

ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas (PCR)
The Honorable Perry H. Gravely, Post-Conviction Relief Judge

Glenn Edwin Vanover,

v.

State of South Carolina,

Petitioner,

Respondent.

Appellate Case No. 2016-001917

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....1
TABLE OF AUTHORITIES.....2
STATEMENT OF ISSUE ON APPEAL.....3
STATEMENT OF THE CASE.....4
RESPONDENT’S STATEMENT OF FACTS.....7
STANDARD OF REVIEW8
ARGUMENT.....9

There is probative evidence in the record supporting the PCR judge’s ruling that Petitioner failed to show ineffective assistance in declining to further investigate, obtain and present evidence from witness Pace regard a prior false allegation purportedly made by victim as related by her mother that did not involve any allegation of sexual battery.....9

CONCLUSION.....19

TABLE OF AUTHORITIES

Cases:

<i>Buckson v. State</i> , 423 S.C. 313, 815 S.E.2d 436 (2018)	8
<i>Franklin v. Catoe</i> , 346 S.C. 563, 552 S.E.2d 718 (2001)	14
<i>Goins v. State</i> , 397 S.C. 568, 726 S.E.2d 1 (2012)	13
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	13, 14
<i>Mizell v. Glover</i> , 351 S.C. 392, 570 S.E.2d 176 (2002)	17
<i>Rosemond v. Catoe</i> , 383 S.C. 320, 680 S.E.2d 5 (2009)	14
<i>Sellner v. State</i> , 416 S.C. 606, 787 S.E.2d 525 (2016)	8
<i>Smalls v. State</i> , 422 S.C. 174, 810 S.E.2d 836 (2018)	8
<i>Smith v. State</i> , 386 S.C. 562, 689 S.E.2d 629 (2010)	14, 17, 18
<i>State v. Grovenstein</i> , 340 S.C. 210, 530 S.E.2d 406 (Ct.App. 2000).....	16
<i>State v. Quattlebaum</i> , 338 S.C. 441, 527 S.E.2d 105 (2000)	17
<i>State v. Scott</i> , 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013).....	16
<i>State v. Vanover</i> , Unpublished Opinion No. 2013-UP-481 (S.C.Ct.App. 2013), 2013 WL 8541658 (2013).....	4
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	13, 14, 15, 17, 18
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	13
<i>Wilder v. State</i> , 388 S.C. 282, 696 S.E.2d 587 (2010)	17
<i>Wong v. Belmontes</i> , 558 U.S. 15 (2009).....	18

Court Rules:

Rule 71.1(e), SCRCP	13
Rule 243 (g), SCACR	16
Rule 403, SCRE	16
Rule 608(b), SCRE	17, 18

STATEMENT OF ISSUE ON APPEAL

Did the PCR court err by finding trial counsel was not ineffective for failing to investigate claims that the victim previously made unfounded allegations of a sexual nature against a former teacher?

(Order Granting Petition for Writ of Certiorari).

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court in Lexington County. A Lexington County Grand Jury indicted Petitioner in August 2011 on two counts of criminal sexual conduct with a minor under the age of eleven, first degree. (App. pp. 514-517) (Indictments 2011-GS-32-2356 and 2357). A jury trial was held on August 28-29, 2012 before the Honorable Perry M. Buckner. (App. p. 1; p. 93). The jury convicted as charged. (App. pp. 275, line 17 – p. 276, line 3). Judge Buckner sentenced Petitioner to two concurrent terms of twenty-six (26) years imprisonment. (App. p. 286, line 24- p. 287, line 4). Petitioner appealed.

Katherine Carruth Goode, Esq., represented Petitioner in the direct appeal. Appellate counsel filed a final brief in the South Carolina Court of Appeals on August 23, 2013, along with Petitioner's final reply brief.¹ Appellate counsel raised the following issue on appeal:

Did the circuit court err in admitting testimony concerning alleged prior acts of the defendant toward the mother of the alleged victim?

(Final Brief of Appellant, p. 1).

The State filed its final brief on September 10, 2013. This Court issued an unpublished opinion on December 23, 2013 that affirmed upon finding the issue procedurally barred from review, *State v. Vanover*, Unpublished Opinion No. 2013-UP-481 (S.C.Ct.App. 2013), 2013 WL 8541658 (2013), and subsequently issued the remittitur on January 8, 2014.

On December 10, 2014, Petitioner filed a PCR action and made the following allegations of ineffective assistance of trial counsel:

¹ The direct appeal briefs have not been included in the petition appendix, but are available on the Court's website through C-Track. See Appellate Case No. 2012-212998.

- (a) Failure to Object/Preserve Issue;
- (b) Failure to Investigate – School Records and Medical Records;
- (c) Failure to Investigate – Brandon Vanover
- (d) Failure to Investigate/Cross Examine/Impeach
- (e) Permitting Client to Appear and Testify while under the influence of prescription narcotics
- (f) Soliciting/Failure to object to testimony regarding suicide attempt;
- (g) Failure to Investigate prior unfounded allegations by the victim
- (h) Calling Mike Horne as a Witness in the Defendant's case

(App. pp. 297-303).

The State made its return to the application on March 19, 2015. (App. pp. 305-309).

An evidentiary hearing was held April 19, 2016, before the Honorable Perry H. Gravely. (App. p. 310). Jonathan M. Milling, Esq., represented Petitioner in the action. Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented the State. At the conclusion of the hearing Judge Gravely took the matter under advisement. (App. p. 475). A formal written order of dismissal dated June 17, 2016, filed June 22, 2016, followed. (App. pp. 478-483). Petitioner filed a Rule 59 motion on July 7, 2016. (App. pp. 486-496). The State made its return to the motion on July 25, 2016. (App. pp. 498-505). Judge Gravely denied the motion on by order dated July 28, 2016, filed August 12, 2016. (App. p. 507). Petitioner sought a timely appeal from the denial of relief.

On March 24, 2017, Petitioner filed his petition for writ of certiorari with this Court and presented two questions:

- I. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in failing to properly investigate allegations that the victim made unfounded allegations of a sexual nature against a former teacher?

II. Did the circuit court err in holding that petitioner's trial counsel was not ineffective in failing to properly object to "bad act" evidence?

(Petition, p. 1).

The State made a return on July 26, 2017. Petitioner made a reply on August 17, 2017.

On October 30, 2017, the Supreme Court transferred jurisdiction of the matter to this Court.

On February 6, 2019, this Court granted certiorari on one issue which the Court framed as follows:

Did the PCR court err by finding trial counsel was not ineffective for failing to investigate claims that the victim previously made unfounded allegations of a sexual nature against a former teacher?

The Brief of Petitioner was filed March 7, 2019. This Brief of Respondent follows.

STATEMENT OF FACTS

The victim in this case was Petitioner's daughter. Victim testified to several incidents of sexual assault prior to the age of eleven. (App. p. 108, line 9 – p. 118, line 3). She testified she initially told her mother about the allegations in the seventh grade, but no police involvement followed. (App. p. 117, lines 7-22). Victim made the allegations against Petitioner to individuals outside the family when she was fourteen years old and in the ninth grade. (App. p. 84, line 19 – p. 85, line 3). Victim testified Petitioner felt her on the outside of her clothes, (App. p. 109, line 10- p. 110, line 21), and on another occasion, Petitioner invited victim into his bedroom, pulled her pants down, "was kind of like cradled on top" of her and put his "private" inside her "private," (App. p. 111, line 4 – p. 112, line 25). She further testified Petitioner instructed her not to tell anyone or she would get in trouble. (App. p. 113, lines 1-12). She also testified that other times, Petitioner forced her to perform oral sex on him, and also to rub his penis. (Tr. pp. 114, line 20- p. 115, line 11). She testified these events were repeated at different homes. (App. p. 116, lines 1-18). She testified the abuse stopped when she began menstruating. (App. p. 124, lines 20-23).

Petitioner, his wife, and his mother, testified he had been accused before as a result of a discipline issue, but Victim eventually denied the abuse. (See App. p. 209, line 2 – p. 211, line 4; p. 185, line 12 – p. 189, line 4; p. 202, line 9 – p. 203, line 1).

The jury was in deliberations over four hours before returning a verdict of guilty of both charges. (See App. p. 270, line 23 – p. 274, line 4).

STANDARD OF REVIEW

“An appellate court must give deference to the PCR court’s factual findings, and must uphold them if there is any evidence of probative value to support them.” *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, appellate courts “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 (2018).

ARGUMENT

There is probative evidence in the record supporting the PCR judge's ruling that Petitioner failed to show ineffective assistance in declining to further investigate, obtain and present evidence from witness Pace regarding a prior false allegation purportedly made by victim as related by her mother that did not involve any allegation of sexual battery.

When considered in light of the record before the PCR court, the record supports relief is not warranted. This case presents a failure to present a sufficient factual basis at the PCR hearing to carry an applicant's burden of proof. Petitioner simply failed to show trial counsel rendered deficient performance with resulting prejudice such as would entitle him to relief.

The PCR Ruling

At the PCR hearing, former defense counsel explained that he came to accept the case the case through a law school friend, Kenneth Mathews, and that he knew Petitioner's sister, Caroline, who worked for Mr. Mathews. (App. p. 318, lines 9-23; see also p. 413, lines 12-13).² Counsel testified he met essentially with "the entire family" as the charges stemmed from a father's molestation of his daughter. (See App. p. 316; lines 1-16). Former defense counsel testified that he was aware of Mr. Pace ("Pace") from a line in Victim's mother's note (from a suicide attempt) which indicated Victim "almost had a teacher fired because she said he said, 'what color is your underwear' But he said 'no one wants to see that, pull your pants up.'" (App. p. 327, line 11 – p. 328, line 12). Defense counsel testified he did not see the comment as "sexual in nature," but a comment to dress properly. (App. p. 328, line 19 – p. 329, line 10). In particular, counsel testified:

A. Well, the way I learned about that allegation is that there was a one-page

² Mr. Mathews is a criminal defense attorney based in Columbia, South Carolina. His website reflects more than 40 years of experience with areas of practice including criminal defense, family law, and personal injury. See <https://www.kenmathewslaw.com>.

line, which was written about him by the wife. And if I could just read to you that one-page line?

Q. Please.

A. This is when she tried to commit suicide. And she basically was putting everything that she could think of about what was going on. And she said that -- maybe it's on the other side here. I'll read you word for word what his wife said.

Q. Please do.

A. She almost had a teacher fired because she said he said, "what color is your underwear" But he said "no one wants to see that, pull your pants up."

That is the extent of that sentence and I can tell you, I guess, probably I'm basing some of my decision based on my knowledge of teaching school and stuff like that. I went to Clemson in Secondary Ed/History and I was going to be a history teacher.

Q. Yes, sir.

A. And my mother was a teacher. And I guess being a teacher I could see myself telling some young girl to 'pull your pants' Nobody wants to see what color your underwear -- I could hear my mother saying that to children. And I don't really think that's sexual in nature.

Q. Okay. But you didn't talk with Mr. Pace to find out whether or not there might have been more to the story?

A. I accepted that as being true. I don't know if Mr. Pace said that or not, but if he said that -- I don't see that as being that bad a thing for a teacher to tell some young student running about -- because old-school, you wanted the students to dress properly.

Q. Okay.

A. I would add that neither the Defendant or any of his family wanted me to subpoena him and bring him to Court to testify.

Q. You had that conversation with them?

A. I asked if there was anything else. I asked him 'is there anything else you think we should do?' And I would assume that Caroline would have said

something. I didn't really know that -- I didn't put that much faith -- and maybe, Ms. Vanover, in doing that. Because she's a lovely lady. But she doesn't have experience with the criminal system. But I thought if Caroline really thought it was important, she would have said something to me. But I didn't think it was important.

(App. pp. 329, line 4 – p. 330, line 3).

“Caroline” is Caroline Lindler. Ms. Lindler testified at the PCR hearing. She indicated she had not met with trial counsel until the morning of trial; however, she testified she had “briefly” spoken to him, and asked if counsel need anything in preparation. (App. p. 413, line 21 – p. 414, line 18). She indicated that she was aware of the Pace “allegations,” and also indicated counsel “did know about that.” (App. p. 415, lines 7-13.) She indicated that she did not suggest counsel interview Pace, and also again, that counsel “had the information,” and it was not her “job to tell him what to do.” (App. p. 416, lines 11-14).

Pace testified at the PCR hearing that he only heard the allegations from the mother, did not hear accusations from Victim, and the mother indicated Victim told her Pace “had been asking what color her panties her and her friend wore. What time of the month their period was, if they had a boyfriend or not.” (App. p. 355, lines 18-21). Though both parents called Pace, Petitioner approached the matter calmly indicating, “I need you to talk to my wife.” (App. p. 353, line 16 – p. 354, line 20). The mother “was very accusing and basically accusing [Pace] of doing something wrong.” (App. p. 354, lines 19-22). The confrontation occurred when Victim was in the seventh grade. (App. p. 352, lines 2-3). The first allegations against Petitioner were made when Victim was in the seventh grade, (App. p. 117, lines 20-22), though Petitioner stated to the DSS investigator that he never heard of any allegations prior to the investigation of the instant charges, (App. p. 171, lines 18-24).

Petitioner failed to establish who withdrew the allegations, as Pace had no personal

knowledge of who withdrew the allegations. (App. 356, lines 5-22). Petitioner placed no evidence in the record of any contemporaneous report or notation by school officials over who withdrew what allegation, though Petitioner testified that he went to the school and spoke to a school official. (App. p. 117, lines 1-9).

Brandon Vanover also testified at the PCR hearing referencing the Pace allegations. He testified the allegation went to Pace allegedly wanting to know the color of Victim's underwear. (App. p. 371, lines 20-22).

Petitioner testified at the PCR the allegations were "in the same line" as those against him, then added – differently than the mother's note, Pace's PCR testimony, or any other testimony – that the allegation involved a touching on the buttocks. (App. p. 441, line 21 – p. 442, line 3).

During argument as the conclusion of the PCR evidentiary hearing, Petitioner offered that the Pace allegations were of a "sexual nature" and would demonstrate a pattern of Victim making allegations to obtain a desired result. (App. p. 460, lines 1-17). The PCR judge question: "You don't think he'd have had a problem getting that evidence in?" (App. p. 460, lines 18-20). Petitioner argued that if Victim had been confronted and denied the allegation, then extrinsic evidence would have been allowed in the defense case. (App. p. 460, line 20 – p. 461, line 19). The State argued impeachment was a suspect argument when Pace never heard the allegations from Victim, and further argued the information also held damaging inferences the allegation was an effort to "cover up" Petitioner's own behavior. (App. p. 472, lines 22-25).

The PCR judge resolved:

Applicant alleges trial counsel was deficient in failing to interview a teacher whom, Applicant alleges, the victim accused of making sexually harassing statements that were later recanted.

During the PCR hearing, Kenneth Pace, the victim's former teacher, testified that Applicant and Applicant's wife called him and stated the victim had claimed he made comments about the color of her underwear. Mr. Pace testified he had not said these things to the victim. Mr. Pace testified he never heard directly from the victim about this allegation and did not speak with the victim again after receiving that phone call from Applicant.

Applicant states the witness should have been used at trial to show the character of the victim and previous false statements. However, this Court finds Applicant did not establish the testimony would have been admissible. Further, this Court finds Applicant failed to show that the failure to introduce this testimony prejudiced Applicant.

(App. pp. 481-482, Order, pp. 7-8).

Petitioner maintained in his motion to alter or amend that Victim could have been questioned about the prior allegation and recantation, and Pace could have been called to present testimony if Victim failed to admit the prior allegation and recantation. (App. pp. 495-496).

Relevant Law Governing Ineffective Assistance Claims

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 673 (1984)). A PCR "applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRPC. *See also Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). In order to prove deficient performance, the convicted defendant must "show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (*quoting Strickland*, 466 U.S. at 687). The petitioner "must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different."

Franklin v. Catoe, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001). “A reasonable probability is a probability sufficient to undermine confidence in the outcome” of the proceeding. *Strickland*, 466 U.S. at 694. “The likelihood of a different result must be substantial, not just conceivable.” *Richter*, 562 U.S. at 112 (citing *Strickland*, 466 U.S. at 693).

“[E]rror by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Smith v. State*, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010) (quoting *Strickland*, 466 U.S. at 691). “To establish prejudice, the defendant is required ‘to show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.*, at 565–66, 689 S.E.2d at 631 (quoting *Strickland*, 466 U.S. at 694). “[N]o prejudice occurs, despite trial counsel’s deficient performance, where there is otherwise overwhelming evidence of the defendant’s guilt.” *Id.*, at 566, 689 S.E.2d at 631 (citing *Rosemond v. Catoe*, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)).

Discussion

Petitioner argues to this Court that the PCR judge incorrectly dismissed the allegation by finding the evidence was not admissible. (BOP, pp. 9 and 13). However, that is the very nub of whether prejudice could be established. It matters not if counsel was deficient in investigation if there is no admissible evidence to be discovered. *Strickland* provides:

... a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. 466 U.S. at 697.

However, the presentation at the PCR hearing shows a variety of failings in the case presented which in turn supports neither a finding of deficient performance nor prejudice under the *Strickland* test.

First, Petitioner's evidence that demonstrates counsel was aware of the Pace allegation rests on hearsay *from the mother*. Further, Pace testified the accusations were received from the mother. He did not hear any allegation by Victim. There was no direct testimony, or contemporaneous written record, of what Victim purportedly stated. Further, the mother's note – which counsel admitted that he reviewed and considered – actually contradicts the mother's purported statement to Pace as related by him during the PCR proceedings. Further, the PCR testimony from Caroline Lindler seems to indicate that counsel knew the essence of the allegation, (App. p. 415, lines 7-13), but if this came from the suicide note, the failure to investigate further is reasonable given the explanation forwarded by trial counsel in his PCR testimony. Further still, the PCR testimony from Brandon Vanover specifically limits the comment to that regarding the color of underwear, (App. p. 371, lines 20-22), but in an apparently attempt to move the target, Petitioner testified at PCR for the first time that there was a purported touching, (App. p. 441, line 21 – p. 442, line 3). As a whole, the PCR testimony about the Pace allegation is contradictory and unreliable. But again, and critically, the note *given to defense counsel* did not indicate an allegation of a sexual nature. Counsel's information reasonably indicated no further investigation was necessary. *Strickland*, 466 U.S. at, 691 (“In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based,

quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.”). This alone is sufficient to affirm the finding Petitioner failed to show ineffective assistance. See Rule 243 (g), SCACR (the return may offer additional sustaining grounds).

Second, as noted within the above argument, Petitioner failed to establish the substance of the purported accusation. As far as a “prior bad act,” not only was the substance not clearly established, Petitioner failed to show how such accusation would be admissible as a prior bad act,³ especially given the marked dissimilarity between an allegation of sexual comment and the graphic description of long term sexual abuse. See generally *State v. Scott*, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013) (explaining prior bad act evidence requires “clear and convincing evidence” of scheme with a “close degree of similarity” to the crimes at issue).⁴ Petitioner offers, though, that such evidence should come in as “character evidence” under

³ Evidence of other prior sexual incidents perpetrated by sexual abuse victims was admissible in *State v. Grovenstein*, 340 S.C. 210, 530 S.E.2d 406 (Ct.App. 2000), for the limited purpose of explaining possible source of young victim’s sexual knowledge. Petitioner has neither alleged such an exception, nor does the exception fit the facts of this case.

⁴ Even if Petitioner could meet the relevance standard, and the prior bad act admissibility requirements, he would still need to pass the hurdle of unfair prejudice. *Scott*, 405 S.C. at 505, 748 S.E.2d at 245 (“Even when bad act evidence is sufficiently similar to the crimes charged, a trial court may, nonetheless, exclude the evidence when its probative value is substantially outweighed by the danger of unfair prejudice.”); see Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”). This would be a hard argument to make based on the lack of clarity of the offered evidence regarding allegation and recantation, the dissimilarity of comment versus act, possible introduction of the inference of differing abuse from another adult, and, a resulting raw character attack without any fair probative value tied to the charges at issue.

608(b)(1), SCRE. (BOP, p. 13). However, he must first establish that the allegation was made by Victim. That was not established at PCR. If the *Victim* had made a false allegation, it is possible that a specific instance may be the subject of a *question*, for purposes of impeachment, but again, the very failing here is there is no clear evidence the allegation and retraction was made by victim. See generally *Wilder v. State*, 388 S.C. 282, 285, 696 S.E.2d 587, 588 (2010) (“Under Rule 608(b)(1), a trial judge may allow a witness to be cross-examined about ‘specific instances of [that witness’s] conduct’ if the trial judge, in his discretion, finds these instances probative of the witness’s credibility.”); *State v. Quattlebaum*, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000) (“The inquiry under Rule 608(b) is limited to those specific instances of misconduct which are clearly probative of truthfulness or untruthfulness...”); *Mizell v. Glover*, 351 S.C. 392, 400, 570 S.E.2d 176, 180 (2002) (“Rule 608 permits questioning about the underlying event from the actor in the event, not rumors or reports of what others perceived about the event.”). Even if a question could be allowed, Petitioner was barred by the very rule he relies upon from presenting any extrinsic evidence. Rule 608(b), SCRE (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence.”); *Mizell*, 351 S.C. at 401, 570 S.E.2d at 180 (“...Rule 608(b) allows specific instances of conduct to be *inquired into* on cross, but does not allow those instances of conduct *to be proved* by extrinsic evidence.”).

Third, the lack of sufficiency of the evidence of the purported prior allegation and recantation impairs any argument on prejudice. “[E]rror by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Smith v. State*, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010) (quoting *Strickland*, 466 U.S. at 691). “To establish prejudice, the defendant is required ‘to show

that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 565–66, 689 S.E.2d at 631 (quoting *Strickland*, 466 U.S. at 694). If, for the sake of argument, one assumes deficient performance in investigation, there is still no factual basis for finding prejudice. Again, Petitioner failed to establish what, if any, accusation was actually made by Victim. Whatever statement was purportedly made by the victim would need to be determined before she could be questioned about the substance. Additionally, and critically, extrinsic evidence of the statement is prohibited. See Rule 608(b), SCRE. Because Petitioner fails to show a path to admissibility, there is no possibility of *Strickland* prejudice on these facts. On the other hand, admission of the evidence as shown in the PCR hearing would tend to impeach Petitioner (as it is contrary to his statement to the DSS investigator), and also show a failed attempt to discredit the victim when the abuse was previously first reported to family members. See *Wong v. Belmontes*, 558 U.S. 15, 25 (2009) (considering negative results that may occur when omitted evidence is considered under a *Strickland* analysis). In short, whatever could possibly be accepted under some theory would lead to damaging evidence for the defense, much greater than any positive value to the defense. Again, Petitioner fails to show any possibility of *Strickland* prejudice.

In short, the record fully supports the PCR judge's ruling. Petitioner failed to show deficient performance and/or prejudice under *Strickland*, most specifically, because he failed to show admissible evidence was missed in investigation. (See App. pp. 481-482; PCR order pp. 7-8). The denial of post-conviction relief should be affirmed.

CONCLUSION

For the reasons stated above, Respondent submits the Court should affirm the PCR court's denial of post-conviction relief.

Respectfully submitted,

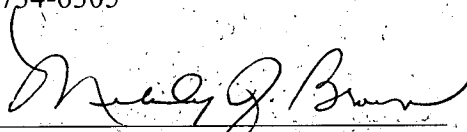
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