conviction relief court properly denied relief on grounds that Petitioner was not deprived of the effective assistance of counsel where: (1) Counsel's failure to object to potentially objectionable testimony elicited at trial was part of a valid trial strategy; (2) the majority of the testimony in question would likely have been admitted under well-recognized exceptions to the hearsay rule; and (3) Petitioner failed to prove there is a reasonable probability that, had the testimony been excluded, the result of the trial would have been different.

STATEMENT OF THE CASE

Petitioner was indicted at the January 2011 term of the Colleton County Grand Jury for first-degree criminal sexual conduct with a minor (2010-GS-15-0916). (App.p.369-p.370). He was represented by David Matthews, Esquire (Counsel). Respondent (the State) was represented by Assistant Solicitor Charles Balish, Esquire, of the Fourteenth Circuit Solicitor's Office. On February 28-March 2, 2011, Petitioner proceeded to trial by jury pursuant to which he was found guilty as indicted. He was sentenced by the Honorable D. Craig Brown to twenty-five (25) years' imprisonment. (App.p.298-p.306).

Petitioner timely filed a notice of intent to appeal his conviction and sentence and an *Anders*[1] brief was submitted on his behalf by Appellate Defender LaNelle C. Durant, Esquire, of the South Carolina Commission on Indigent Defense. Petitioner raised the following issue on appeal:

> Did the trial court err in allowing the doctor to testify that the complaining witness said her uncle put his finger inside her and that it hurt which went beyond time and place, and violated Rule 801(d)(1)(D)?

(App.p.308-p.319). In an unpublished opinion filed October 2, 2013, the South Carolina Court of Appeals dismissed the appeal after review pursuant to *Anders*. *State v. Lemacks*, Op. No. 2013-UP-363 (S.C. Ct. App. filed October 2, 2013). (App.p.320-p.321).

On February 25, 2014, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held unlawfully for the following reasons:

1. Police never tested me for DNA.
2. No DNA or visual evidence present during the use of rape kit.
3. Rushed to trial, David Mathews put in for a speedy trial without my knowledge.

---

[1] *Anders v. California*, 386 U.S. 738 (1967).

(App.p.322-p.327). The State filed its Return on August 20, 2014, requesting an evidentiary hearing be held. (App.p.328-p.333).

An evidentiary hearing into the matter was convened on October 27, 2014, at the Beaufort County Courthouse before the Honorable Edgar W. Dickson. Petitioner was present and represented by Tristan M. Shaffer, Esquire. The State was represented by Assistant Attorney General Ashleigh R. Wilson, Esquire, of the Office of the Attorney General. At the evidentiary hearing, Petitioner orally amended his application and alleged:

1. Trial Counsel was ineffective for failing to object to Michelle Amaya's testimony to statements made by the alleged victim that are outside of time and place.
2. Trial Counsel was ineffective for failing to object to Tiffany Davis's testimony of statements that were made by the alleged victim outside of time and place.
3. Trial Counsel was ineffective for failing to object to Epifanio Garcia's conveying that the victim identified Applicant to him.
4. Trial Counsel was ineffective for failing to object to Detective Geathers, who conveyed hearsay statements made by the victims, giving specific facts about the case outside of time and place.
5. Trial Counsel was ineffective for failing to object to the State's attacks on trial counsel in closing argument
6. Trial Counsel was ineffective for eliciting hearsay from the victim's sister.
7. Trial Counsel was ineffective for failing to object to Tiffany Davis's testimony of what happened to her.

(App.p.334-p.340). At the hearing, Petitioner called only Counsel to testify regarding the allegations. The State cross-examined Counsel but called no additional witnesses in response. The PCR court had before it a copy of Petitioner's records from the Colleton County Clerk of Court, Petitioner's records from the South Carolina Department of Corrections, the trial transcript, Petitioner's direct appeal records, the PCR application, and the State's return. At the conclusion of the evidentiary hearing, the PCR court took the matter under advisement. (App.p.334-p.361). On December 15, 2015, Judge Dickson issued a written order denying relief, finding counsel provided effective assistance in this case. (App.p.362-p.368).

On November 26, 2016, Petitioner filed a Notice of Appeal, appealing the PCR court's denial of his application for PCR. Petitioner filed his Petition for Writ of Certiorari and the Appendix on June 1, 2017, and the State filed a Return on August 14, 2017. By order filed October 23, 2018, this Court granted certiorari. On November 2, 2018, Petitioner submitted a Brief in support of his appeal. This Brief of Respondent on behalf of the State now follows.

STATEMENT OF FACTS

Trial

In his opening statement, the solicitor described the State's burden of proof and the elements of the charged crime, and then he summarized the State's case. He said the jurors would hear from the ten-year-old girl (Victim) who was sexual assaulted by Petitioner, and acknowledged that when it came to direct evidence it was "just going to be her word that this [sexual assault] happened." The solicitor, however, noted Victim had immediately disclosed the abuse to her mother the next morning, and then repeated her story to law enforcement and medical personnel. He said: "[s]he's remained consistent." (App.p.74-p.77). In response, Counsel noted how hard it was to prove something beyond a reasonable doubt and described weaknesses in the State's case. He placed particular focus on the fact that Victim spoke to a counselor shortly after the alleged assault and that her statements to that counselor would show "contradictions that a little girl who doesn't understand what all is going on." (App.p.78-p.80).

The State then presented testimony and evidence regarding Petitioner's sexual assault of Victim. First, Victim, who was eleven at the time of trial, took the stand. She identified Petitioner in the courtroom and said she knew him as "Uncle Timmy." Petitioner was a close family friend who had lived with Victim and her family in the past, and was spending the night in the house on the night of the incident after spending the evening drinking with Victim's father.

(App.p.138). Victim testified she had gone to sleep in the living room after watching TV with her brother and sister when she suddenly felt Petitioner touching her. When he stopped, she woke her sister and brother and asked them to move with her to the top bunk of her bed. (App.p.85-p.87). Victim said she felt Petitioner put his hand in her underwear and then she felt his finger go inside her vagina, which she referred to as her "Lucy." She testified it "hurt really, really bad." Victim said Petitioner put his finger in her at least twice. Victim acted like she was asleep and attempted to scoot away from Petitioner and told him to stop. Eventually Petitioner stopped and left the bed. Victim then got her sister and brother and made them sleep with her on the top bunkbed in a different room. (App.p.93-p.96). As soon as she got up in the morning, Victim got in bed with her mother and told her what Petitioner had done. **She testified she told the story to her mother just like she told it in court.** The solicitor then asked how many people she had told about the abuse. Victim said she made the disclosure to her cousin, her family members, about eight doctors, Detective Geathers, and the solicitor himself, and claimed that her story "**had not changed at all.**" (App.p.100-p.102) (emphasis added).

On cross-examination, Counsel immediately questioned this claim of absolute consistency. He began by asking Victim about her multiple disclosures, particularly the one she made to "a counselor over in Beaufort" named Ms. Mary Beth.[2] Counsel questioned Victim about things she told the Ms. Mary Beth that either were omitted from or inconsistent with her trial testimony including: (1) her claim that the assault hurt as much as getting her finger shut in a car door when she was seven, (2) her statement that she woke up when Petitioner turned the lights on after the alleged assault, (3) her claim that before the incident she fell asleep with her sister holding onto her leg, (4) her estimation of the time of the alleged assault, (5) her description of the clothes she was wearing during the alleged assault, and (6) her claim that

[2] The counselor was later identified as Mary Beth Hefner.

Petitioner had really long fingernails. (App.p.102-p.108). Counsel then asked Victim about inconsistencies between her trial testimony and the disclosure she made to the medical personnel who examined her after the incident, particularly her claim that she kept moving Petitioner's hand away during the alleged assault. (App.p.108-p.109). Next, Counsel returned to the interview with Ms. Mary Beth, asking about more of Victim's inconsistencies including: (1) her statement that Petitioner put two fingers all the way in, (2) her claim that she never said a word to Petitioner during the assault, (3) her reference to Petitioner as "this boy Timmy" rather than "Uncle Timmy," (4) her acknowledgement that Petitioner had spent the night at her house many times in the past, (5) her claim that she had a Hannah Montana blanket on top of her during the alleged assault, (6) her claim that this was the first time Petitioner had spent the night at the house without a girlfriend, and (7) her statement that she woke up in the morning and saw Petitioner on the couch. (App.p.109-p.116). During his cross-examination, Counsel had Victim acknowledge that Detective Geathers was present when she talked to Ms. Mary Beth and that Geathers had watched the whole interview. (App.p.111, lines 6-14). Following the solicitor's questions on redirect, when the trial judge asked Counsel if he had any re-cross examination, a bench conference was held off the record. (App.p.118, lines 7-14). Although the topic and contents of that bench conference are not part of the record, Counsel's later statements during trial suggest this was when he attempted to introduce a copy of the videotape of the forensic interview in an effort to support his already thorough cross-examination of Victim. (See App.p.227: "Your Honor, I sought to introduce this during [Victim's] interview and was told that was not the proper time, and I'm just looking for the proper way to introduce this evidence in the proper fashion. I wasn't permitted to introduce it during [Victim's] interview and I'd just like to do it during the cross-examination of Det. Geathers.").

Next, Victim's mother, Tiffany Davis, took the stand. In regard to Victim's initial disclosure, Davis was asked: "What did she say?" She responded:

> She told me that when she was laying on the - - this weren't her exact words. She said, "Mama, Timmy - - Uncle Timmy touched me." And I said, "Excuse me?" And she said "Uncle Timmy touched me." I said, "What do you mean, he touched you, Minor ? Explain to mama. Tell me." Because she is a child and things happen. And she said, "Mama, he stick his hands in my pants and he moved his finger around." And for about 20 seconds, I was floored. I had to gather myself. I didn't know who I was or who was around me. I did not know anything.
>
> So I proceeded to ask more question, to get further into detail with her. "Minor, are you absolutely sure?" And she said, "Yes, ma'am." While she was saying all this, she was crying; she was upset. And I had no reason to believe she would make up anything like that. So after we talked some more, she went into, you know, further details with it as far as he touched her and, you know, she had tried to get up and all this other stuff.

(App.p.140-p.141) (emphasis added). Counsel did not object. Shortly thereafter, the solicitor asked: "So do you believe her?" Davis responded: "Yes, I believe her with 100 percent of what's in my body and hers. **I believe everything that's coming out of that baby's mouth.** (App.p.144, lines 18-21) (emphasis added). Finally, the solicitor asked: "And do you believe your daughter?" Davis said: "Yes, I do believe her." (App.p.146, lines 8-9). Counsel also did not object to these two comments.

After the disclosure, Davis took Victim to her grandmother's house where they called the police. Police officers responded to the scene before Petitioner had gotten up from the couch where he was sleeping. Davis talked to the police and then took Victim to the hospital in Colleton County, and then to MUSC for a medical exam. She testified they went straight to MUSC and did not stop for food or anything else. (App.p.141-p.143; p.100).

On cross-examination, Counsel questioned Davis about having been the victim of a sexual assault when she was sixteen and her feeling that she had never gotten justice for that

crime, seemingly suggesting Davis had a motive to indiscriminately believe the disclosure made by Victim in this case. Counsel then began to question Davis about inconsistencies in the Victim's multiple disclosures. He tried to ask her about inconsistencies in the forensic interview with Mary Beth Hefner but disengaged when Davis explained she had not watched the interview like Detective Geathers. (App.p.146-p.153).

The State then called a pediatrician from MUSC, Dr. Michelle Amaya, to the stand. She was admitted as an expert in child abuse pediatrics and explained she was one of two attending physicians working the night Victim was brought in for an exam. She explained that the on-call SANE nurse, Ms. Kerr, responded to the initial visit, examined Victim, took notes, collected an evidence kit, and then shared her work with Dr. Amaya for review and referral for a follow-up visit. Dr. Amaya then proceeded to relay information from the medical records. She said the emergency room physician saw Victim first and noted she was very upset and tearful. That physician called the SANE nurse, who came to talk to the victim to ask what happened and gather evidence. Dr. Amaya said: "And Ms. Kerr talked to her and she was able to say what had happened to her and gave pretty clear evidence. **She was believable, because she was tearful**, but she was - - -" (App.p.157-p. 165) (emphasis added). Counsel objected to this comment. His objection was sustained, and the trial judge gave a curative instruction. The solicitor then asked Dr. Amaya to continue, but without talking about believability. When Dr. Amaya began testifying about Victim's disclosure, Counsel asked that it be limited to time and place of the incident. The solicitor correctly noted he could elicit more than just time and place if it was for purposes of medical treatment. Dr. Amaya then testified, "per the patient report, the patient reports she was sleeping on the floor with her sister and brother when **she felt her uncle trying to touch her privates. She tried to push his hand away. And then he put his finger insider**

her, and that it hurt. She moved over to her sister. Then, he fell asleep." (App.p.165-p.166) (emphasis added). Counsel did not object.

On cross-examination Dr. Amaya acknowledged there were no indications of tearing or cuts or any physical evidence of trauma to Victim. As highlighted by Counsel throughout the trial, this lack of physical injury was found even though the alleged assault happened the night before the exam and the victim's own disclosures indicated it involved two fingers all the way into her vagina, was committed by a man with long fingernails, and was very painful. Counsel then had Dr. Amaya repeat the portion of the medical report stating Victim told the SANE nurse she pushed Petitioner's hand away during the alleged assault, a claim which was inconsistent with Victim's trial testimony. (App.p.172-p.177).

Next, Victim's father, Epifanio Garcia, was called to the stand. He described his family's relationship with Petitioner and then described how they had all spent the day preceding the incident. The next morning, Garcia left for work before Victim made her initial disclosure to her mom. He returned home when he and his father-in-law got a phone call telling them something happened. (App.p.188-p.198). When the solicitor asked Garcia what happened when he got home, he testified in part:

> Tiffany met me, crying, and I said, "What's wrong?" What's wrong with you?" She told me "Minor - - Minor was touched by Timmy." I said, "What? What do you mean?" And then that time, like "Timmy touched her." I was like - - and I seen Minor. I said, "Where's my baby at? "Where's Minor?" And she come up crying. And that's whenever I grabbed her and told her I was sorry. Said, "I'm sorry. I'm sorry." Told her "I'm sorry."

(App.p.199, lines 13-20). Counsel did not object. On cross-examination, Counsel got Garcia to concede Victim was infatuated with Petitioner and "very much" had a crush on him prior to the incident. Counsel then questioned Garcia about his conversation with the officers who responded to the scene. He got Garcia to acknowledge that during that talk, he said **Victim had**

told him "she stopped because she told Timmy it hurt." Finally, Counsel got Garcia to concede Victim was once allowed to have a boyfriend spend the night with her at their house. (App.p.207-p.212) (emphasis added).

Finally, the State called Detective Dorothea Geathers of the Colleton County Sheriff's Department to the stand. She explained she investigated this case and described the procedure followed by the Sheriff's Office in cases of an alleged sexual assault of a minor. Detective Geathers testified it was standard procedure for officers not to talk to the minor when they respond to a scene, but instead to refer the minor to a medical forensic rape crisis advocate at MUSC followed by a counselor at Hope Haven Rape Crisis Center for a forensic interview. This is what was done with Victim. Detective Geathers arrested Petitioner after watching the forensic interview, reviewing the video recording of the forensic interview, and conducting further investigation. (App.p.220-p.224).

On cross-examination, Counsel began by questioning Detective Geathers about the forensic interview. She acknowledged she was at Hope Haven when Mary Beth Hefner interviewed Victim and had watched the entire interview. She also watched the videotape of the interview. When Counsel attempted to ask specific questions about the details given by Victim during the interview Detective Geathers said she couldn't recall, so Counsel sought to refresh her memory by having her watch the videotape before continuing. Following an objection from the State, the jury was sent out and the parties discussed whether the videotape should be introduced into evidence and played for the jury, or if Counsel could merely use it to refresh Detective Geathers' memory and ask her questions about what Victim said during the interview. Ultimately the trial court ruled to allow Counsel to use the videotape as requested, and she was given a copy of the videotape to watch overnight. (App.p.224-p.236). The next morning,

Counsel proceeded to question Detective Geathers about Victim's disclosure to the counselor and every inconsistency between that disclosure and Victim's trial testimony, reinforcing and proving the numerous inconsistencies pointed out during his cross-examination of Victim earlier in trial. (App.p.237-p.248). At the conclusion of redirect, the solicitor moved a redacted version of the videotape into evidence, without objection from Counsel. (App.p.251). The video was then played for the jury and the solicitor continued his redirect examination. (App.p.252). He asked Detective Geathers what was the most important thing she got out of re-watching the video during trial and the following exchange occurred:

> A: I was just making sure everything was consistent what she already disclosed.
>
> Q: What specific instances were you looking at? What did you want to hear to make sure that you had enough evidence to get an arrest?
>
> A: When she stated that Uncle Timmy touched her "Lucy".

(App.p.255-p.256). Counsel did not object.

During his closing argument, Counsel continued pursuing his trial strategy of attacking Victim's credibility in hopes of securing an acquittal for Petitioner. He asked the jury to focus on the details of Victim's testimony and how those details were inconsistent with her prior disclosures of the abuse. He used those inconsistencies to argue Victim was "trying to make things up," telling lies, and trying to fill in gaps in her story. Counsel also attacked Davis and her testimony that she indiscriminately believed her daughter's story despite glaring inconsistencies in the details between the disclosures, suggesting someone could be blinded by emotion and seriously misjudge credibility.[3] He then went after Garcia, focusing on his admission that Victim had a crush on Petitioner. Counsel argued all of these things should give the jury plenty of reasons to have a reasonable doubt. (App.p.273-p.281) Counsel ended his

[3] It appears Counsel was imploring the jurors not to make the same mistake.

closing argument with the following statement, clearly encapsulating his theory of defense: "But if you've got a reasonable doubt, which you do, **these inconsistent statements are enough, you have to find him not guilty**." (App.p.281, lines 20-23) (emphasis added).

PCR Hearing

At the October 27, 2014, evidentiary hearing, Petitioner first listed his amended allegations, most of which focused on claims that Counsel was ineffective for failing to object to alleged hearsay testimony about Victim's disclosure of the sexual assault, which went beyond the time and place of that assault. (App.p.334-p.340). He then put Counsel on the stand and asked him about each instance and whether he believed he should have objected. Counsel first noted this was a case with no physical evidence or DNA and essentially amounted to a little girl's story. (App.p.341). Counsel did not remember anything about the facts of the case in regard to what happened the day after the incident and began reviewing the transcript in an attempt to catch up. He then simply recited portions of the transcript as directed by PCR counsel, and initially had almost no recollection of the case or his particular trial strategies.

With prompting from PCR counsel, Counsel agreed, in hindsight and without context, that there was some testimony to which he thought he should have objected. This included Dr. Amaya's description of Victim's disclosure which went beyond time and place, Davis' recounting of Victim's initial disclosure which also went beyond time and place, and Garcia's description of being told about the disclosure by Davis. (App.p.343-p.348). In regard to similar testimony from Detective Geathers however, Counsel testified: "If my memory serves right, I wanted them to get into that, even though it was hearsay. That's my recollection." (App.p.349, lines 1-25). He then agreed with PCR counsel's suggestion that he should have objected to Detective Geathers' testimony on redirect that during the forensic interview Victim said: "Uncle

Timmy touched her Lucy." This opinion was offered despite the fact that the videotape was already in evidence, Counsel had already questioned Geathers extensively about Victim's disclosure as part of his defense strategy, and the allegation was a basic repetition of Victim's trial testimony which was already before the jury. (App.p.349-p.350). Counsel then acknowledged an instance where he elicited hearsay himself, but noted that in his review of the transcript, "there's hearsay all over the place." (App.p.350). He did not opine that the hearsay was prejudicial or that it affected the outcome of the trial, but he again testified his failure to object to some of it was "probably a mistake." (App.p.352).

On cross-examination, Counsel repeated his claim that he wanted to allow some of the possible hearsay testimony so he could point out the inconsistencies in Victim's statements, particularly by using Detective Geathers and the videotape of the forensic interview. He testified:

> I want to get into why somebody's lying, if they're lying, if they're just mistaken. I mean - - why would the little - - why would a girl say this if it didn't happen? And you know, the most common reason is because they - - somebody puts them up to it, or they want to be cool, and somebody else has made an allegation, or whatever. . . . [T]here were - - the inconsistency that I remember, if I am remembering it correctly, is whether she was on the top of the covers or under the covers. . . . I mean, if I'm getting into that, **I did it for some - - probably to show inconsistencies, but I - - I had a reason.**

(App.p.356-p.357) (emphasis added). Counsel was asked: "And it's your testimony today that you decided not to object, kind of, on a strategic basis?" and he answered, "Right." (App.p.357, lines 13-15). In regard to Davis, Counsel explained he wanted to solicit that she had been a victim before, and then suggest Victim's allegation against Petitioner might have just been a way for mother and daughter to bond over unresolved issues and feelings of injustice. (App.p.359). On redirect, Counsel testified he did not have a strategic reason for letting in all of the hearsay, only some, and admitted he made some mistakes at trial. (App.p.360).

After hearing arguments from both parties on the claims of ineffective assistance of counsel, the PCR court took the case under advisement. (App.p.361-p.362). In an Order of Dismissal dated December 15, 2015, and filed December 21, 2015, Judge Dickson denied and dismissed Petitioner's PCR Application with prejudice. In pertinent part, the PCR court found: "[Petitioner] was not denied effective assistance of counsel." It concluded that: "[Petitioner] has not established any constitutional violations or deprivations that would require the Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice." (App.p.366-p.367).

STANDARD OF REVIEW

The standard of review in post-conviction relief cases depends on the specific issue before the reviewing court. It will defer to a post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law *de novo*, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018). Indeed, the proper standard of review in a post-conviction relief action is whether "*any* evidence of probative value" exists to sustain the post-conviction relief court's findings. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). In criminal cases, the appellate court sits to review errors of law only. *State v. Broadnax*, 414 S.C. 468, 473, 779 S.E.2d 789, 791 (2015). The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion. *Id.*; *State v. Morris*, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); *State v. Howard*, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct. App. 2011) An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012); *Howard* at

178, 720 S.E.2d at 514. To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); *Howard* at 178, 720 S.E.2d at 514.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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. "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). An Applicant must overcome this presumption in order to receive relief. *Cherry*, 300 S.C. 115, 386 S.E.2d 624. 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. In assessing counsel's performance, counsel's decisions must be evaluated at the time in which they were made and "every effort [must] be made to eliminate the distorting effects of hindsight."

Strickland, 466 U.S. at 689. 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 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. 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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 668.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief Applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside *the wide range* of professional competent assistance" required of a criminal defense attorney." *Id.* at 690 (emphasis added).

ARGUMENT

The post-conviction relief court properly denied relief on grounds that Petitioner was not deprived of the effective assistance of counsel because: (1) Counsel's failure to object to potentially objectionable testimony elicited at trial was part of a valid trial strategy; (2) the majority of the testimony in question would likely have been admitted under well-recognized exceptions to the hearsay rule; and (3) Petitioner failed to prove there is a reasonable probability that, had the testimony been excluded, the result of the trial would have been different.

The PCR court found "[Petitioner] was not deprived of effective assistance of counsel." (App.p.366). The proper standard of review in a post-conviction relief action is whether "*any* evidence of probative value" exists to sustain the post-conviction relief court's findings. *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626. (emphasis added). Indeed, an appellate court must defer to a post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law *de novo*, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018).

Here, there is probative evidence to support the PCR court's finding that Counsel provided effective assistance at trial despite failing to object to the introduction of potentially objectionable testimony, because the trial court record demonstrates Counsel employed a valid trial strategy built upon using that very testimony to: (1) frame and amplify his attack on the victim's credibility by focusing on the inconsistencies between her trial testimony and her pretrial disclosures of abuse, including specific details mentioned during her forensic interview, her initial disclosure to Davis, and statements she made to Garcia; and (2) develop an attack on Davis' credibility by highlighting her indiscriminate belief in Victim's story of abuse. Despite Counsel's failure to clearly remember and articulate his trial strategy in this regard, the record demonstrates Counsel had a valid and consistent strategy under the circumstances of this case. Therefore, the PCR court's denial of relief should be affirmed on this basis alone.

Additionally, even if Counsel had objected to the potentially objectionable testimony, most of the challenged statements were likely to have been admitted under well-recognized exceptions to the hearsay rule. The only inadmissible parts of the testimony, the identification of Petitioner as the assailant, were cumulative and so insignificant in the context of the case there is no reasonable probability their exclusion would have changed the outcome of the trial. See Rule 803(2) & Rule 803(4), SCRE. Finally, Petitioner failed to prove there is a reasonable probability that, had the testimony been excluded, the result of the trial would have been different. For all of these reasons, this Court should affirm the PCR court's denial of relief under the controlling standard of review.

A. Counsel employed a valid trial strategy

Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Moreover, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In fact, *Strickland* requires extreme deference to counsel's strategic judgments that are adequately investigated. *Strickland* explains "strategic choices made after thorough

investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." *Strickland*, 466 U.S. at 690-91.

The United States Supreme Court has held that counsel's failure to remember does not overcome *Strickland*'s strong presumption of reasonable performance. *Burt v. Titlow*, 571 U.S. at 12, 22-23 (2013) ("We have said that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' ... and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant ... . The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'"). *See also Romine v. Head*, 253 F.3d 1349, 1357 (11th Cir. 2001) (trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance); *Fretwell v. Norris*, 133 F.3d 621, 623-24 (8th Cir. 1998) (reversing the district court's grant of the writ based in part on counsel's inability to recall because this is contrary to the presumption of reasonable assistance).

Here, Counsel's decision not to object to potentially objectionable hearsay testimony was part of a valid trial strategy, used from his opening statement throughout trial and into his closing argument, to attack Victim's credibility by admitting into evidence and then using inconsistencies between her trial testimony and her prior discolsures. At the PCR evidentiary hearing, Counsel testified he decided not to object to some potentially objectionable testimony on a strategic basis. (App.p.357). Counsel testified, "[My] recollection is that… she said she was wearing something she clearly wasn't… I wanted them to get into that, even though it was hearsay." (App.p.349). Counsel also testified that, due to the length of time since the trial, he did

not recall all the reasons behind each decision at trial. (App.p.354; p.356). However, Counsel did testify, "I mean, if I'm getting into that, I did it for some – probably to show inconsistencies, but I – I had a reason." (App.p.357).

This Court has found that there are valid trial strategies for choosing not to object to improper hearsay testimony:

> **[T]he failure to object to improper hearsay testimony in a criminal sexual conduct case** because the testimony is merely cumulative to the victim's testimony is not a reasonable strategy where the evidence is not overwhelming or the improper testimony bolsters the victim's testimony. However, **where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.**

Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (citations omitted).

Here, Counsel did not claim he chose not to object because the evidence was merely cumulative. Instead, Counsel testified he wanted the hearsay evidence admitted in order to attack Victim's inconsistent statements. (App.p.349-p.357). This overall strategy is clearly evident from the trial court record even if not clearly articulated by Counsel at the PCR hearing. This was a valid reason for not objecting to each instance of the potentially improper hearsay testimony and this is probative evidence to sustain the PCR court's finding of effective representation.

Counsel intentionally allowed or elicited multiple statements from Detective Geathers, Davis, Dr. Amaya, and Garcia concerning inconsistent statements made by Victim. Counsel referenced those inconsistencies in his opening statement and used those statements in his closing argument to attack Victim as a liar and to assert Petitioner's innocence. (App.p.280). Counsel's closing argument reflects the intentional decision to use all of the admitted hearsay statements to show inconsistencies in Victim's testimony. "Where counsel articulates a valid

reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State,* 308 S.C. 546, 419 S.E.2d 778 (1992). A strategic or tactical decision does not have to be articulated by counsel. A court may infer from the record that counsel's actions reflect strategic decisions and, thus, should not be disturbed under *Strickland*; *See Wood v. Allen*, 558 U.S. 290 (2010). Petitioner has failed to prove that Counsel's strategy of allowing hearsay evidence, in order to elicit impeachment material, was deficient.

Counsel's apparent agreement that some of the withheld objections were, in hindsight, a mistake matters little. The relevant inquiry is not whether any one attorney believes he was ineffective, but whether his performance fell below an objective standard of reasonableness. "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000). Counsel's claim he should have objected to some of the hearsay was made with the retrospective knowledge that his client was found guilty. Counsel's decision at trial to allow the testimony was not deficient performance because it was a valid strategy to attack Victim's credibility.

There were only two instances of improper direct bolstering testimony and the one which did not support Counsel's trial strategy was immediately objected to by Counsel and corrected by a curative instruction from the trial judge. (App.p.165). "They called the SANE nurse to come see her [Victim], Ms. Kerr, and Ms. Kerr talked to her [Victim] and she [Victim] was able to say what had happened to her and gave pretty clear evidence. **She was believable**, because she was tearful, but she was..." (App.p.165, line 3-line 6) (emphasis added). Counsel immediately objected. App. p. 165. The Court sustained the objected and instructed the jury, "Let the record

reflect that the last response of Dr. Amaya be stricken from the record and you are not to consider that response by her in any way, shape or form in your deliberations." App. 165. ll. 15-18. "Generally, a curative instruction is deemed to have cured any alleged error." *State v. Walker,* 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct.App.2005). Thus, one instance of direct bolstering evidence presented in this case was properly objected to by Counsel and corrected by the trial judge's curative instruction.

This shows Counsel delineated between statements he believed were harmful to Petitioner's case and statements he believed were not harmful. In fact, a comparison with similar testimony elicited from Davis is instructive. Davis, Victim's mother, made statements which could also constitute improper bolstering:

> "Victim, are you absolutely sure?" And she said, "Yes, ma'am."...And I had no reason to believe she would make up anything like that."

(App.p.141, lines 11-14).

> Q: So do you believe her?
>
> A: Yes, I believe her with 100 percent of what's in my body and hers. I believe everything that's coming out of that baby's mouth.

(App.p.144, lines 19-21).

> Q: And do you believe your daughter?
>
> A: Yes, I do believe her.

(App.p.146, lines 8-9). Instead of objecting to these statements, Counsel used these statements to attack the credibility of both Victim and her mother in his closing argument. (App.p.279-p.280). Counsel demonstrated to the jury, through cross-examination and hearsay testimony, that Victim made numerous inconsistent statements. Counsel used Ms. Davis's unwavering belief in her child to highlight the inconsistencies in Victim's story and to suggest the story should not be

indiscriminately accepted as true. (App.p.280-p.281). This valid trial strategy should not be discolored by the lens of hindsight.

> Judicial scrutiny of counsel's performance must be highly deferential... [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. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Stone v. State, 419 S.C. 370, 383–84, 798 S.E.2d 561, 568 (2017).

Counsel also drew attention to other inconsistencies in Victim's hearsay statements. Counsel noted, in Victim's medical report, Victim said Petitioner put a single finger inside her. App. 166. This was in direct contradiction to Victim's other hearsay statement to the forensic interviewer that Petitioner inserted two fingers "all the way" into her vagina. Counsel also asked Dr. Amaya numerous questions concerning the lack of physical evidence indicating sexual assault and the increased likelihood of trauma with two fingers. (App.p.174-p.175). This line of questioning demonstrated Victim's inconsistent testimony regarding the abuse itself in relation to the physical evidence. This cross-examination also called the veracity of Victim's statement to the nurse into question, a tactic similar to the valid strategy noted with approval by Justice Pleicones in *Huggler*. "It is apparent from the trial record that counsel's strategy was to exploit in closing argument the only weakness in the State's case, that is, the inconsistencies between the victims' written statements and their trial testimony...counsel's performance was not objectively unreasonable." *Huggler v. State*, 360 S.C. 627, 636, 602 S.E.2d 753, 758 (2004) (concurring opinion).

Counsel also allowed arguable hearsay from Garcia and was able to draw attention to an inconsistency in what Victim said to him, that **she** stopped the encounter after telling Petitioner it hurt, versus what she said at trial. Here, Victim's inconsistent statements were the only weaknesses in the State's case. Counsel appropriately chose a trial strategy to attack that weakness. Also, Counsel was able to make this attack using the prior disclosures without actively going after the eleven year old victim on the stand, a tactic that would likely have been difficult to accomplish directly without offending the jury. For all of these reasons, there is probative evidence to support the PCR court's finding that Counsel's strategy to attack that weakness by any means necessary, including the intentional admission of possible hearsay, did not fall below the professional norms of reasonableness. This Court should affirm the PCR court because Counsel's decision to use potentially objectionable testimony for the purpose of impeaching Victim's testimony was a valid trial strategy and should not be deemed ineffective through the distorting lens of hindsight and Counsel's failure to remember his own trial strategy with clarity.

B. Most testimony was admissible under Rule 803(2) or Rule 803(4), SCRE.

Counsel was not deficient because the potentially objectionable testimony about the pretrial statements Victim made to the witnesses were admissible under well-recognized exceptions to the hearsay rule as either excited utterances or for the purposes of medical diagnosis and treatment. Rules 803(2) & 803(4), SCRE.

1. Rule 803(2), SCRE

Petitioner complains about counsel's failure to object to testimony from Victim's mother, father, Dr. Amaya, and Detective Geathers recounting Victim's pretrial disclosure of abuse. However, each instance of the challenged testimony would likely have been admitted as an

excited utterance under Rule 803(2). "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE. Victim's statements were admissible because they were: (1) made shortly after Victim's abuse, (2) recounting a very painful sexual intrusion, (3) uttered when Victim was still in an emotional state, and (4) made by a ten-year old for whom the stress of the excitement was extended.

> There are three elements that must be met to find a statement to be an excited utterance:
> (1) the statement must relate to a startling event or condition;
> (2) the statement must have been made while the declarant was under the stress of excitement; and
> (3) the stress of excitement must be caused by the startling event or condition.

State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007).

Here, Victim, a ten-year-old girl, had her vagina "all the way" penetrated by two of her "Uncle Timmy's" fingers. (App.p.111). A sexual assault alone is a startling event and here, Victim claimed the pain was like a car door being slammed on her fingers. (App.p.105). Each witness testified that at the time of the disclosure, Victim was upset and crying. Davis, her mother, said: "While she was saying all this, she was crying; she was upset." (App.p.141, lines 12-13). Dr. Amaya said the medical reports revealed: "She was noted to be very upset, tearful." (App.p.164, line 15). Garcia, her father, said: "And she come up crying." (App.p.199, line 18). Davis testified she took Victim straight to the hospital after she learned of the assault. App. 143. At the hospital, Victim was still visibly upset and crying about the assault, which had just occurred the night prior. Given Victim's age and the stress of the recent event, it is likely Victim's statements would have been admitted by the trial court as excited utterances. *Cf. State*

v. *Sims*, 348 S.C. 16, 558 S.E.2d 518 (2002) (finding where a six-year-old suddenly stopped testifying that the trial court did not err in allowing a police officer to testify that the child had indicated who was in the apartment on the night his mother was fatally attacked and that it was the defendant; the testimony was admissible as an excited utterance under Rule 803(2), SCRE, even though some twelve hours had passed since the attack, as time is just one factor to consider, along with the declarant's demeanor and age, and the severity of the startling event, and even statements in response to an officer's questioning can be an excited utterance because the statements still have spontaneity, especially for a child, for whom stress can last longer than for an adult; the Court stated it is the totality of the circumstances that must be considered in this analysis). Therefore, Counsel did not err by failing to object because the testimony was admissible.

2. *Rule 803(4), SCRE*

Victim's statement to the nurse was admissible because it was related to the nurse's' attempt to diagnose and treat Victim.

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (4) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

Rule 803(4), SCRE

The substance of the nurse's report falls under this exception. To the extent Petitioner now complains this is double hearsay, the report itself was admissible as a business record. Rule 803(6), SCRE. The incident occurred the night before the examination. (App.p.164). Petitioner inserted a finger into Victim's vagina while Victim was lying down and it hurt. (App.p.166).

These facts are relevant to diagnosis and fall under the hearsay exception in Rule 803(4). Petitioner alleges *Borroughs* stands for the proposition that Victim's medical report was prejudicial and did not fall under the medical diagnosis hearsay exception. *State v. Burroughs*, 328 S.C. 489, 502, 492 S.E.2d 408, 414 (Ct. App. 1997). Petitioner's reliance on *Burroughs* is distinguishable from this case. In *Borroughs*, the victim told the doctor the alleged rapist "asked for a hug." *Id.* at 501, 492 S.E.2d at 414. *Burroughs* found this was outside the scope of the "medical diagnosis" exception because it was not "reasonably pertinent" to the victim's diagnosis or treatment. *Id.* Importantly, the court found that, "[T]his portion of the victim's story proved to be extremely important to the State's case against Burroughs." *Id.*

In contrast, other than the identification and actions of Petitioner, Victim's medical report contained only the location and movement of the children preceding and following Petitioner's assault of Victim. Unlike in *Burroughs*, the location and movement of the children preceding and following the alleged incident were undisputed and not important to the State's case. The children's movement was undisputed because it did not demonstrate guilt or prejudice Petitioner. Victim's brother also corroborated Victim's story, concerning the children's location and movement the night of the assault. App. 127-129. Therefore, *Burroughs* is distinguishable from this case because there was no self-corroborating prejudicial evidence.

The State concedes the portion of Dr. Amaya's testimony identifying Petitioner as her assailant would not have been admissible for the purpose of medical diagnosis or treatment. *State v. Simmons*, 423 S.C. 552, 565, 816 S.E.2d 552, 573 (2018). Nevertheless, it was not prejudicial. In *Brown*, the doctor's testimony regarding the assailant's identity was found to be harmless, because it was cumulative, and the conviction was affirmed. *State v. Brown*, 286 S.C. 445, 447, 334 S.E.2d 816, 817 (1985). Here, the identification of Petitioner was also cumulative

to the victim's identification. There was no question that Petitioner was the accused. Petitioner's indictments were in evidence and he was seated at the defense table. App. 24; 299. Victim testified and pointed him out during testimony. App. 84. As in *Brown*, there was no prejudice in Victim's identification of Petitioner to the nurse.

Victim's statements to the nurse were relevant to the victim's medical diagnosis and treatment under Rule 803(4). Victim's statements to the nurse, Ms. Davis, Mr. Garcia, and Detective Geathers were admissible under the excited utterance exception under Rule 803(2). Therefore, this Court should also affirm the PCR court's denial of relief and finding effective assistance of counsel on this alternative sustaining ground.

3. *There is probative evidence to support the PCR court's finding Petitioner was not prejudiced because the admission of the testimony, when evaluated under the totality of the circumstances, was harmless beyond a reasonable doubt.*

Petitioner initially relied heavily on *Jolly* for the assertion that improper corroboration testimony, which is cumulative to the victim's testimony, cannot be harmless. (PWC, p.13-p.14). However, Petitioner now acknowledges *Jolly* was overruled by *Jenkins*. "Our finding that the error was not harmless is based on our analysis of the facts of this individual case, not based on any categorical rule. (collectively overruling *Jolly v. State*, 314 S.C. 17, 443 S.E.2d 566 (1994), to the extent *Jolly* imposes a categorical or per se rule regarding harmless error." *State v. Jenkins*, 398 S.C. 215, 227, 727 S.E.2d 761, 767 (Ct. App. 2012), rev'd, 412 S.C. 643, 773 S.E.2d 906 (2015) (internal citations omitted) (overruled on other grounds). In overruling *Jenkins*, this Court found: "[T]rial errors occur during the presentation of the case to the jury, and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt... appellate courts

must determine the materiality and prejudicial character of the error in relation to the entire case." *State v. Jenkins*, 412 S.C. 643, 650–51, 773 S.E.2d 906, 909 (2015).

Here, the hearsay evidence was used by Counsel to attack Victim's credibility and, thus, was divested of its ordinarily prejudicial nature. Indeed, as Davis' statements of unconditional belief in Victim were used by Counsel to point out inconsistencies in Victim's testimony and deprive Davis' testimony of credibility during his closing argument. Though these statements would normally be prejudicial, in this case, Counsel used them to attack Victim's credibility and to assert Petitioner's innocence. Counsel turned the normally prejudicial evidence against the State where it was at its weakest. Counsel, thereby, both acted strategically and effectively deprived the evidence of its potential prejudice. Simply because the weakened State's evidence was still accepted by the jury despite Counsel's efforts does not prove prejudice.

Accordingly, the State asks this Court to affirm the PCR court's denial of relief and finding of effective assistance of counsel on this third alternative sustaining ground. The PCR court found Counsel provided effective assistance. The record supports this finding for a variety of reasons. As Petitioner failed to meet his burden of proof in this PCR action, his application was properly denied and dismissed with prejudice.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment denying post-conviction relief be affirmed.

Respectfully submitted,

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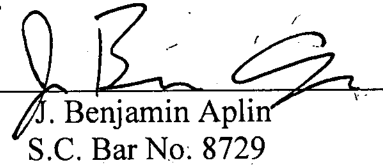
BY: 
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