

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Maite Murphy, PCR Judge
Deadra L. Jefferson, Trial Judge
Appellate Case No. 2018-001050

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S.C. SUPREME COURT

DANIEL J. JENKINS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Statement of Issues on Certiorari

Whether the PCR court erred by ruling defense counsel was not ineffective for failing to object to the qualifications of midwife SANE nurse Faye Lebeof, as an expert with a specialty in sexual assault, and her bolstering opinions where Lebeof was a law enforcement witness since she took DNA evidence from petitioner to help prove his guilt, Lebeof testified the alleged victim's "history" was consistent with her assertion she had been sexually assaulted in this case, and the PCR court's order cited outdated case law on expert testimony that was no longer good law in support of its order denying relief?

Respondent's Counterstatement of Issues on Certiorari

The post-conviction relief court properly denied relief where Petitioner failed to establish trial counsel was constitutionally ineffective in regards to SANE nurse Faye Lebeof where Lebeof was properly qualified as an expert in sexual assault examination, her testimony did not bolster the victim's testimony or exceed the scope of her expertise, and overwhelming evidence firmly established Petitioner's guilt such that the result of the trial would not have been different but for Lebeof's testimony.

A. The post-conviction relief court correctly found Lebeof was properly qualified as an expert witness, and, accordingly, trial counsel was not ineffective for failing to challenging her qualifications as an expert witness in sexual assault examination.

B. The post-conviction relief court properly found Lebeof's testimony was within the scope of her expertise in sexual assault examination and did not impermissibly bolster Victim's testimony.

C. The post-conviction relief court properly found Petitioner could not establish any resulting prejudice where overwhelming evidence firmly established Petitioner's guilt such that the result of the trial would not have been different but for Lebeof's testimony.

STATEMENT OF THE CASE

Procedural History

Petitioner Daniel J. Jenkins is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. In April of 2006, Petitioner was arrested following an investigation into a sexual assault. In September of 2006, the Charleston County Grand Jury indicted Petitioner for one count of first-degree criminal sexual conduct. Assistant Public Defender Jason T. King of the Charleston County Public Defender's Office represented Petitioner. Assistant Solicitor Chad Simpson of the Ninth Circuit Solicitor's Office prosecuted the case. On December 8, 2009, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable Deadra L. Jefferson, circuit court judge, presiding. At the conclusion of trial, the jury convicted Petitioner as indicted. Following the verdict, the trial judge sentenced Petitioner to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45 based on Petitioner's two prior convictions for "most serious" offenses.

Petitioner filed a timely notice of appeal and an appeal was perfected on his behalf by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense—Office of Appellate Defense.¹ Subsequently, following briefing and oral argument, the South Carolina Court of Appeals reversed the trial court's ruling on the validity of a search warrant issued in Petitioner's case and remanded the matter to the trial court for an evidentiary

¹ Although Petitioner's entire appellate record was before the post-conviction relief court, Petitioner has failed to include any of the appellate record in his Appendix. Pursuant to Rule 243(f), SCACR, Petitioner's appellate record should be have included in the Appendix as it was part of the lower court record. A portion of Petitioner's direct appeal records (his certiorari records only) are available on the C-Track case records search on the S.C. Judicial Department's website: <https://ctrack.sccourts.org/public/caseView.do?csIID=51625>.

hearing on the applicability of the inevitable discovery doctrine. State v. Jenkins, Op. No. 4958 (S.C. Ct. App. filed Mar. 28, 2012) (Shearouse Adv. Sh. No. 11 at 48). Thereafter, the State petitioned the Court of Appeals for rehearing, and the Court of Appeals granted the State's petition, withdrew its previous opinion, filed a substituted opinion that contained an additional footnote but was otherwise consistent with its previous opinion, and dispensed with further argument and briefing. State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012).

In reaching that decision, the Court of Appeals determined the search warrant affidavit was deficient because it did not demonstrate the police had probable cause to believe Petitioner raped Victim or Petitioner's DNA was relevant to the investigation. Id. Furthermore, the Court of Appeals determined any error in the admission of the DNA evidence was not harmless, stating:

Without the DNA in this case, . . . the State would have been forced to rely heavily on the credibility of the victim. [Petitioner]'s fingerprint in the victim's home proved he was there, the presence of fluids in her body proved someone had sex with her, and the facial injuries proved someone violently assaulted her. However, removing the DNA leaves only the victim's credibility to prove two key facts necessary for a conviction: that [Petitioner] was the person who had sex with her, and that the sex was not consensual. We cannot find beyond a reasonable doubt that the DNA comparison results in this case, which the DNA analyst testified had a one-in-8.6 quintillion likelihood of error, did not contribute to or affect the verdict.

Id. at 226-27, 727 S.E.2d at 767 (citations and footnotes omitted). Finally, the Court of Appeals concluded there was insufficient evidence in the "blank" appellate record to establish Petitioner's DNA would inevitably have been discovered and remanded the matter for an evidentiary hearing on that issue. Id.

The State then filed a petition for a writ of certiorari in the South Carolina Supreme Court, and the petition was granted on September 24, 2014. Following briefing and oral argument, the Supreme Court reversed the Court of Appeals and reinstated Petitioner's

conviction, finding the trial court's error in admitting DNA evidence that was collected pursuant to an invalid warrant was harmless. State v. Jenkins, 412 S.C. 643, 773 S.E.2d 906 (2015).

Specifically, the Supreme Court found:

Notwithstanding the DNA evidence, there was abundant, independent evidence in the record from which the jury could have found Respondent guilty. For example, the victim testified at length, giving a detailed account of the assault and the events that followed. Moreover, the State presented physical evidence regarding the results of the rape examination conducted on the victim, including the extensive nature of the victim's injuries, the defensive wounds on the victim's body, and the presence of semen. The State likewise presented testimony from the nurse who performed the rape examination that the victim's wounds were consistent with sexual assault. Other testimony revealed that the responding officers described the victim as "roughed up pretty good," and the rape examination nurse described the victim's face as "quite bruised." Additionally, the investigation of the alleged crime scene at the victim's apartment uncovered the victim's ripped underwear and blood and fingerprint evidence corroborating the victim's version of events. Finally, the responding police officers independently connected Respondent to the crime by his nickname "Black" due to their previous dealings with him. Further, after the officers searched for Respondent and found him naked and asleep a short distance away from the scene of the crime, the victim positively identified Respondent as her attacker within thirty minutes of the assault.

Accordingly, contrary to the court of appeals' assertion, this case was not dependent on the credibility of the victim and [Petitioner], with the DNA evidence serving as the only physical evidence that Respondent committed the assault. Cf. State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94–95 (2011) ("We further find the trial court's admission of the reports did not amount to harmless error. *There was no physical evidence presented in this case. The only evidence presented by the State was the children's accounts of what occurred* and other hearsay evidence of the children's accounts. Because the children's credibility was the most critical determination of the case, we find the admission of the written reports was not harmless." (emphasis added) (citation omitted)). Rather, there was other physical evidence that the victim was sexually assaulted, and that [Petitioner] was the perpetrator.

Id. at 652-53, 773 S.E.2d at 910. The Remittitur was returned to the circuit court on July 17, 2015.

Petitioner filed a timely application for post-conviction relief on April 4, 2016. The State (Respondent) filed a return on June 24, 2016, and an amended return on November 8, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened February 1, 2018, at the Charleston County Courthouse before the Honorable Maite Murphy, circuit court judge. Petitioner was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of Respondent.

In his application and amended application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Notice of life without parole, was and still today, invalid and void (sic)."
 - a. "Illegal sentence and conviction."
2. "Prior Conviction- Not Most Serious Offense. 93-GS-10-6617. (sic)"
 - a. "Illegal use of prior conviction of 7-06-1978- was not most serious offense in 1978 (sic)."
3. "Prior Conviction- Not Most Serious Offense. 7-06-1978. (sic)."
 - a. "Carjacking- no notice of life without parole- left court without jurisdiction to proceed to trial."
4. "There is not a carjacking conviction"
 - a. "There's no carjacking indictment, sentence, or conviction."
5. "17-25-45 of January 1, 1996 is "prospective" (sic)"
 - a. "Offense before June 1986 was not classified as violent."

While he did not formally amend his application, Applicant proceeded forward on the following grounds at the evidentiary hearing without objection from the State:

1. Counsel should have moved for a mistrial when the State asked the victim to make an in-court identification of Applicant prior to a ruling on the admissibility of the identification
2. Counsel should have moved for a mistrial following his objection to the officer's testimony that he was familiar with Applicant
3. Counsel should have sought a curative instruction after State sought to bolster the victim's prior testimony

4. Counsel should have challenged Faye Leboef's credentials to testify as an expert in sexual assault examination

Following the evidentiary hearing, Judge Murphy denied the application by written order filed on May 15, 2018.

Summary of Facts Adduced at Trial

In April of 2006, thirty-one-year-old Heather Mayer (Victim) lived alone in downtown Charleston, South Carolina, and worked at a local bakery five days a week. (App. 56-58). Frequently, when Victim headed to work or went to a grocery store near her home, she would encounter Petitioner, who regularly hung around outside of the entrance to the grocery store. (App. 58-59). When she did so, Victim would greet Petitioner, who she knew as "Black," and sometimes exchange pleasantries with him. (App. 58-60; 117-18). However, other than briefly addressing Petitioner when she passed him, Victim did not have a relationship with Petitioner, did not know Petitioner well, did not consider Petitioner to be a friend, and was not even aware of Petitioner's real name. (App. 59-60; 117-18).

On the morning of April 5, 2006, Victim reported to her job at the bakery at approximately 8:00 a.m. and worked throughout the day. (App. 56-57; 60). At around 3:00 p.m. to 4:00 p.m., Victim finished working for the day and returned to her home. (App. 60). After she did so, one of her friends came over to visit, and the two drank several beers together while they socialized. (App. 60-61). Then, Victim's friend left for the evening, Victim ordered a pizza for dinner, and Victim fell asleep on her couch around 8:00 p.m. while she waited for her pizza to arrive. (App. 60-61).

Subsequently, at around 10:00 p.m., Victim was awakened by the sound of someone

knocking on her door and went to open the door in response. (App. 61). When she opened her door, Victim found Petitioner standing on her doorstep, and he asked her if she wanted to go get a beer with him. (App. 62). However, Victim declined Petitioner's invitation. (App. 62). Petitioner then asked Victim for money so he could go get a beer for himself, and Victim again declined. (App. 62). After that, Petitioner abruptly entered Victim's home "somewhat aggressively," and Victim responded by backing away into her living room and sitting down on her couch. (App. 63-64).

Thereafter, Petitioner followed Victim to her couch, immediately began making lewd sexual demands, and threatened to kill her if she did not comply with his demands. (App. 64; 125). In response, Victim pleaded with Petitioner not to do anything, warned him of the potential consequences of his actions, and did everything she could to dissuade him from doing anything further. (App. 64). However, Petitioner was undeterred by Victim's pleas and started touching her. (App. 65). Then, Petitioner grabbed a glass candle holder from Victim's coffee table and began repeatedly striking Victim in her head, face, nose, forehead, ears, and mouth. (App. 64-66). Stunned, Victim tried to physically resist Petitioner while also trying to hold onto her pants and reach her portable house phone to call for help. (App. 65-66). However, Petitioner grabbed the phone away from Victim and forcibly ripped off her pants and underwear. (App. 67). After that, Victim repeatedly begged Petitioner to stop, warned Petitioner her boyfriend was on the way in an effort to frighten him into stopping, and attempted to scream. (App. 67; 128). However, Petitioner was not dissuaded, and he told Victim she was going to die, covered her mouth with his hand, and forced himself inside of her while continuing to make sexual remarks. (App. 68; 130). Petitioner then continued to sexually assault Victim until he ejaculated. (App. 68;

266).

Once Petitioner was finished, he climbed off of Victim, threatened to kill her if she told anyone about the assault, and quickly fled from her home. (App. 68). Injured, frightened, and in disbelief of what had occurred, Victim put on a sweatshirt to cover her blood-soaked clothes and began looking for her phone inside of her house. (App. 69). When she could not find it, Victim ran into the street looking for help, but several passing cars would not stop for her. (App. 69). Victim then ran towards the grocery store near her home, and a woman approached her to find out what had happened. (App. 69-71). However, before Victim could tell the woman, Petitioner approached them and inquired about what had occurred. (App. 71). Terrified, Victim began to cry and asked to use a phone, and Petitioner responded by grabbing her by the arm, leading her across the street, and offering to let her use her phone if she would wash the blood off of her face. (App. 71-72). Petitioner then helped Victim wash her face with water from a nearby spigot before returning Victim's own phone to her. (App. 72-73). After that, Victim took the phone and immediately ran to her house. (App. 73). However, fearing Petitioner would return, she ran back outside and hid under a tarp on the side of her home before calling 911 to report the sexual assault. (App. 73).

Shortly thereafter, law enforcement officers from the Charleston Police Department arrived at Victim's house and spoke with Victim, who was shaking, crying, bleeding, and appeared to have been "roughed up pretty good." (App. 74; 113-14; 156-58; 207). At that time, Victim advised the officers she had been sexually assaulted by a man she knew as "Black," and, based on his familiarity with "Black," Officer Jake Grill immediately headed to an abandoned building across from the grocery store located near Victim's house. (App. 114; 158; 160-61).

Inside, he found Petitioner, who was completely naked and appeared to be sleeping. (App. 114; 158; 160-61). Officer Grill then woke Petitioner up, allowed him to get dressed, and escorted him to the parking lot of the grocery store while Detective Jennie Antonio quickly brought Victim to that location to see if Petitioner was the person who had sexually assaulted her. (App. 114-15; p. 53; 161; 206-08). Upon seeing Petitioner, Victim quickly identified him as her assailant. (App. 115; 161). Petitioner was then arrested, and Victim was transported to a clinic for a sexual assault examination. (App. 116; 186; 237).

At the clinic, Faye Lebeof, a certified nurse midwife and an expert in sexual assaults, interviewed Victim and performed a sexual assault examination on her. (App. 234-37). During the examination, Lebeof discovered Victim's face, eyes, and mouth were bruised and injured, Victim had abrasions and lacerations in her vagina, and Victim's hymen had signs of redness, and Lebeof located fluids inside of Victim's vagina, which were collected as evidence. (App. 238-40). Based on her examination, Lebeof concluded Victim's injuries were consistent with Victim's report of a sexual assault. (App. 239-40).

Meanwhile, officers processed the crime scene, located blood stains on Victim's sofa, collected Victim's ripped underwear and a glass candle holder from the floor, and recovered several fingerprints from the candle holder, which were subsequently determined to belong to Petitioner. (App. 162; 166-68; 170; 179-80). Additionally, as part of the investigation, Detective Antonio prepared a search warrant affidavit for the recovery of Petitioner's DNA based on the information Victim reported to her about the assault. (App. 185-86; 190; 193). Subsequently, pursuant to the issued search warrant, Lebeof collected a DNA sample from Petitioner. (App. 242). Thereafter, Petitioner's DNA sample was compared to the semen located in the rectal and

vaginal swabs collected from Victim after the sexual assault, and an expert in forensic DNA analysis determined Petitioner's DNA profile conclusively matched the DNA profile developed from the evidence collected during Victim's sexual assault examination. (App. 263; App. 265-66).

Petitioner was indicted for first-degree criminal sexual conduct, and he proceeded to trial. (Indictment). During trial, Victim recounted the details of the sexual assault and identified Petitioner in the courtroom as her attacker. (App. 64-74; 115). Additionally, the officers and other personnel who were involved in investigating the sexual assault testified about the results of their investigation. (App. 157-58; 164; 179-80; 185-86; 207; 237-38; 265). Then, prior to the introduction of the evidence establishing Petitioner's DNA profile matched the DNA profile of Victim's assailant, defense counsel moved to suppress the DNA evidence, arguing the search warrant used to gather the evidence was insufficient because the accompanying affidavit did not establish probable cause and contained no indication relevant information would have been found through the search. (App. 194; 197-98; 200). However, the trial judge denied the suppression motion. (App. 201-204).

Thereafter, as the trial continued, Adrienne Riley, a forensic DNA analyst and expert in forensic DNA analysis, testified Petitioner's DNA profile matched the DNA profile developed from the semen collected from Victim's body. (App. 261; 263; 265-66). Riley further explained the odds of randomly finding an individual with a matching DNA profile were one in 8,600,000,000,000,000,000. (App. 266). Defense counsel then renewed his objection to the admission of the DNA evidence, and the trial judge again overruled the objection. (App. 266-67).

Subsequently, at the conclusion of trial, Petitioner was convicted as indicted. (App. 358).

During the ensuing sentencing proceedings, the assistant solicitor informed the trial judge of Petitioner's prior criminal record, which consisted of convictions for first-degree criminal sexual conduct in 1978, carjacking in 1993, failure to register as a sex offender in 1998, strong-arm robbery and assault and battery of a high and aggravated nature in 2001, and failure to register as a sex offender in 2005. (App. 365-66). Based on Petitioner's prior "most serious" convictions for first-degree criminal sexual conduct and carjacking, the trial judge sentenced Petitioner to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45. (App. 365-67.)

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly denied relief where Petitioner failed to establish trial counsel was constitutionally ineffective in regards to SANE nurse Faye Lebeof where Lebeof was properly qualified as an expert in sexual assault examination, her testimony did not bolster the victim's testimony or exceed the scope of her expertise, and overwhelming evidence firmly established Petitioner's guilt such that the result of the trial would not have been different but for Lebeof's testimony.

On appeal, Petitioner argues the post-conviction relief court erred in denying him relief as to his allegation that trial counsel was ineffective in his handling of State's witness Faye Lebeof, a certified SANE nurse midwife who was admitted as an expert in sexual assault examination. Specifically, Petitioner contends Lebeof did not have the requisite qualifications to be admitted as an expert in sexual assault examination and her testimony bolstered Victim's credibility, and because of both her lack of qualifications and her bolstering testimony, trial counsel was ineffective for failing to object on either ground. Petitioner argues both of these errors or omissions by trial counsel rise to the level of constitutional ineffectiveness and warrant the reversal of his conviction and a remand for retrial. The post-conviction relief court properly found Petitioner did not meet his requisite burden of proof as to either claim regarding Lebeof, as Lebeof was properly qualified as an expert in sexual assault examination, her testimony did not bolster the victim's testimony or exceed the scope of her expertise, and overwhelming evidence firmly established Petitioner's guilt such that the result of the trial would not have been different but for Lebeof's testimony. This Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action,

and when alleging that trial counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner 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.

A. The post-conviction relief court correctly found Lebeof was properly qualified as an expert witness, and, accordingly, trial counsel was not ineffective for failing to challenging her qualifications as an expert witness in sexual assault examination.

Initially, Petitioner argues Lebeof did not have the requisite qualifications to be admitted as an expert in sexual assault examination. Interestingly, Petitioner fails to state exactly why Lebeof did not have the requisite skills or education to be qualified as an expert witness in sexual

assault examination, but instead complains she “was a true prosecution witness” and “was an advocate [for the State].” (PWC 9). At the evidentiary hearing, Petitioner’s challenge to Lebeof’s qualifications were that she was only a “nurse midwife” and he argued that he was “not necessarily impressed with the fact that she had done a thousand examinations,” speculating as to whether those examinations were peer-reviewed for reliability. (App. 420-21). However, Petitioner failed to identify how exactly Lebeof was unqualified as an expert in sexual assault examination or that her testimony lacked reliability. The post-conviction relief court correctly rejected Petitioner’s speculative assertions that Lebeof was unqualified and found Lebeof was properly qualified as an expert witness in sexual assault examination based on her training, education, and experience.

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). Such testimony “differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.” Id. at 445-446, 699 S.E.2d at 175. Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Moreover, in South Carolina, expert testimony “ ‘in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.’ ” State v. Fripp, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting Rule 704, SCRE).

Trial judges have considerable discretion in determining whether to admit or exclude expert testimony and other evidence, and an appellate court will not reverse a trial judge’s ruling on evidentiary matters absent a clear abuse of that discretion **resulting in prejudice** to the defendant. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) (“The appellate court reviews a trial judge’s ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives **great deference** to the trial court.” (emphasis added)); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) (“A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice.”); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (“[D]eference is due to the trial court’s admission of the evidence.”). “While an expert’s qualification generally goes to weight of his testimony and not its admissibility, the trial court acts as a gatekeeper in vetting its reliability and deeming the testimony admissible.” State v. Simpson, 425 S.C. 522, 536, 823 S.E.2d 229, 236 (Ct. App. 2019) (citing Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012)).

In Petitioner’s case, Lebeof, a certified SANE nurse midwife from the Medical University of South Carolina who had performed Victim’s sexual assault examination, had the requisite qualifications to be admitted as an expert in sexual assault examination. (App. 234-37).

Lebeof received her associate's degree in nursing in 1975, a certificate in nursing midwifery in 1987, and a master's degree in nursing in 1992. (App. 235). She had also completed coursework to become a sexual assault nurse examiner (SANE) and had completed over one-thousand sexual assault examinations during her career. (App. 235-36). Lebeof had previously been qualified as an expert witness in the area of sexual assault ten times in court. (App. 236). After a review of her qualifications, the State tendered Lebeof as an expert in the field of "female health, generally medical practice specifically related to sexual assault." (App. 236). Trial counsel did not object to her qualifications, and the trial court admitted Lebeof as an expert in sexual assault examination. (App. 236)

At the evidentiary hearing, trial counsel testified Petitioner informed him that Petitioner had consensual sex with Victim. (App. 403). Counsel testified he had prior knowledge with Lebeof, either from his own cases or other cases in the area as she was a sexual assault examiner commonly used in Charleston County. (App. 411-12). When asked if he investigated Lebeof's qualifications, counsel testified:

I had my own expert, Dr. Betsy Baker-Gibbs, who was a physician that — she was from Columbia. I knew her from when I was a public defender in Columbia. We used her as an expert up there. She had done work on rape trauma victims. And she was very generous with helping out defense. Sometimes you could call her without retaining her and she would answer some questions. But I retained her to review that and give me some, I guess, some guidance on cross-examining Faye LeBoeuf. I remember she was familiar with Faye LeBoeuf because she told me she thought Faye LeBoeuf would be fair in her testimony, because she was familiar with her. But I didn't think she wasn't qualified, I think she was doing a lot of sexual assault nurse examinations in Charleston at that time. . . .She took the sexual assault nurse examiner course. She had done a thousand sexual assault examinations and qualified as an expert ten times.

(App. 412-13). When asked why he did not conduct any voir dire on Lebeof or challenge her qualifications, counsel testified:

Well, Dr. Gibbs had told me she thought that she would be fair on the stand. And if you read her testimony, I think it was — I think the end result was fairly neutral. Typically, in those cases, it is. If the sexual assault nurse examiner testifies that they found nothing, then the State can argue, well, just because someone is sexually assaulted doesn't mean it leaves to physical manifestation. And if there is a physical manifestation, the defense can argue, even sexual assault can leave a physical manifestation. So there's always both ways you can go with it.

So when she testified, she testified those injuries were consistent with a sexual assault. But on cross-examination, when I went through the same injuries and things that could cause those injuries, she testified it was also consistent with consensual sex. So she really — her testimony really, I think in the end, was kind of neutral.

(App. 413-14). Counsel elaborated Lebeof testified Victim's injuries were consistent with sexual assault, not that the injuries were caused by sexual assault, and that the injuries were also consistent with consensual sex. (App. 414).

The post-conviction relief court found trial counsel was not ineffective in failing to challenge Lebeof's admission as an expert based on her qualifications because Lebeof was properly admitted as an expert. This finding is supported to the record and is not premised on an error of law. Lebeof "possesses the requisite knowledge, skill, experience, training, or education" to be qualified as an expert in sexual assault examination and her testimony was reliable. Simpson, 425 S.C. at 536, 823 S.E.2d at 236; see Watson, 389 S.C. at 445, 699 S.E.2d at 175 (recognizing it is necessary for a witness to be qualified as an expert when the witness testifies in regard to an area of specialized knowledge, training, or skill).

In arguing that the post-conviction relief court erred, Petitioner repeatedly complains the lower court cited to "outdated case law on expert testimony" that was no longer good law, referring State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1998) and State v. Peer, 320 S.C. 546, 466 S.E.2d 375 (Cr. App. 1996). However, Petitioner reluctantly acknowledges that

neither case has been overruled and instead asks this Court to grant certiorari to “use this case as a vehicle to address this case law that has not been overruled.” (PWC 13). However, he further still fails to explain why Lebeof lacked the requisite qualifications to be admitted as an expert witness in sexual assault examination.

The post-conviction relief court properly denied relief as to Petitioner’s assertions trial counsel was constitutionally ineffective for failing to challenge Lebeof’s qualifications as an expert in sexual assault.

B. The post-conviction relief court properly found Lebeof’s testimony was within the scope of her expertise in sexual assault examination and did not impermissibly bolster Victim’s testimony.

Next, Petitioner argues Lebeof’s testimony that Victim’s injuries were consistent with a sexual assault improperly bolstered Victim’s credibility and counsel was ineffective for failing to object. The post-conviction relief court rejected Petitioner’s assertion, finding Lebeof’s testimony was “ultimately neutral and never went beyond the scope of her expertise.” (App. 445). These findings are supported by the record and are not premised upon an error of law.

During Petitioner’s trial, Lebeof testified Victim’s injuries to her vagina were consistent with a sexual assault. (App. 239-40). However, Lebeof also testified it was possible for someone to be sexually assaulted and there to be no signs of injury. (App. 245). Critically, Lebeof also testified numerous times on cross-examination and re-direct examination that Victim’s injuries were consistent with consensual sex. (App. 241-52). Lebeof did not opine that Victim’s injuries were caused by sexual assault.

In support of his contention that Lebeof’s testimony impermissibly bolstered Victim’s testimony, Petitioner avers there was no other way to interpret Lebeof’s testimony other than as

an affirmation she personally believed Victim's testimony. Critically though, contrary to Petitioner's contentions and despite the fact expert testimony embracing an ultimate issue to be decided by the trier of fact is admissible in South Carolina, Lebeof's testimony did not embrace the ultimate issue in Appellant case and could **not** reasonably have been interpreted as a statement she believed Victim's allegations. See Rule 704, SCRE ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."). That is true because Lebeof specifically informed the jury Victim's injuries were consistent with sexual assault but were **also** consistent with and could be caused by a variety of scenarios of consensual sexual intercourse. See Mackey v. State, 235 Ga. App. 209, 211, 509 S.E.2d 68, 71 (Ga. Ct. App. 1998) ("Testifying that the results of an examination are consistent with sexual assault does not address the ultimate question of fact (whether Mackey raped or sexually molested the child) and is 'within the bounds of permissible expert testimony.' " (footnote omitted)); State v. Ross, 203 Wis. 2d 66, 81-82, 552 N.W.2d 428, 434 (Wis. Ct. App. 1996) ("[H]er testimony was not an impermissible expert opinion on the victim's veracity, but merely her expert opinion on whether the victim's physical condition at the time of her treatment was consistent with the victim's statement to her that her vagina had been penetrated."); see also Velazquez, 263 Va. at 105, 557 S.E.2d at 219 (only finding error in the admission of a sexual assault nurse examiner's testimony because the "testimony as a whole clearly expressed her opinion that [the victim] was raped because her opinion **excluded all other trauma as the cause of [the victim]'s injuries.**" (emphasis added)). Thus, Lebeof's testimony in no way improperly bolstered Victim's testimony or suggested Lebeof believed Victim in the manner proscribed by our appellate courts' decisions addressing the propriety of the testimony of

forensic interviewers. Cf. State v. Kromah, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013) (instructing that forensic interviewers should not testify about a child's veracity or tendency to tell the truth, vouch for a child's believability, state that they made a compelling finding of abuse, assert that they believed the child, or indicate that the child's behavior suggests the child was telling the truth); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011) (finding a forensic interviewer's testimony constituted improper vouching where the interviewer testified the victims provided compelling disclosures of abuse by Jennings and provided details consistent with the background information provided by the victims' mother, the police report, and other children); State v. McKerley, 397 S.C. 461, 465-466, 725 S.E.2d 139, 142 (Ct. App. 2012) (finding a forensic interviewer's testimony to be improper where the interviewer testified about giving an opinion as to whether something happened and about consistent information and compelling findings).

In sum, Lebeof's testimony did not bolster the Victim's testimony. Ultimately, she informed the jury that Victim's injuries were consistent with a sexual assault and consensual sex. The post-conviction relief court properly denied relief.

C. The post-conviction relief court properly found Petitioner could not establish any resulting prejudice where overwhelming evidence firmly established Petitioner's guilt such that the result of the trial would not have been different but for Lebeof's testimony.

Moreover, the post-conviction relief court also properly found Petitioner could not establish any prejudice overwhelming evidence firmly established Petitioner's guilt such that the result of the trial would not have been different but for Lebeof's testimony.

First, even assuming Lebeof's testimony indicating Victim's injuries were consistent with injuries commonly found in sexual assault victims was somehow improper, the admission of that

testimony was entirely harmless and resulted in no articulable prejudice to Petitioner. Significantly, because Lebeof's testimony clearly conveyed to the jury the abrasion to Victim's vagina was consistent with **both** a non-consensual sexual assault and consensual sexual intercourse, the admission of that testimony could in no way have bolstered Victim's testimony or suggested Lebeof believed Victim was sexually assaulted. See State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a **prejudicial** abuse of discretion." (emphasis added)). For that reason, even assuming Lebeof's testimony was improper and trial counsel should have objected to her testimony, it would not warrant a reversal of Petitioner's conviction. See State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."); State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) ("[An appellate court] will not set aside a conviction due to insubstantial errors not affecting the result.").

Moreover, overwhelming evidence firmly established Petitioner's guilt such that the result of the trial would not have been different but for Lebeof's testimony, including DNA evidence, fingerprint evidence, and a positive identification of Petitioner as the attacker within hours of the attack. The evidence in this case is "a combination of physical and corroborating evidence so strong that the Strickland standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met." Smalls v. State, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018).

The testimony and evidence presented during trial overwhelmingly established Petitioner's guilt for the indicted offense and rendered any error in the admission of Lebeof as an

expert witness entirely harmless. Initially, DNA evidence established Petitioner was the source of semen found in Victim's vagina shortly after the assault.² Moreover, even without the DNA evidence, there was other overwhelming evidence establishing Petitioner's guilt. Victim unconditionally identified Petitioner as the person who sexually assaulted her to law enforcement before Petitioner was apprehended, during a show-up identification procedure conducted shortly after the crime occurred, and during trial without any hesitation whatsoever. Thus, the testimony and evidence presented to the jury established Victim consistently and unwaveringly identified Petitioner as the person who sexually assaulted her from the moment the crime occurred and continuing through trial. Corroborating Victim's testimony she was sexually assaulted, photographs documenting Victim's injuries to her head and body were presented to the jury, and the investigating officers who spoke with Victim after the sexual assault testified Victim was "roughed up," hysterical, shaking, crying, and bleeding after the crime. Consistent with the officers' testimony and the photographic evidence, the nurse who examined Victim after the crime testified Victim's mouth was cut and Victim's face and body were swollen, bloody, and bruised. Additionally, the testimony presented during trial established Victim's ripped underwear was discovered on the floor of her home shortly after the crime and bloodstains were discovered on her sofa. Furthermore, Petitioner was further linked to the crime through the discovery of his fingerprints inside of Victim's home. Collectively, that evidence overwhelmingly established Petitioner's guilt for the sexual assault.

² Respondent is cognizant this Court found the admission of the DNA evidence in Petitioner's case to be in error based on an invalid search warrant but ultimately affirmed the conviction finding the trial court's error in admitting DNA evidence was harmless. State v. Jenkins, 412 S.C. 643, 773 S.E.2d 906 (2015). If the admission of the DNA evidence was harmless, there is no conceivable way the testimony of Lebeof can be prejudicial enough to warrant a new trial.

Critically, based on that evidence of guilt, Petitioner's guilt was overwhelmingly established, and there is no reasonable probability the result of the trial would have been different but for Lebeof's testimony. The post-conviction relief court properly determined Petitioner could not establish prejudice and denied relief. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

april 30, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APR 30 2019

S.C. SUPREME COURT

Certiorari to Charleston County
Maite Murphy, PCR Judge
Deadra L. Jefferson, Trial Judge
Appellate Case No. 2018-001050

DANIEL J. JENKINS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

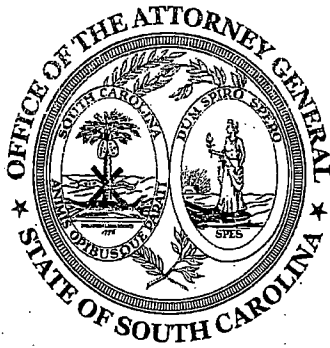
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by hand-delivering two copies via interagency mail, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia SC 29201

This 30th day of April, 2019.


Jennifer Jennison
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

April 30, 2019

RECEIVED
APR 30 2019
S.C. SUPREME COURT

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

RE: Daniel J. Jenkins v. State of South Carolina
Appellate Case No.: 2018-001050

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
S.C. Bar # 100108

MHJ/jj
Enclosures

cc: Robert M. Dudek, Esquire
Victim Advocacy Division