

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

Honorable Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2019-000907

JERALD D. GASKINS, JR., #00362923,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-0904

ATTORNEYS FOR RESPONDENT

RECEIVED

JAN 06 2020

S.C. SUPREME COURT

TABLE OF CONTENTS

STATEMENT OF ISSUES ON CERTIORARI.....ii

STATEMENT OF THE CASE.....1

STANDARD OF REVIEW.....5

ARGUMENT.....6

The PCR court properly found Petitioner failed to demonstrate the State’s cross-examination of Petitioner about his electronic communications with the victim and her family members and about other topics affected the outcome of his trial7

The PCR court properly found trial counsel was not constitutionally ineffective in failing to object to hearsay testimony from a law enforcement witness and a physician because the testimony from the physician was admissible due to the medical treatment exception to the hearsay rule and Petitioner has failed to demonstrate prejudice from trial counsel’s failure to object to the instances of hearsay14

Trial counsel was not ineffective for failing to object to the testimony of a law enforcement witness that it was common for him to see children delaying disclosure in child sex abuse cases because the statement was not expert testimony.....16

Trial counsel was not ineffective for failing to raise a vouching objection to testimony from two witnesses because trial counsel strategically undermined the physician’s testimony and the law enforcement witness’s testimony was not vouching.....17

The PCR properly found appellate counsel was not ineffective for advising Petitioner to abandon his direct appeal and file an application for post-conviction relief because Petitioner’s issue on appeal did not have merit19

CONCLUSION.....20

STATEMENT OF ISSUES ON CERTIORARI

Petitioner's Issues Presented

Did the Post-Conviction Relief Court err in failing to find trial counsel was ineffective when trial counsel failed to object to the improper cross-examination of Jerald Gaskins when the prosecutor was permitted to ask Mr. Gaskins improper questions on cross-examination?

Did the Post-Conviction Relief Judge err in failing to find that trial counsel was not ineffective when he failed on several occasions to object to improper hearsay testimony as to statements made by the complaining witness were improper under Rule 801(d)(1)(D) of the South Carolina Rules of Evidence?

Did the Post-Conviction Relief Judge err in failing to find that trial counsel was ineffective for his failure to object to the expert testimony of Officer Robert Perry as to delayed disclosure when the officer had not been qualified as an expert?

Did the Post-Conviction Relief Judge err in failing to hold trial counsel to be ineffective when trial counsel failed to object to the improper vouching for the credibility of the complaining witness?

Did the Post-Conviction Relief Judge err in failing to find appellate counsel was ineffective when appellate counsel admitted he knew that the South Carolina Supreme Court had granted a petition for writ of certiorari in State v. Perez to overturn State v. Wallace, but failed to disclose this fact to Jerald Gaskins prior to advising Mr. Gaskins not to file a petition for writ of certiorari to the South Carolina Supreme Court?

Respondent's Issues Presented

Issue One: Did the PCR court properly find Petitioner failed to demonstrate that the State's cross-examination of Petitioner about his electronic communications with the victim and her family members and about other topics affected the outcome of trial?

Issue Two: Did the PCR court properly find trial counsel was not constitutionally ineffective in failing to object to hearsay testimony from a law enforcement witness and a physician because the testimony from the physician was admissible due to the medical treatment exception to the hearsay rule and Petitioner has failed to demonstrate prejudice from trial counsel's failure to object to the instances of hearsay?

Issue Three: Was trial counsel constitutionally ineffective for failing to object to the testimony of a law enforcement witness's testimony that it was common for him to see children delaying disclosure in child sex abuse cases when the testimony did not constitute expert testimony?

Issue Four: Was trial counsel constitutionally ineffective for failing to raise a vouching objection to testimony from two witnesses when trial counsel strategically undermined the physician's testimony and the law enforcement's testimony did not bolster the victim's credibility?

Issue Five: Did the PCR court properly find appellate counsel was not constitutionally ineffective for advising Petitioner to abandon his direct appeal and file an application for post-conviction relief when Petitioner's issue on direct appeal did not have merit?

STATEMENT OF THE CASE

During its April of 2013 term, the Greenville County Grand Jury indicted Jerald D. Gaskins (Petitioner) for four counts of criminal sexual conduct with a minor in the second degree and two counts of committing a lewd act upon a child. Randall L. Chambers, Esquire, (trial counsel) represented Petitioner, and Assistant Solicitor Kristie B. Hodge of the Thirteenth Circuit Solicitor's Office prosecuted the case. On February 4-5, 2015, Petitioner proceeded to a jury trial with the Honorable D. Garrison Hill (trial court), presiding. At the conclusion of trial, the jury convicted Petitioner as indicted. The trial court sentenced Petitioner to imprisonment for twenty years for each of the counts of criminal sexual conduct with a minor in the second degree, fifteen years for one of the counts of committing a lewd act, and five years for the remaining count of committing a lewd act. Trial counsel filed a timely notice of appeal on Petitioner's behalf, and Petitioner's appeal was perfected by J. Falkner Wilkes, Esquire (appellate counsel). On appeal, Petitioner argued the trial court erred in admitting evidence of Petitioner's prior bad acts, erred in allowing the State to question Petitioner about text messages purportedly exchanged between Petitioner and the victim's father, and that the prejudicial effect of issues preserved at trial should be considered in light of the cumulative effect of all errors. In an unpublished opinion, the South Carolina Court of Appeals affirmed Petitioner's convictions, finding the trial court had not abused its discretion in admitting the evidence of prior bad acts, trial counsel had not preserved the objection to the State's questioning of Petitioner about the text messages, and that the Court could not consider the prejudicial effect of all errors because South Carolina does not recognize the plain error rule. State v. Gaskins, Op. No. 2017-UP-166 (S.C. Ct. App. filed April 19, 2017). The Remittitur was issued on May 5, 2017.

Petitioner then filed a timely application for post-conviction relief on September 14, 2017, alleging prosecutorial misconduct, violations of Petitioner's right to due process, and that Petitioner was afforded the ineffective assistance of counsel. App. 621-27. Respondent made its return on January 17, 2018, and requested therein the summary dismissal of Petitioner's allegation of prosecutorial misconduct, a more definite statement as to the allegations of due process violations, and requested a hearing regarding the allegation of ineffective assistance of counsel. App. 628-33. On May 22, 2018, Petitioner filed an amended application for post-conviction relief, alleging trial counsel was constitutionally ineffective for failing to object to improper questions asked of Petitioner by the State on cross-examination, failing to call witnesses on Petitioner's behalf, failure to investigate and obtain records, failure to introduce the complaint from Petitioner's divorce, failure to object to the State's question to Petitioner about his drug use, failure to subpoena medical records from Petitioner's physician in order to establish his latex allergy, failure to object to improper testimony from a physician who conducted a medical exam of the victim, failed to object to questions from the State about criminal charges stemming from an incident involving Petitioner's then-fiancée, failure to object to hearsay testimony from two law enforcement witnesses, and failure to object to improper opinion testimony about delayed disclosure from a law enforcement witness, and alleging appellate counsel was constitutionally ineffective for advising Petitioner to forego further prosecuting his direct appeal after the Court of Appeals affirmed his convictions in light of a then-pending Supreme Court case. App. 636-39, 765-66.

An evidentiary hearing was convened before the Honorable Alex Kinlaw, Jr., (PCR court) on October 24, 2018, at the Greenville County Courthouse. C. Rauch Wise, Esquire, was

present on behalf of Petitioner, and Assistant Attorney General Deshawn H. Mitchell represented Respondent. The PCR court denied Petitioner's application for post-conviction relief and dismissed the action with prejudice in an Order of Dismissal issued on February 1, 2019. App. 754-80. The PCR court found Petitioner had failed to establish trial counsel was ineffective in failing to object to the questions about Petitioner's texts with the victim's father because trial counsel did object to the questions, trial counsel's performance was reasonable, and that it was unclear what further counsel could have done to prevent further questions about the texts. App. 772, 780.

Petitioner filed a motion to alter or amend judgment on March 8, 2019, alleging the PCR court erred in failing to rule upon the allegation that the jury was misled as to the texts between Petitioner and the victim's father and that there was no reasonable trial strategy in trial counsel's failure to object to the cross-examination concerning the texts, failing to consider that trial counsel failed to properly preserve the objections the State's questions about the text messages when finding that trial counsel did not object according to a trial strategy, finding trial counsel was not ineffective in failing to object to the State's cross-examination of Petitioner as to his Facebook messages to Jennifer Anglin's minor daughter, finding that trial counsel objected to the State's questioning of Petitioner about a pending criminal case involving his then-fiancée, finding trial counsel employed a trial strategy in failing to object to the State's question of Petitioner as to whether he sold drugs, finding that trial counsel was not ineffective in failing to object to hearsay testimony from two law enforcement witnesses and the physician who examined the victim because and in finding that there was no case law at the time of trial that would have cautioned against the admission of the testimony, misstating the holding of State v.

King, 422 S.C. 47, 810 S.E.2d 18 (2017), finding that trial counsel conducted an adequate investigation when trial counsel testified at the PCR hearing that he received two of the messages used by the State on the eve of trial, failing to address Petitioner's allegation that trial counsel failed to object when two witnesses improperly vouched for the victim, failing to address the allegation that trial counsel failed to object to expert testimony from a lay witness, and failed to address the allegation that appellate counsel did not fully inform Petitioner of the law before advising him to discontinue his direct appeal. App. 782-88. Respondent filed a return to Petitioner's motion to alter or amend judgment on March 11, 2019, arguing therein that the PCR's order fully ruled upon all issues that were properly presented in the amended application for post-conviction relief and at the evidentiary hearing. App. 789-91. The PCR court denied Petitioner's motion to alter or amendment judgement in an order issued on March 4, 2019, finding its Order of Dismissal addressed and disposed of all allegations that were properly raised by Petitioner and that Petitioner did not present sufficient evidence at the PCR hearing to raise any allegation that was not raised in the amended application for post-conviction relief. App. 793-95. Petitioner's appeal follows.

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, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR 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 PCR 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

Petitioner has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. 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 PCR 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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the PCR 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.

Issue One

The PCR court properly found Petitioner failed to demonstrate the State’s cross-examination of Petitioner about his electronic communications with the victim and her family members and about other topics affected the outcome of his trial.

Petitioner argues the PCR court erred in finding trial counsel was not constitutionally ineffective for failing to preserve for appellate review multiple objections to questions asked of Petitioner by the State on cross-examination. Petitioner has failed to show trial counsel’s failure to object or preserve objections during the State’s cross-examination of Petitioner affected the outcome of his trial because the relevant portions of the cross-examination were so limited in scope or duration that they likely had no effect when considered within the context of the entirety of the State’s case and because, in other instances, counsel and Petitioner refuted the implications of the State’s questions.

A. Petitioner suffered no prejudice when Petitioner was cross-examined about his text messages with the victim’s sister that were not admitted into evidence.

Petitioner argues trial counsel was ineffective in failing to object to the State’s cross-examination of Petitioner about texts between him and the victim’s sister. The PCR court did not

address this issue in its order.¹ Nevertheless, trial counsel was not ineffective in his handling of the testimony about the text messages. At trial, the victim's sister testified that she had received text messages from Petitioner that caused her to suspect an inappropriate relationship between the victim and Petitioner, to which trial counsel objected. App. 101. In response to trial counsel's objection, the trial court instructed the State to lay a foundation for the texts so that it could give a ruling. App. 103. Outside the jury's presence, the victim's sister testified that she had received the text messages from Petitioner, and that she had communicated with him by text message and voice calls, and shared the photographs of the texts with the State on the day before trial. App. 104-05. The trial court overruled trial counsel's objection, and allowed the State to question the victim's sister about the texts in the jury's presence. App. 105-06. The record demonstrates that trial counsel did object to the questions from the State about the text messages, and the trial court's instructing the State to lay a foundation for the texts demonstrates that trial counsel's objection adequately conveyed the substance or the argument Petitioner argues should have been made. In other words, trial counsel did what Petitioner now says he did not do.

Petitioner has failed to demonstrate that the State did not have a good faith basis in asking Petitioner about the text messages in light of the testimony of the victim's sister, which established Petitioner as the author. See Rule 901(b)(1), SCRE (recognizing the requirements for authentication can be satisfied in multiple ways, including through presentation of testimony from a witness with knowledge the thing being offered is what it is purported to be); see also Winburn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 576-77, 201 S.E.2d 376 (1973) (stating direct proof is not required to authenticate a piece of evidence, and indirect or circumstantial

¹ Petitioner did not specifically address this issue in his motion to alter or amend the judgment, referring only generally to his allegation that trial counsel was ineffective in failing to object "to the various text message and other electronic communications . . ." App. 782.

evidence may be used instead); see also Henry, 292 Neb. at 868-69 (finding that a sufficient foundation for the admission of a hard copy of text messages sent by the defendant had been established by witness testimony that the sending number belonged to Henry and on the content of the text, and noting that a party seeking to admit texts is not required to prove conclusively the authorship of the messages before they can be admitted).

Petitioner testified at the PCR hearing that he did not send the relevant texts to the victim's sister. Petitioner now argues that aspects of the photographs of the text messages calls into question their authenticity. Petitioner cites the references to "momma" in the texts as proof that he was not the author, as he would not have referred to the victim's mother that way; however, the victim's mother testified at trial that Petitioner referred to her as "mom", the victim's father as "dad", and the victim as his little sister. App. 64-65. Petitioner testified he treated the victim as if she were his sister. App. 422.

Since the messages were not admitted into evidence at trial, they likely had only limited effect on the jury's verdict since the only testimony about them was from the victim's sister and Petitioner's denial that he had sent the messages. Therefore, there was no prejudice in the State's questions. See McEachern, 399 S.C. at 148, 731 S.E.2d at 616 (noting that the mere asking of an improper question is not necessarily prejudicial if no evidence is introduced as a result of the question). The PCR court properly found that Petitioner failed to establish any prejudice suffered in trial counsel's not preserving the objections for appellate review.

B. The PCR court properly found that Petitioner suffered no prejudice from trial counsel's failure to preserve his objection to the State's cross-examination of Petitioner about text messages to the victim's father.

Petitioner argues trial counsel was ineffective for failing to preserve his objection to the State's questioning of Petitioner about text messages he sent to the victim's father because the

issue was not preserved for appellate review and because trial counsel did not require the State to establish a good faith basis in asking the questions. Even if trial counsel had preserved the objection, Petitioner would not have been successful on appeal. Petitioner testified he hated the victim's family after the victim reported her allegations to police. App. 423-24. The State asked Petitioner if he texted the victim's father after the victim's disclosure in order to share with the father the news that Petitioner's divorce had become final, Petitioner denied doing so, and the trial court sustained trial counsel's subsequent objection to the State's lack of foundation. App. 424-25. The State asked Petitioner if he later texted the victim's father asking him to drop the accusations of sexual misconduct on Petitioner's part. App. 426. The trial court sustained trial counsel's objection to the question. App. 426. Trial counsel then unsuccessfully objected to the State's use of hard copies while questioning Petitioner if he had sent certain texts to the victim's father, arguing that the solicitor was using hard copies as if she were confronting Petitioner with evidence, the foundation of which had not been established. App. 426-30. The State indicated it had a witness it could call in rebuttal who could lay a proper foundation for the admission of the texts, and that it was giving Petitioner the opportunity to admit or deny sending the texts before calling its rebuttal witness. App. 427. The State identified the victim's mother as its rebuttal witness and the source of the texts, stated the mother provided the text messages to the State after taking photographs of them from the phone of the victim's father, and noted that the photographs had been provided to trial counsel before trial. App. 428. After that point, the State again asked Petitioner if he had sent texts to the victim's father, which Petitioner denied. App. 431-433. The State did not call a rebuttal witness, and Petitioner's denials regarding the text messages was the only testimony before the jury about them.

The PCR court properly found that Petitioner had failed to offer more than conjecture about the outcome of trial had trial counsel had objected further to the State's questions. Petitioner strenuously denied at trial that he had sent the text messages. The messages were not admitted into evidence at trial, and the only testimony before the jury during trial regarding the messages was Petitioner's denial that he had sent them. App. 705. Therefore, there was no prejudice in the State's questions. See McEachern, 399 S.C. at 148, 731 S.E.2d at 616 (noting that the mere asking of an improper question is not necessarily prejudicial if no evidence is introduced as a result of the question). The trial court instructed the jury that statements made by counsel were not evidence and that it should consider only witness testimony and exhibits admitted. See Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267 (1999) (declining to presume prejudice when the trial court instructed the jury to consider guilt based only on the evidence at trial and when petitioner failed to show that the jury disregarded the instruction). The PCR court properly found that Petitioner failed to establish any prejudice suffered in trial counsel's not preserving the objections for appellate review.

C. Petitioner has failed to demonstrate he suffered prejudice when trial counsel failed to object to the State's cross-examination of Petitioner about his contacting another minor on Facebook under the name of "Jay Fowler".

Petitioner argues the State's cross-examination about a Facebook profile for "Jay Fowler" constituted improper character evidence because the questions implied Petitioner was using a false social media profile to solicit sex from a minor while on bond and awaiting trial in the underlying criminal case, and that trial counsel was constitutionally ineffective in failing to object to the questions. Petitioner and trial counsel testified about this issue at the PCR hearing. App. 669-71, 723-26. Although the PCR court did not specifically address Petitioner's claim that

trial counsel's failure to object to the questions was ineffective, it did find generally that the record contradicted Petitioner's allegations. App. 771-72.²

Petitioner has failed to show that he was prejudiced by trial counsel's failure to object to the questions. The State asked Petitioner if he had had dinner with a woman named Jennifer Anglin, and whether he had sent a Facebook friend request to the woman's twelve-year-old daughter afterwards. App. 444-45. When Petitioner denied having any knowledge of the child or being Facebook friends with her, the State asked if Petitioner had been using Facebook under the name of "Jay Fowler", which Petitioner likewise denied. App. 445. After these limited questions about Petitioner's alleged Facebook contact with Anglin's minor daughter, the subject was never again specifically referenced at trial. The State did not mention the questions or Petitioner's denials in closing arguments, focusing instead on Petitioner's actions with regards to the victim and her family. App. 486-96.

D. Petitioner has failed to show he suffered any prejudice when trial counsel failed to object to the State's brief cross-examination about whether Petitioner has ever sold drugs.

Trial counsel did not object when the State asked Petitioner on cross-examination whether he had ever sold drugs. App. 442. Petitioner denied ever using or selling drugs, and the issue was never mentioned again during trial. App. 442. The exchange consisted of a single question from the State and a follow-up question. This quite brief instance of cross-examination likely had no effect on the jury's verdict, considering its brevity and its lack of recurrence or reference at any other point during the trial. As such, Petitioner has failed to show that he suffered prejudice from trial counsel's failure to object to the questions.

² Petitioner specifically requested in his motion to alter or amend the judgment that the PCR court address the issue. App. 783-84. The PCR court did not do so, and Respondent submits remand may be appropriate in order to allow the PCR court to make findings as to the issue.

E. Petitioner has failed to demonstrate that he suffered any prejudice from trial counsel's failure to object to the State's cross-examination about Petitioner's violation of a "no-contact" order involving his fiancée.

Petitioner has failed to demonstrate that he suffered prejudice from trial counsel's failure to object to the State's questioning about whether Petitioner had violated a restraining order prohibiting him from contacting his fiancée, Angelina Campbell, who was present in the courtroom during trial, and whether there was "an active charge with [Campbell]" App. 4465-46. As the PCR court correctly noted, trial counsel did object, and based his objection upon the fact that the State was arguing with Petitioner. App. 772. Petitioner had the opportunity to deny that he had violated restraining order and that there was an ongoing case involving him and Campbell, and he made the most of that opportunity. He also testified in response that Campbell was going to drop the case against him or that she had already done so. App. 446. As it was specifically noted from the State's question and from Petitioner's answer that Campbell was present in the courtroom, the jury likely expected to hear for more information about the restraining order from her; lacking that, the jury heard only the questions and Petitioner's strong denials, which would have lessened the effect of the questioning.

F. The Court should not recognize "cumulative error" as a new ground for post-conviction relief in South Carolina's jurisprudence in this case.

Petitioner argues the Court should use this case to hold for the first time the principle that cumulative instances of deficient performance on the part of a defense attorney that are not prejudicial in and of themselves may have a cumulative effect that is sufficiently prejudicial to warrant the grant of post-conviction relief. The Court should not use this case as a vehicle to institute such a change into this State's collateral jurisprudence to begin recognizing cumulative errors as a ground for relief in PCR actions. See Green v. State, 351 S.C. 184, 197, 569 S.E.2d

318, 325 (2002) (holding that it is unsettled whether individual errors that may not be prejudicial when considered independently may be prejudicial when considered cumulatively, but recognizing that a PCR applicant would have to show, as a threshold matter, that counsel committed errors). Claims of ineffective assistance of counsel are to be reviewed by the PCR courts individually. Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998). This is especially true when the issue was not raised and argued by Petitioner until this appeal.

Issue Two

The PCR court properly found trial counsel was not constitutionally ineffective in failing to object to hearsay testimony from a law enforcement witness and a physician because the testimony from the physician was admissible due to the medical treatment exception to the hearsay rule and Petitioner has failed to demonstrate prejudice from trial counsel's failure to object to the instances of hearsay.

Trial counsel testified at the PCR hearing that he could have objected to Officer Perry's testimony about what the victim told him, but that the facts were already in evidence since the victim testified before Perry took the stand, giving similar factual testimony. App. 714-14. When asked at the hearing if he believed that Officer Floyd's identification of Petitioner as the victim's abuser was objectionable, trial counsel testified he was not overly concerned with the identification because the victim had already identified Petitioner as her abuser in her own testimony. App. 716-16A. In this case, the effect of this instance of hearsay would have been negligible when compared to the other evidence at trial, which was the testimony from the victim's sister about Petitioner's behavior towards the victim, testimony from the victim about Petitioner's seductive behavior, corroborative testimony from the victim's friend about how Petitioner had committed sex acts with her in a way consistent with his seduction of the victim, and testimony from Petitioner's ex-wife about inappropriate behavior towards her when the victim was with Petitioner, such as his leaving her alone at the emergency room so as to spend

time alone with Petitioner and sleeping on the couch with his body intertwined with the victim. Petitioner has failed to demonstrate any prejudice from trial counsel's failure to object to the testimony, which is a crucial burden he is required to meet. See Thompson v. State, 423 S.C. 235, 246, 814 S.E.2d 487, 493 (2018) (requiring an applicant for post-conviction relief to prove prejudice and stating that the reviewing court must consider the Strength's case absent the inadmissible evidence in order to gauge prejudice).

Hearsay is admissible if it is made for the purposes of medical diagnosis or treatment. Rule 803(4), SCRE. Petitioner relies upon State v. Simmons, 423 S.C. 552, 816 S.E.2d 566 (2018), in its argument as to the objectionable nature of the physician's comments at trial. Petitioner's reliance is misplaced because, in Simmons, the victims' pediatrician testified in detail about the specific acts of abuse which the victims' said Simmons had performed, named Simmons as the abuser, alleged that Simmons had the victims view pornography, and that Simmons had made the victims form a secret pact to keep the abuse secret. Id. at 556-59, 816 S.E.2d at 568-71. In this case, the physician never identified Petitioner as the victim's abuser. The witness's testimony indicated she tailored her medical testing based upon the sex acts the victim reported. App. 338-39, 341-42. Contrary to Petitioner's assertion, the witness's testimony indicates she was a treating physician, ordering diagnostic tests to be performed upon the victim. App. 338-39. As an additional matter, Respondent notes that Petitioner did not elicit testimony at the PCR hearing on the question of whether the physician was providing inadmissible hearsay at trial, which should bar him from arguing this issue now.

Petitioner has failed to demonstrate either deficiency on the part of trial counsel in not objecting to the testimony or resulting prejudice.

Issue Three

Trial counsel was not ineffective for failing to object to the testimony of a law enforcement witness that it was common for him to see children delaying disclosure in child sex abuse cases because the statement was not expert testimony.

Petitioner argues that trial counsel was constitutionally ineffective in failing to object to testimony from a law enforcement witness on the ground that the witness inappropriately provided expert testimony.³ The relevant testimony is as follows:

Q. [By solicitor] And in your experience investigating those cases, is - - what we call delayed disclosure or the child coming forward much after the events have, actually, occurred, is that common or uncommon?

A. [By witness] Oh, yeah. It's such a rarity for me to see a case that a child has immediately told that it's like, you know, maybe one out of a hundred, you know. So that is a very common thing, very common.

App. 357.

After this exchange, the State immediately questioned the witness about law enforcement's inability to collect physical evidence of sexual conduct after the passage of a significant amount of time. In response to this line of questioning, the witness testified that if there is an extended length of time between an alleged sex act and the report of it, "the gathering of physical evidence is much more difficult." App. 357. Trial counsel testified at the PCR hearing that he did not find the testimony objectionable at the time of trial, and affirmed his continued belief that it was not objectionable because the witness was testifying about characteristics of child sex abuse investigations based upon his observations through years of experience. App. 716. The testimony was a comment about the effect of time's passage on the ability of law enforcement to collect

³ Petitioner specifically requested in his motion to alter or amend the judgment that the PCR court address the issue. App. 787. The PCR court did not do so, and Respondent submits remand may be appropriate in order to allow the PCR court to make findings as to the issue.

physical or other evidence. Trial counsel was not deficient in failing to object because the witness was not providing expert testimony.

Furthermore, Petitioner failed to demonstrate at the PCR hearing that he suffered any prejudice from trial counsel's failure to object to the testimony. App. 686. Petitioner's trial defense concerned primarily the allegation that the victim, the victim's family, and Petitioner's ex-wife had concocted the accusations against him due to his deteriorated relationship with his ex-wife, his ex-wife's friendship with the victim's sister, and his falling out with the victim's family; he did not argue that the delay between his carnal acts with the victim and her disclosure thereof was evidence that the allegations were not true. As such, the law enforcement witness's brief reference to delayed disclosure did not concern a topic that was of significant dispute or materiality in either the State's case against Petitioner or in Petitioner's defense.

Issue Four

Trial counsel was not ineffective for failing to raise a vouching objection to testimony from two witnesses because trial counsel strategically undermined the physician's testimony and the law enforcement witness's testimony was not vouching.

Petitioner argues that trial counsel was constitutionally ineffective in failing to object to testimony of a physician and a law enforcement witness on the ground that the witnesses were vouching for the victim's credibility.⁴ The physician who examined the victim testified the victim's medical exam was normal. App. 337. She testified her exam of the victim was consistent with the allegations provided to her by the victim. App. 339-40. She did see any physical indications of sexual abuse during her examination of the victim. App. 339. Under trial counsel's questioning, the physician admitted that she assumes that the subjects of her

⁴ Petitioner specifically requested in his motion to alter or amend the judgment that the PCR court address the issue. App. 786. The PCR court did not do so, and Respondent submits remand may be appropriate in order to allow the PCR court to make findings as to the issue.

examinations are being truthful to her when they tell her what happened to them and that it is possible that the victim or her parents had lied to her. App. 341. Petitioner cites multiple authorities, like State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989), and State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), in support of his position that the physician in this case vouched for the victim's credibility. In Dawkins, the victim's psychiatrist testified that the victim's symptoms were genuine. Id. at 394, 377 S.E.2d at 302. In Kromah, a forensic interviewer testified the victim's disclosure of sexual abuse was compelling. Id. at 356, 737 S.E.2d at 498-99. In contrast, the physician here admitted explicitly that she was assuming the victim was telling the truth, and that this assumption may have been false. The PCR court noted that trial counsel strategically asked pointed questions of the physician in order to elicit inconsistencies in her testimony, and properly found that the strategy was reasonable. App. 773. The PCR court correctly found that there was no deficiency in trial counsel's conduct with respect to the physician.

The law enforcement witness testified at trial as to the victim's demeanor when he met with her at her school shortly after she and her family made their initial report to police, stating that the witness appeared ashamed, embarrassed, bright, intelligent, and articulate. App. 351. Trial counsel testified at the PCR hearing he did not interpret the witness's testimony as vouching for the victim's credibility at the time, but rather as comments on the victim's demeanor during his meeting with her. App. 729. Petitioner cites to authorities that concern testimony of expert witnesses, not a lay witness, and has failed to demonstrate that the witness was commenting upon the victim's truthfulness. The witness's testimony allowed the jury to hear about the victim's demeanor as she made her disclosure to law enforcement, which would have

aided them in judging the credibility of her accusations, and did not rise to the level that they acted as an instruction to the jury that the witness believed the victim. Considering that the jury heard extensive testimony from the victim about Petitioner's actions, the law enforcement witness's observations that Petitioner seemed articulate and intelligent were unlikely to have affected the jury's estimation of the victim. Trial counsel was not constitutionally ineffective in failing to object to the witness's testimony about the victim's demeanor.

Issue Five

The PCR properly found appellate counsel was not ineffective for advising Petitioner to abandon his direct appeal and file an application for post-conviction relief because Petitioner's issue on appeal did not have merit.

Petitioner argues that appellate counsel was constitutionally ineffective in advising him to abandon his direct appeal and immediately file an application for post-conviction relief because appellate counsel did not inform Petitioner that, while Petitioner's appeal was still pending, this Court granted a writ of certiorari in State v. Perez, 423 S.C. 491, 816 S.E.2d 550 (2018). At trial, the State offered testimony from the victim's friend, who testified that Petitioner had sexual intercourse with her while she was a minor, and described the details surrounding their carnal encounters. App. 248-58, 306-27. The testimony was being offered to establish a common scheme or plan in Petitioner's conduct with respect to the witness and the victim. See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (recognizing evidence of other crimes is competent to prove a charged offense if it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or identity); see Rule 404(b), SCRE (allowing the admission of evidence of other wrongful acts in order to show the existence of a common scheme or plan in one's conduct). Trial counsel unsuccessfully objected to the admission of the witness's testimony arguing, among other things, that State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), should

be overturned. App. 258-266. Appellate counsel tried to distinguish the testimony at Petitioner's trial from the evidence admissible under Wallace in Petitioner's appellate brief. App. 604-05.

The PCR court properly found Petitioner did not establish any deficiency in appellate counsel's performance or resulting prejudice to Petitioner. App. 779. Appellate counsel testified at the PCR hearing that he stays abreast of appellate issues. App. 743. He advised Petitioner he would have a better chance of success in applying for post-conviction relief immediately rather than waiting until the conclusion of his direct appeal, which counsel did not believe would be fruitful for Petitioner. App. 744. In giving this advice, counsel assumed that this Court would not take the opportunity in Perez to overturn Wallace. App. 747. Counsel's judgment was sound. Id. at 501, 816 S.E.2d at 556 (Hearn, J., concurrence) ("I concur in the result reached by the majority; however, I write separately because I believe the Court should take this opportunity to overturn our holding in [Wallace] . . ."). Petitioner cross-examined appellate counsel in granular detail at the PCR hearing about the vote counting involved in Petitioner's calculations regarding the likelihood that this Court would have overturned Wallace. App. 747-51. Petitioner's efforts have been unable to diminish the accuracy of appellate counsel's prediction, and Petitioner has failed to show any prejudice resulting from counsel's advice. The PCR court properly found that Petitioner did not demonstrate that appellate counsel was constitutionally ineffective.

CONCLUSION

Petitioner has failed to demonstrate that trial counsel was constitutionally ineffective for the reasons argued herein and has failed to show the PCR court erred in its findings. This Court

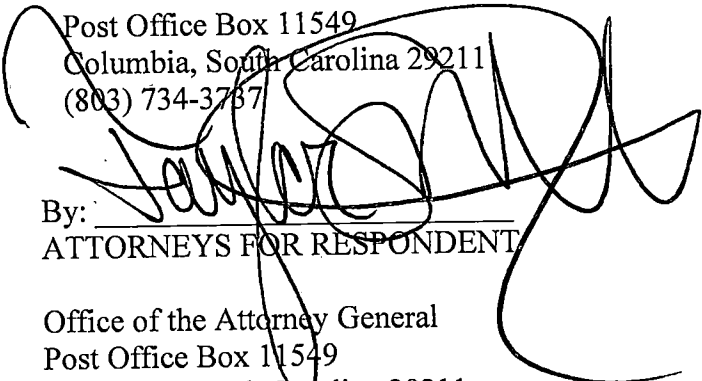
should deny the petition for a writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General
S.C. Bar No. 103282

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

January 2, 2020

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County
The Honorable Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2019-000907

JERALD D. GASKINS, JR., #362923

Petitioner,

v.

STATE OF SOUTH CAROLINA,

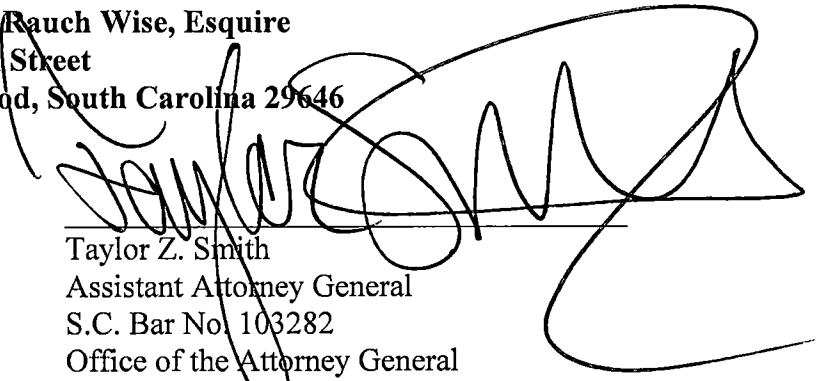
Respondent.

CERTIFICATE OF SERVICE

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

Clarence Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

This 2nd day of January, 2020



Taylor Z. Smith
Assistant Attorney General
S.C. Bar No. 103282
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737