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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Appellate Case No. 2017-001877
Case No. 2014-CP-32-04769

Lance Austin Williams,Respondent,

v.

State of South Carolina.....Petitioner.

BRIEF OF RESPONDENT

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LANCE AUSTIN WILLIAMS

January 13, 2020
Columbia, South Carolina.

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STATEMENT OF ISSUES ON APPEAL

1. Whether there was a breakdown in adversarial testing within the meaning United States v. Cronic where trial counsel failed to make any meaningful investigation, misapprehended facts and law critical to presenting a defense, and abdicated virtually all trial work to co-counsel retained just 24 hours before trial.
2. Whether trial counsel was ineffective, and Respondent was prejudiced, by the failure to call a known, available expert that could corroborate Respondent's trial testimony and statements to police by explaining markings on the child were consistent with a diaper change—a medical touching and legal defense to the criminal sexual conduct charge.
3. Whether trial counsel was ineffective in failing to contemporaneously object to graphic images of the infant child's genitals, which served no purpose other than to invite a jury decision on an improper basis.

INTRODUCTION

Respondent Lance Austin Williams' lead trial counsel never prepared his case for trial. Counsel failed to understand predicate facts and relevant law necessary to defend his client. See App. 1212. He failed to contact any key fact witness. See App. 1211. A forensic pathologist opined the markings on the victim child were consistent with Respondent's statements to the police and jury: that he was too rough when changing her diaper, but never molested the 15-month-old child. See App. 1197–98 & 1204–07. This available expert testimony was not only consistent with Respondent's testimony, but also with physical evidence like the absence of Respondent's DNA on the child, diaper, or clothing. See App. 1199. Notwithstanding the probity of this testimony, trial counsel failed to call the pathologist (or any other expert) to testify at trial. See App. 1203. The State's expert testified the markings suggested a bite mark and digital penetration of the child's vagina. App. 1200. The jury returned guilty verdicts on unlawful neglect of a child and criminal sexual conduct (CSC) with a minor in the first degree. The trial court sentenced Respondent to 10- and 25-years' incarceration.

Prior to trial, Respondent's mother suggested and paid to retain a second more seasoned lawyer. See App. 1206–07. Co-counsel accepted the representation a mere 24 hours before trial. See App. 1207. No continuance was sought. But instead of merely assisting trial counsel, co-counsel came to handle the pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing, cross-examine 11 of 13 State witnesses, and deliver closing argument. See App. 1207. While doing so, co-counsel failed to interpose timely objections to the admission of graphic images of the child's vagina, rendering the issue unreviewable on appeal. See State v. Williams, 405 S.C. 263, 281–82, 747 S.E.2d 194, 204 (Ct. App. 2013) (“Therefore, the admission of the photographs is not preserved

for our review because Williams did not object to their admission.”). He conceded no trial strategy informed the failure to object. See App. 1209.

The PCR court found that trial counsel’s representation of his client was a “total failure to function as a meaningful State adversary[.]” See App. 1210. Based on detailed factual findings (see App. 1196–1209), the PCR court identified three representational deficiencies implicating the Sixth Amendment. First, the PCR court held trial counsel’s lack of factual and legal preparation was a specific, prejudicial error under Strickland v. Washington, 466 U.S. 668 (1984), as well as a systemic denial of constitutionally required adversarial testing as contemplated by United States v. Cronin, 466 U.S. 648 (1984). See App. 1210–18. Second, the PCR court held trial counsel’s failure to call an available expert to establish the child’s injuries arose during a “medically recognized treatment” was deficient under Strickland because it denied Respondent a legal defense to the CSC charge. See App. 1218–20. Finally, the PCR court agreed Respondent was prejudiced by co-counsel’s failure to timely object to graphic images of the child’s vagina that likely inflamed the passions and prejudices of the jury and invited it to reach a verdict on an improper basis. See App. 1220–23. The Court should affirm.

STATEMENT OF THE CASE

Respondent was indicted for neglect of a child (2010-GS-32-01860) and CSC first (2010-GS-32-01861). App. 638–41. At trial, he was represented by James R. Snell, Jr., Esquire (trial counsel) and H. Wayne Floyd, Esquire (co-counsel). After a plea of not guilty, Respondent was convicted on both counts. On April 5, 2011, the Honorable R. Knox McMahon, Circuit Court Judge, sentenced Respondent to two terms of incarceration, 10 years and 25 years, respectively, to run concurrently and that Respondent be placed on the South Carolina Sex Offender Registry. App. 802–03.

Respondent appealed and retained his current counsel. On July 24, 2013, the Court of Appeals affirmed. Williams, 405 S.C. 263, 747 S.E. 194. On July 24, 2014, this Court denied Respondent's petition for a writ of certiorari. App. 766.

On December 31, 2014, Respondent filed an application for post-conviction relief (PCR) alleging violations of the Sixth Amendment's guarantee of effective assistance from counsel. App. 769–80. On August 13, 2015, the State served a return in opposition. App. 781–86. On October 25, 2016, Respondent amended his application. App. 787–96.

On January 30 and 31, 2017, the Honorable Eugene C. Griffith, Jr., Circuit Court Judge, held an evidentiary hearing that included testimony from trial counsel and co-counsel and from an expert forensic pathologist that trial counsel was aware of, but did not bring to trial. App. 804–1052. After the evidence was presented, Respondent sought leave to file a second amended application that conformed to the evidence. The motion was granted and the second amended application, filed April 13, 2017, joined three issues. App. 1179–88. First, Respondent alleged counsels' preparation—factual investigation and legal research—was deficient, which Respondent argued were both specific errors contemplated by Strickland, and evidence of a total failure to function as a meaningful state adversary such that prejudice is presumed under Cronic. Second, Respondent argued his counsels ran afoul of Strickland by failing to call an available expert witness to testify the victim's injuries were consistent with Respondent's statement to police and testimony at trial, which would have established a “medically recognized treatment” defense under South Carolina Code § 16-3-651. Third, Respondent alleged the failure to contemporaneously object to photographs of the child's vagina was ineffective assistance that and prejudiced the jury by inflaming its passions and inviting a verdict on an improper basis.

On June 19, 2017, the PCR court granted Respondent relief based on three deficiencies of constitutional concern. First, the PCR court held that trial counsel's lack of factual and legal preparation was a specific, prejudicial error under Strickland and a systemic denial of constitutionally required adversarial testing under Cronic. See App. 1210–18. Second, the PCR court held trial counsel's failure to call an available expert to establish the child's injuries arose during a "medically recognized treatment" was deficient under Strickland because it denied Respondent a legal defense to the CSC charge. See App. 1218–20. Finally, the PCR court found Respondent was prejudiced by the failure to timely object to the images of the child's vagina. See App. 1220–23. On June 29, 2017, the State moved to alter or amend the judgment (App. 1224–42), which was denied on August 15, 2017. App. 1265.

The State filed an appeal on September 13, 2017 and a petition for a writ of certiorari on February 15, 2018, raising five issues. The Court granted the petition on August 5, 2019.

COUNTER STATEMENT OF FACTS

The facts material to this appeal are accurately detailed in the PCR court's order granting relief. App. 1196–1209. They are copied here with Appendix citations replacing the original:

This Court has carefully reviewed the record in this case. That review has included an examination of the trial transcript, live testimony taken during a two-day hearing on January 30 and 31, 2017, and exhibits offered into evidence during that hearing. Having made such a review, the Court makes the following factual findings.

Relevant Trial Testimony

On April 15, 2010, Applicant cared for his girlfriend's fifteen-month-old daughter for about 10 hours. Williams, 405 S.C. at 268–69, 747 S.E.2d at 197. That evening, the child's mother and other family members took her to the emergency room after observing bruises on her face, arms, and genital area. See id.; see also App. 163–164 (testimony of mother); App. 888–91 (summarizing the State's allegations).

The next day, Lexington County Sheriff's Department (LCSD) Detective Ed Prestigiaco learned Applicant cared for the child the day her injuries were discovered and contacted Applicant who agreed to meet Det. Prestigiaco at the

LCSD. See Williams, 405 S.C. at 268–70, 747 S.E.2d at 197. Det. Prestigiaco confront Applicant with photos of bruising on the child’s arm, which Applicant attributed to a hand-injury that caused him to be heavy handed with the child. See id. at 269, 747 S.E.2d at 197. The detective also confronted Applicant with photos of bruising behind the child’s ears, which Applicant explained resulted from two instances when he disciplined the child for misbehaving by slapping her on the ears. See id. Applicant was then shown photos of bruising on the child’s forehead and near her genitals, which Applicant explained were the result of a fall and the application of eczema cream. See id. at 270, 747 S.E.2d at 197; see also App. 503. Applicant was placed under arrest.

At trial, Applicant took the stand and conceded he was too rough with the child. He testified that he agreed to watch the child when asked by her mother, his girlfriend, but that he expected to be relieved of that obligation by 1:00 or 2:00 p.m. that afternoon. See App. 490–91. Upon learning his girlfriend would not return until 6:00 p.m., Applicant testified he felt “used”. App. 497. Applicant changed several wet diapers that morning, and a “messy diaper,” he described as “diarrhea, runny” that afternoon. App. 498–99. Applicant described “poop everywhere” on the child’s lower region, which required him to clean the child’s genital area by wiping between the lips of the vagina to remove feces. App. 499–501. Applicant conceded he was “[a]ggravated” and “rougher than [he] should have been.” App. 502; see also App. 504 (explaining his aggravation stemmed from having to watch the child). Thereafter, the child began throwing toys and misbehaving, and Applicant “popped” her twice, once on each side of the head. See App. 504 & 505. At trial, Applicant conceded he hit her too hard, explaining, “[i]t was very wrong[,]” to hit her like that. App. 505. Applicant also testified the child fell and hit her head while playing outside earlier that day. App. 493.

Two State witnesses offered evidence in support of the criminal sexual conduct charge. The State offered Marlene Clary with Palmetto Health Richland’s regional nurse examiner program to testify as an expert in the field of forensic nurse examination. App. 223–24 & 229. Mr. Snell indicated he had no notice of Ms. Clary, but declined to *voir dire* her before the Court qualified her, without objection, as an expert in forensic nurse examination. See App. 229–30. Ms. Clary testified she examined the child and spoke to her mother on April 15, 2010. See App. 231, 234–36. At trial, she reported the findings of her examination, referring to a report documenting bruising on the child’s neck, head, thigh, elbow, and knee. See App. 240–49. Through Ms. Clary, the State introduced three diagram images—full body, face, and genitals—without anatomical features, that noted the location of “any type of abnormality.” See App. 238–39 (discussing Trial Ex. 9), 245–46 (discussing Trial Ex. 10) & 250 (discussing Trial Ex. 11). Mr. Floyd unsuccessfully interposed objections to the diagrams, arguing the State “can put the report itself in which this actually just a copy of it[,]” but inquired, “Why do they need a blow-up copy of it?” App. 239–40; see also, App. 246 (raising “the same objection”) & 251 (same).

The child also received a genital exam. See App. 254. Ms. Clary reported observing swollen labia and “an abrasion between the left minora and majora, basically the lips.” App. 254. With respect to the child’s hymen, Ms. Clary “was not able to visualize all of it at one time[,]” which prevented her from making a determination as to whether it was all intact. App. 267–68. Nevertheless, she offered the opinion her observations were consistent with trauma. See App. 267 & 270–71. Ms. Clary also testified she collected an unidentified specimen located on the child’s foot, buccal swabs with DNA from the child’s genital area, a diaper, and clothing. See App. 242–43 & 271–72. That collection failed to reveal any semen. App. 261 (and negative lab results) & 305.

Finally, the State asked Ms. Clary to authenticate and then offered Exhibits 12, 13, 14, and 15 as photographs of the child taken during the examination. See App. 275–76. After being marked, the following exchange occurred:

[Trial] Court: All right. Mr. Floyd?

Mr. Floyd: No objection, Your Honor.

[Trial] Court: No objection?

Mr. Floyd: No objection Your Honor.

[Trial] Court: All right. State’s 12, 13, 14 and 15 are in evidence without objection.

App. 276. When asked about Exhibit 14, Ms. Clary identified the photograph as the child’s genitalia and explained:

Ms. Clary: ... That’s her labia minora in the center there, that kind of a V-shaped area pointing down. There’s a darkened area in the middle and then the redness on either side of that. And Because there’s traction there, you can’t really appreciate the majora, the outer part, the lips, because I’m spreading that apart so I can better visualize the inner genitalia.

App. 281. Ms. Clary also described Exhibit 13 to show “her mons, her genitalia, her mons and her labia minora and then the folds in between, you know, where her legs meet her genitalia there.” App. 281. This Court has reviewed the images and they are graphic.

The State also called Dr. Susan Luberoff, a pediatrician to testify as an expert in the field of child abuse pediatrics. See App. 310 & 313. Without objection, the Court qualified Dr. Luberoff as an expert in the field. See App. 313–14. Dr. Luberoff testified she was consulted on April 16, 2010, and examined the child and

took photographs. See App. 314–17. Dr. Luberoff cited bruising discussed by Ms. Clary as evidence of physical abuse. See App. 321–22 & 333. With respect to the child’s genitals, Dr. Luberoff testified the child “had injury to her genital area that included a series of bruises in sort of a curved pattern over the front or the pubic area of her diaper area.” App. 323; see also App. 335 (discussing “arc pattern” of bruising in pubic area). Dr. Luberoff opined further that “[s]he had injuries to her hymen, which is part of the structure of the vagina. She had injuries just under the clitoris, which were some injuries on both sides of torn tissue or torn skin.” App. 323. Dr. Luberoff observed an “injury to her hymen” she described as “bruising[.]” App. 323.

Dr. Luberoff’s testimony also suggested penetration into, not just the genitals, but the child’s vagina. She testified, in her experience, “the most common type of sexual abuse that ends up being discovered to be true or that a finding is made involves digital fondling or digital penetration of a child’s genital area[.]” and that it was “extremely rare for [her] to find an injury to the child’s hymen.” App. 340–41. Dr. Luberoff also opined that the arc pattern of bruising on the pubic area and the bruising on the hymen as “diagnostic of vaginal penetration.” See App. 342–43 (“...And the only way to get there is by penetrating into that area. So these were penetrating injuries.”). Dr. Luberoff also identified the arc-pattern bruising on the child’s pelvic bone to represent “bite marks.” App. 344–45.

Dr. Luberoff also authenticated Trial Exhibits 16, 17, 18, 19, and 20 as photographs she took during her exam, all of which were admitted into evidence without objection by Trial Counsels. See App. 324–25. As with Ms. Clary, the State asked Dr. Luberoff to explain these photographs, which included photographs “where [Dr. Luberoff had] taken the labia and moved them to the side in order to see the internal structures.” See App. 343–346 (discussing Trial Ex. 19). As with the photos admitted through Ms. Clary, this Court has examined them and they are graphic.

Evidence Presented at the Post-Conviction Relief Hearing

During the PCR hearing, Applicant called his former trial counsels and an expert witness to testify. The State called no witnesses.

Mr. Snell testified he was retained by Applicant on April 17, 2010, almost one year before the case was called to trial on March 30, 2011. See App. 818. During his year-long representation of Applicant, Mr. Snell met with him “probably close to 20” times. App. 820. Mr. Snell explained, in his experience on other similar cases, “it would be very likely that a charge like [first degree criminal sexual conduct] would be substantially reduced by the prosecutor’s office to something closer to, you know, matching the facts of ten [years].” App. 822; see also App. 843 (same). Instead, he was told by the assistant solicitor handling Applicant’s prosecution “there would not be any offers.” App. 823. Mr. Snell was informed of the State’s position 12 days before Applicant’s case was called to trial. App. 825–26. When he

received the notice, he was not expecting an imminent trial. App. 842; see also App. 845 (agreeing it was “certainly surprising.”).

Five days before trial, Mr. Snell received an email from the assistant solicitor with a list of 24 possible witnesses. App. 829 & 830 (discussing Pl.’s Ex. 1). Of these potential witnesses, Mr. Snell had spoken to six of them prior to trial. App. 830. Mr. Snell spoke to Det. Prestigiacomio on two occasions, but made no notes of those interviews. App. 831. When asked whether he spoke to the child’s aunt (and the State’s first witness), Mr. Snell explained, “the folks I spoke to were only the law enforcement individuals. As far as the private folks that were the fact witnesses *I didn’t speak to any of them.*” App. 831–32 (emphasis added). Pressed further about *specific* witnesses called at trial, Mr. Snell conceded they were never contacted. Mr. Snell testified neither he, nor his investigator spoke with the child’s mother (App. 835), the mother’s friend dispatched from the hospital to retrieve diaper evidence (compare App. 835, with App. 195–97), the child’s grandmother (App. 835–36), Ms. Clary (see App. 836), or Dr. Luberoff. See App. 836–37. Mr. Snell testified that Dr. Ann Able, a consulting physician, spoke with Dr. Luberoff while evaluating the case for the Applicant. Mr. Snell was forced to correct himself to explain the consultant simply reviewed Dr. Luberoff’s report and adopted her findings. See App. 836–37; see also App. 838–39 (equivocating further, then conceding “I don’t have a recollection of her saying she went back and had a discussion regarding the merits of the situation.”). In fact, Dr. Able, the consulting physician that reported to Mr. Snell, agreed with Dr. Luberoff’s opinion, practiced medicine in the same physician practice as Dr. Luberoff. App. 885. Mr. Snell testified he had a “very brief” conversation with LCSD investigator Shelby Derrick one year before trial. App. 839. He had no recollection of LCSD crime scene investigator Troy Crump (App. 839), likely because Mr. Crump was not identified on the witness list provided by the State. See App. 839–40 (discussing his absence from Pl.’s Ex. 1). He had no recollection of whether he spoke to SLED’s DNA analyst Adrienne Riley-Hefney, one of just two witnesses he cross-examined at trial. Compare App. 836, with App. 306–08. He also had no notes or recollection of LCSD evidence custodians Beth Harmon and Candy Kyzer. See App. 840.

In short, Mr. Snell’s testimony evidenced almost no pre-trial investigation into what State witnesses might say at trial. See App. 840 (“Q. Now, I want you to look at page 3 of the trial transcript. The people I have just read off to you are the people that testified for the State in the case, correct? A. Yes, sir.”); see also App. 841 (“Q. And you had no notes prior to the trial of any interview with any of these people” A. Correct. Yes, sir.”). Nevertheless, Mr. Snell “didn’t see a need for a continuance.” App. 881.

Although Mr. Snell had access to several possible experts to aid Applicant’s defense, no expert was presented at trial. Applicant’s family paid to retain registered nurse Cindy Hurley, but she was not called to testify because Dr. Luberoff “said the same things that Ms. Hurley would have said[,]” namely that the child suffered no life-threatening injuries and that the vaginal injuries were not the

type that would have been inflicted by a penis. See App. 855–56. Mr. Snell explained, “a big part of [Ms. Hurley’s] review was we talked about diaper changes and how diaper changes were conducted and made since the child’s injuries came through or from a diaper change.” App. 857. Asked whether this formed the basis for Applicant’s defense, Mr. Snell testified, “the defense in this was that it was not a [sic] intentional sexual act or an intentional assault in the genital area of the child. App. 857.

Mr. Snell also consulted with Dr. Edward Friedlander, but did not retain him. App. 869–70. Dr. Friedlander reviewed records provided by Mr. Snell and spoke with him on the telephone. Dr. Friedlander is a medical doctor who practices and teaches pathology¹ at Mississippi State’s medical university. See App. 928–32. His training includes conducting sexual assault examinations and he has been qualified to as a testifying expert by state and federal courts on approximately 50 occasions. App. 933–34. Dr. Friedlander’s work as an expert witness has earned him the Missouri Bar Association’s highest non-lawyer recognition for *pro bono* work. See App. 944–45. This Court found Dr. Friedlander qualified to offer opinions in the field of pathology. App. 943.

After reviewing the records prior to trial, Dr. Friedlander sent Mr. Snell a letter indicating this case bore the indicia of a man who became frustrated with having to care for another man’s child and “[w]hile changing a diaper loses control of himself and takes out his anger physically on the child.” See App. 870 & 871–72. However, in Dr. Friedlander’s view, the State’s case summary was “in error” because “[t]here are a pair of visual abrasions of the vulva which is not the vagina which are quite consistent with the defendant’s account of having gripped the child here forcefully while he was out of control when he was trying to clean her.” App. 872 (discussing Pl.’s Ex. 7). Mr. Snell conceded this assessment was helpful to Applicant. App. 872. It was consistent with the statement and trial testimony of Applicant, that he was frustrated because the child defecated and feces had gotten between the lips of her vagina. App. 873–74. Dr. Friedlander agreed touching to cleaning feces off the genitals is a legitimate and medically necessary act. App. 950; see also App. 958 (describing it as part of a child’s “basic medical care”). Dr. Friedlander’s medical opinion was consistent with what Applicant told police and the jury, which, if believed, would have entitled Applicant to a medical-touching defense.

Mr. Snell was not clear as to why Dr. Friedlander was not retained. See App. 875–76 (claiming Dr. Friedlander “would have had a big retainer” but failing to recall how much). After suggesting Applicant’s story changed over time, Mr. Snell agreed that Applicant’s version of events mirrored his statement to police “weeks or months” before trial, but he still did not contact Dr. Friedlander or Ms. Hurley to testify. See App. 877–78. Regardless of reason, there is no dispute Trial Counsel

¹ Dr. Friedlander explained the field of pathology as the study of injury and disease and a “bridge discipline between basic medical science and clinical medicine.” App. 932.

called no medical expert to testify the injuries to and near the child's vagina were consistent with a diaper change. See App. 876.

Mr. Harpootlian: And that was the defense? The defense was a rough diaper change basically?

Mr. Snell: Rough diaper change. Yes, sir.

Mr. Harpootlian: Okay. Dr. Friedlander's opinion was consistent with that?

Mr. Snell: It was.

App. 877.

During the PCR hearing, Dr. Friedlander testified concerning Trial Exhibits 19 and 20, which he explained were superior images to the ones provided when he reached his initial opinion. See App. 950–51. After reviewing these photos (admitted here as Pl.'s Exs. 5–10), Dr. Friedlander testified “[i]t's clear what's happened.” App. 951; see also App. 966–67 (same). Using the State's trial exhibits to illustrate his testimony, Dr. Friedlander pointed to two “little scratch[es]” on the vulva and a bruise on the hymen. See App. 952 (discussing Trial Ex. 19/Pl.'s Ex. 5). Dr. Friedlander also highlighted “three little bruises consistent with finger impressions[,]” on the child's pubic area. See App. 953 (discussing Trial Ex. 20/Pl.'s Ex. 6). While illustrating with his hands, Dr. Friedlander explained:

Mr. Harpootlian: Are those two injuries that you see in those two photos consistent or inconsistent with your position that these injuries occurred while he was attempting to remove feces from the lips of this little girl's vagina?

Dr. Friedlander: It's a perfect match. He's holding her down too hard and he's opening the lips here so he can with the other hand remove the feces and this is scratching probably by his nails. These are two parts of the nails where the nails would rub up against and then the impression only on the back half, that's where the finger is going to strike [the hymen]. It's a perfect match.

App. 953. While the hymen was bruised, it was not penetrated. App. 977 (“A. Okay. The vulva was penetrated. The hymen is not penetrated.”). Likewise, there is no evidence of intrusion into the vagina. App. 981. Dr. Friedlander also testified that the size of the abrasions on the child were consistent with a scratch by an adult

finger nail. See App. 953–54. Finally, Dr. Friedlander challenged the objectivity of Dr. Luberoff’s testimony that the bruises on the child’s public area, which he identified as finger impressions, were bite marks when a “good fit” for the injuries was what Applicant had described. See App. 961–62; see also App. 974–75 (using photo exhibit to note the absence of markings consistent with a bite). He was also critical of Dr. Luberoff, explaining “[i]t’s sloppy usage to call the vulva the vagina” because, while the vulva is an exterior structure to the genitals, the vagina is located behind the hymen. See App. 947–48 (explaining, “it’s common speech but it’s not scientific.”).

As for the child’s other injuries, Dr. Friedlander believed the child “was manhandled[,]” which he conveyed to Mr. Snell prior to trial and again to this Court. See App. 954. Dr. Friedlander was available and willing to come to South Carolina to testify and quoted Mr. Snell the modest fee of \$1,000 because he believed Applicant had been too rough with the child. See App. 959–60. Nevertheless, Dr. Friedlander was disappointed when Mr. Snell failed to contact him again because he believed Applicant “was over charged[,]” and believed he could help explain “what really happened[.]” See App. 961.

The day before Applicant’s trial began, Applicant’s mother gave Mr. Snell \$5,000 to retain additional counsel. App. 847–48. A memorandum by Mr. Snell in his file dated March 29, 3:22 p.m. recorded his contemporaneous observation that Applicant’s mother “did not want to hurt [his] feelings” but “wondered if I would have co-counsel for [Applicant’s] trial.” See App. 848–851 (discussing and admitting Pl.’s Ex. 2 into evidence) & 852–53 (publishing memo). After Applicant’s mother left, Mr. Snell contacted Mr. Floyd who agreed “to help”, whereupon Mr. Snell obtained a certified check from applicant’s mother and delivered it and a copy of all discovery and reports to Mr. Floyd. App. 853. At the time Mr. Floyd was retained—between 12 and 48 hours before trial—he had not met Applicant. App. 853, 854 (Mr. Floyd’s first meeting with applicant was 12 hours before trial...) & 990 (and Mr. Floyd agreeing with that timeline); but see App. 864–65 (second guessing his recollection, but agreeing Mr. Floyd was retained no more than 48 hours before trial).

Mr. Floyd is an experienced criminal defense lawyer with 42 years’ experience during which he has tried “hundreds” of criminal cases. See App. 988–89 & 989–90. Mr. Floyd testified that when he agreed to second seat Mr. Snell, he planned to “just help him through the trial[,]” not serve as primary counsel. App. 991. Prior to jury selection, Mr. Floyd had not spoken with any of the witnesses: “all I had was his file. Whatever he provided me, I reviewed that.” App. 991. Mr. Floyd testified, when he handles a case, his practice is to speak with the witnesses. App. 991–92. With respect to lay witnesses, “[y]ou *always* want to try to make contact with them and see what they’ve got to say.” App. 992 (emphasis added). Notwithstanding his limited preparation, Mr. Floyd handled the pre-trial Jackson v. Denno, 378 U.S. 368 (1964) hearing, cross-examined 11 of 13 State witnesses, and delivered closing argument. App. 993–94. When asked how his trial role expanded, Mr. Floyd

explained that during trial Mr. Snell “just asked me to continue with the cross examinations and I did.” App. 994–95.

At trial, Mr. Floyd understood genital penetration for a medically recognized reason gave Applicant a defense to the criminal sexual conduct charge, but he did not ask Mr. Snell whether he retained an expert to address the penetration issue. App. 996. In fact, Mr. Floyd was so cognizant of the import of the factual issue, he intentionally saved this question as his last for Dr. Luberoff. See App. 996 (“Q. And it was your defense, right? A. Mm-hmm. It was the main portion of it. Yes.”). Mr. Floyd first became aware of Dr. Friedlander’s opinion during the PCR hearing:

Mr. Harpootlian: Okay. Now, you have heard Dr. Friedlander’s testimony this morning. Did that testimony corroborate your defense?

[...]

Mr. Floyd: Yes.

Mr. Harpootlian: That is that it would be medically necessary to penetrate the vulva of a 15 month old to clean fecal matter from the lips of the vagina, right?

Mr. Floyd: Correct.

Mr. Harpootlian: And that’s what Mr. Williams had said in his statement given to the police the day of his arrest, correct?

Mr. Floyd: Correct.

Mr. Harpootlian: So that explanation was consistent – inconsistent with what Dr. Luberoff said but consistent with what Dr. Friedlander said, correct?

Mr. Floyd: Correct.

Mr. Harpootlian: So if you had been made aware of Dr. Friedlander -- Did you ever see a written report from Dr. Friedlander?

Mr. Floyd: No.

Mr. Harpootlian: That letter that we have introduced into evidence, you ever seen that before?

Mr. Floyd: No. I don't think I ever saw it.

Mr. Harpootlian: Okay. So Mr. Snell never related to you what you heard here this morning?

Mr. Floyd: Correct.

App. 996–97. Had Mr. Floyd known Dr. Friedlander was available to corroborate Applicant's defense, he would have brought him to trial to offer what he characterized as "a crucial piece of testimony." App. 1000–01. Instead, Applicant went to trial with no expert to counter Dr. Luberoff's testimony. App. 1001.

Finally, having crossed examined both witnesses through which the State obtained the admission of graphic photos of the child's genitals, Mr. Floyd conceded, "... I didn't have any major trial strategy to not object." App. 1018; *cf.* App. 1016–17 (explaining he objected to the silhouette images because they were "[t]oo graphic.").

App. 1196–1209 (brackets original, citations replaced with reference to the Appendix). The PCR court characterized Respondent's representation in this record as a "total failure to function as a meaningful State adversary[.]" *See* App. 1210.

STANDARD OF REVIEW

The Court "defer[s] to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018). Questions of law are reviewed *de novo*. *Id.*; *see also* *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

ARGUMENT

The Sixth Amendment guarantees a criminal defendant the reasonably effective assistance of counsel in his defense. U.S. CONST. amend. VI; *Strickland*, 466 U.S. at 683; *Von Dohlen v. State*, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004). That assistance is measured by "an objective

standard of reasonableness.” Weik v. State, 409 S.C. 214, 233, 761 S.E.2d 757, 767 (2014) (quoting Wiggins v. Smith, 539 U.S. 510, 521 (2003)). When counsel fails to render reasonably effective assistance under prevailing professional norms and that deficient performance prejudices a defendant’s case, the representation runs afoul of Strickland. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006)² (citing Strickland, 466 U.S. at 687). Likewise, when “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable” and prejudice is presumed. See Cronic, 466 U.S. at 659–60.

The PCR court granted relief under three theories, any one of which is sufficient to affirm. First, the court held trial counsel’s lack of preparation fundamentally undermined Respondent’s trial in a manner that was actually and presumptively prejudicial because trial counsel (a) was unreasonable in failing to interview (or attempt to interview) any State witness other than the lead detective and (b) labored under a misapprehension of fact and law as to what constituted a defense. App. 1210–15. Second, it held trial counsel was ineffective and Respondent was prejudiced by the failure to call an available medical expert to testify the child’s injuries were consistent with a rough diaper change. App. 1218–19. Third, the PCR court held counsel was ineffective and Respondent was prejudiced by the failure to contemporaneously object to photographs of the child’s genitals. App. 1220–21. Each of these conclusions is supported by the record.

The State offers five arguments here. As to the PCR court’s holdings under Strickland, the State argues Respondent failed to establish (1) ineffective assistance based on counsel’s pre-trial investigation and understanding of the law and facts, (2) ineffective assistance arising from counsel’s failure to call Dr. Friedlander, and (3) prejudice from co-counsel’s failure to object to

² Abrogated in part by Smalls, 422 S.C. at 181 n.2, 810 S.E.2d at 839 n.2.

graphic images of the infant child's genitals. See Pet. Br. 41–52. Similarly, the State challenges the PCR court's holding under Cronic, arguing (4) a presumption of prejudice should not attach because trial counsel did not “entirely” fail in their representation and (5) the circumstances of this case do not rise to the magnitude that no attorney could provide effective assistance. See Pet. Br. 29–40. The particulars of these arguments are addressed below.

I. The failure to prepare an available legal defense, comprehend necessary law and facts, and interview any prosecution witness violates counsel's obligation to act as a meaningful state adversary and establishes actual and presumptive prejudice in this ineffective assistance claim.

The PCR court held lead trial counsel's “lack of preparation fundamentally undermined [Respondent's] trial in a manner that is actually and presumptively prejudicial.” App. 1210. Under Strickland, an applicant for post-conviction relief must show (1) counsel failed to render effective assistance by prevailing professional norms and (2) the deficient performance prejudiced the applicant's case. Strickland, 466 U.S. at 687. In Cronic, the Supreme Court recognized a claim based on counsel's abject failure to meaningfully contest the State's case in a manner that fundamentally undermines the constitutional promise of an adversarial proceeding, rendering the result “presumptively unreliable.” See Cronic, 466 U.S. 648 at 656–59. The PCR court held Respondent's lack-of-preparation claim satisfied Strickland and Cronic because (1) there was no reasonable investigation of a dozen State witnesses prior to their testimony; (2) counsel labored under a misapprehension of law and fact as to what constituted an available legal defense; and (3) co-counsel's one-day preparation and trial counsel's misapprehensions left Respondent without meaningful state adversaries. See App. 1210–18.

The State argues Respondent's counsel did not “entirely” fail to present a defense and the circumstances surrounding Respondent's trial were not of the magnitude that no attorney could provide effective assistance. Pet. Br. 29. It argues further that, even if counsel was deficient in

preparing for trial, Respondent was not prejudiced. See Pet. Br. 41–43. These assertions give insufficient weight to the record and the harm in denying Respondent a medical-touching defense.

a. CSC first merely requires genital penetration, while a diaper change is a medically recognized treatment and a defense to the charge.

Before turning to the particulars of Respondent’s failure-to-prepare claim, it is essential to understand what trial counsel failed to comprehend at trial: (1) CSC first merely requires genital (not vaginal) penetration and (2) a diaper change is a defense to the charge because it is a medically recognized treatment.

South Carolina Code § 16-3-655 provides “[a] person is guilty of criminal sexual conduct with a minor in the first degree if: (1) the actor engages in sexual battery with a victim who is less than eleven years of age[.]” S.C. Code Ann. § 16-3-655(A)(1). A “sexual battery” means “sexual intercourse, cunnilingus, fellatio, anal intercourse, or *any intrusion, however slight*, of any part of a person’s body or of any object *into the genital or anal openings* of another person’s body, *except* when such intrusion is accomplished for *medically recognized treatment* or diagnostic purposes.” S.C. Code Ann. § 16-3-651(h) (emphasis added). The statutory scheme does not require sexual gratification for liability to attach, nor does it require vaginal penetration. See State v. Morgan, 352 S.C. 359, 365–73, 574 S.E.2d 203, 206–10 (Ct. App. 2002) (construing the inclusion of cunnilingus in the statute and holding “Penetration of the vagina is NOT necessary or required.” (emphasis original)). All that is require is penetration of the genitals for a non-medical purpose. There is no dispute an intrusion into a child’s genitals while changing a diaper and cleaning the child is a medically recognized treatment within the meaning of § 16-3-651(h). On this point Dr. Luberoff and Dr. Friedlander agree. Compare App. 377–78 (“Q. And sometimes you’ve got to even separate [the labia] and clean out and so forth. A. Sometimes you do have to separate and clean out, particularly after a messy diaper.”), with App. 950 (“Q. Okay. Now, if a child of that

age has feces in its vagina, is it medically necessary to clean that out? A. Yes. If you care about the health of the child, you keep that part of the body clean.”).

b. Trial counsel went to trial without understanding what facts would constitute CSC first or the anatomy that would be presented to the jury.

The PCR court credited two arguments under the lack-of-preparation penumbra, the most problematic of which is trial counsel’s misunderstanding of the relevant law and facts relating to his client’s defense. See App. 1212–15. At trial, trial counsel repeatedly highlighted the absence of vaginal penetration—a fact of no legal consequence to the medical touching defense—when questioning key witnesses and moving the trial court for a directed verdict. See App. 1212–13 (citing App. 449–51, 457–60, 955–57 & 1038–39). Trial counsel mistakenly equated the child’s genitals to the vagina, an error most clearly evidenced during argument on Respondent’s motion for a directed verdict where counsel sought to contest *genital* penetration by citing the State’s medical testimony and arguing, “there’s been no evidence presented of any penetration in to the opening.” App. 1213 (citing App. 449–50). The trial court sought clarification from counsel who first explained he was referring to the “genital opening[,]” but continued to argue, “[t]he testimony is that it was a bruised hymen and the hymen sits on the outside of the vaginal canal, which would be the genital opening.” Id. (citing App. 450–51). When the trial court asked, “What are you defining as the genital opening?”, counsel responded, “[t]he vagina.” Id. (App. 450–51); but see Morgan, 352 S.C. at 365–73, 574 S.E.2d at 206–10 (discussing genital intrusion).

Other evidence indicates trial counsel prepared Respondent’s case subject to a fundamental misapprehension of fact and law. During the PCR hearing, trial counsel conceded a diaper change is excluded from the definition of a sexual battery as a legitimate medical touching consistent with Respondent’s trial testimony. Cf. App. 1214 (citing App. 875 & 880–81). However, to Dr. Friedlander’s recollection, trial counsel never inquired about the medical-touching defense when

they spoke, but instead attempted to elicit the view from Dr. Friedlander’s there was no penetration of the vulva—something Dr. Friedlander explained was inaccurate. See App. 1212–13 (citing App. 956–58). The PCR court concluded “[t]he record is uncontradicted that Mr. Snell’s apparent view at trial was neither factually nor legally accurate.” App. 1214; see also App. 1038–39 (co-counsel conceding trial counsel’s views were “not accurate” and he made “an inaccurate argument.”). Trial counsel acknowledged his confusion while the assistant attorney general attempted to rehabilitate him during the PCR hearing: “And I do recall that -- I think basically a lot of folks got an anatomy lesson as far as from the doctor and during the trial.” See App. 911–12. The time for trial counsel to get that anatomy lesson was before his client’s case was called to trial. Cf. App. 1214 (“To guarantee his client effective assistance, trial counsel was obligated to arm himself with accurate information *before* trial.” (emphasis original)).

c. Trial counsel’s preparation deficiencies are prejudicial within the meaning of Strickland because counsel mounted a defense based on a misapprehension of settled law and predicate facts.

The PCR court found trial counsel’s misapprehension actually prejudicial, explaining he “fail[ed] to appreciate the significance of the medically recognized treatment defense” that “resulted in a reliance on inaccurate factual and legal claims to the exclusion of a potentially meritorious defense.” App. 1215. Moreover, by failing to interview Dr. Luberoff or the lay witnesses placing the child in Respondent’s care during the relevant time, trial counsel had no means to prepare any responsive evidence, most critically on the issues of genital penetration and the medical-touching defense. See App. 1211 (discussing witnesses not contacted); see also App. 831–32 (trial counsel conceding he only contacted law enforcement). The PCR court found it was “objectively unreasonable” not to investigate what these individuals would say given their role in establishing predicate facts. See App. 1211. While Strickland entitles counsel to deference on

reasonable strategic judgments made without the benefit of hindsight, the PCR court found trial counsel's investigation reflected a "fail[ure] to act on the import ascribed by his own assessment" and that he "abdicated [his] responsibility to investigate critical witnesses determinative of guilt or innocence." App. 1211. As further illustration, co-counsel's practice in preparing a case is to interview witnesses prior to trial (see App. 1211), but his belated retention just 24 hours before trial meant Respondent's counsel proceeded to trial without any clear sense of the evidence the jury would hear. The State claims this harm is speculative because, "Respondent has failed to articulate how additional pre-trial interviews would have changed anyone's testimony." See Pet. Br. 43. But the purposed of interviewing witnesses is not to *change* their testimony—it is to discover what they plan to tell the jury so counsel can prepare.

Actual prejudice attaches when counsel's performance "has adversely affected the defense[.]" Huffington v. Nuth, 140 F.3d 572, 578 (4th Cir. 1998), and the PCR court was correct to find that standard met here. Trial counsel lacked a basic understanding of CSC law of criminal sexual conduct and the anatomy relevant to that claim. He should have appreciated the significance of Dr. Friedlander's assessment, but did not. He was unable to meaningfully cross-examine witnesses because he had failed to investigate their testimony and misapprehended that eliciting testimony challenging vaginal penetration was no defense to a charge requiring genital penetration. This same misunderstanding rendered Respondent's motion for a directed verdict a futile act. Likewise, because of trial counsel's inaction and co-counsel's newness to the representation, no lawyer investigated this case. Counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. While the Sixth Amendment does not require a lawyer to investigate every possible witness, "most of the witnesses ... deemed 'crucial' were 'alibi witnesses or eyewitnesses critical to the

determination of guilt,’ such as self-defense witnesses.” Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003) (citing Huffington, 140 F.3d at 580); see also App. 1210–11 (quoting same). Here, no witnesses, critical or otherwise, were investigated by counsel such that the PCR court was correct to conclude that counsels’ investigatory and preparational deficiencies were likely to have adversely impacted the result. See also § II, infra (discussing the failure to call Dr. Friedlander).

Thus, the defect in trial counsel’s performance was not adopting a strategy that ultimately proved unsuccessful, but that he failed to comprehend predicates to formulating *any* defense. The notion that counsel employed a valid strategy notwithstanding his misapprehensions incorrectly suggests a level comprehension and competence that is unsupported by the record. See, e.g., App. 1214 (“The record is uncontradicted that Mr. Snell’s apparent view at trial was neither factually nor legally accurate.” (detailing record evidence)). The strategic-decision-of-counsel doctrine requires a *valid* reason, not any reason. See Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (collecting cases) (“counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.”). The State is unable to point to any valid consideration because counsel was unarmed with the knowledge that would allow strategic decision making to occur and that failure was prejudicial.

d. Respondent’s defense represents a systemic breakdown under Cronic warranting a presumption of prejudice:

The PCR court was also correct to hold that trial counsel’s “overall lack of preparation and legal understanding [was] presumptively prejudicial to Applicant.” See App. 1215. Cronic recognized that prejudice can be presumed where (in part) there is a constructive denial of counsel due to the failure “to subject the prosecution’s case to meaningful adversarial testing[,]” which makes “the adversarial process itself presumptively unreliable.” Cronic, 466 U.S. at 659. The State offers three arguments as to why this case falls short of that standard.

i. Precedent the State relies in ascribing error fails to support the proposition that relief is unavailable under Cronic.

Citing Bell v. Cone, 535 U.S. 685 (2002), Haynes v. Cain, 298 F.3d 375 (5th Cir. 2002), Fusi v. O'Brien, 621 F.3d 1 (1st Cir. 2010), United States v. Theodore, 468 F.3d 52 (1st Cir. 2006), Lorenzen v. State, 376 S.C. 521, 657 S.E. 771 (2008), and Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006), the State contends that relief under Cronic is limited to “extreme cases” where no defense is presented and, whatever might be said for Respondent’s defense at trial, it “was not a ‘complete failure’ on par with having no representation at all.” See Pet. Br. 30–36.³

Bell merely stands for the proposition that the singular failure to request mercy during a final argument was not an abdication of meaningful adversarial testing under Cronic. The Court explained the possibility of presuming prejudice based on the failure to test the prosecutor’s case requires “that the attorney’s failure must be complete.” Bell, 535 U.S. at 696–97. That standard was unmet in Bell because the argument was “not that [the defendant’s] counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points.” Id. Haynes is even less salient here because it merely holds counsel made a strategic decision not to contest strong evidence of rape in favor of challenging weaker evidence concerning whether the victim accidentally fell or was thrown to her death. See Haynes, 298 F.3d at 381–82. That is a valid strategy, therefore the appeals court rejected the Cronic claim.

Thus, Respondent does not dispute these precedents; he contests the State’s application of them to a conclusion here that “[a] misunderstanding of the law and the facts may cause a defense to fail. But it will not cause a failure to defend.” Pet. Br. 36. This conclusion does not necessarily

³ The State also challenges the PCR court’s reliance on Tucker v. Ozmint, 350 F.3d 433 (4th Cir. 2003) because Tucker “assessed whether a pretrial investigation was sufficient under a traditional Strickland analysis. See Pet. Br. 33. As explained above, the PCR court considered investigatory and preparatory failures under Strickland and Cronic.

follow. To the contrary, the Fifth Circuit's discussion in Haynes explained the distinction between ineffective assistance under Strickland and constructive denial under Cronic as follows:

Thus, when analyzing an attorney's decision regarding concession of guilt at trial, courts have found a constructive denial of counsel only in those instances where a defendant's attorney concedes the only factual issues in dispute. See United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) (holding that "[a] lawyer who informs the jury that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial testing"). In contrast, those courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel.

Haynes, 298 F.3d at 381 (footnote omitted, bracket original). By placing all legal emphasis on a fact of no consequence (i.e., vaginal penetration), without promulgating evidence to support the medical-touching defense, trial counsel conceded the only issue in dispute for no legitimate reason. That is precisely the distinction drawn in Haynes such that it is unclear why the State attempts to draw support from it here.

The State seeks to analogize this case to Theodore, where an appeals court rejected numerous errors by an unprepared lawyer as sufficient to implicate Cronic. See Pet. Br. 31–32. In Theodore, the First Circuit reviewed the factual record, concluded "[s]uch minimal performance [by counsel] is sufficient to remove this case from Cronic's ambit[.]" and remanded the case to the district court to rule on whether the representation was prejudicial under Strickland. See Theodore, 468 F.3d at 57. Notably absent from this fact-specific decision is any suggestion trial counsel in Theodore misapprehended the nature of the charges, abandoned available defenses, or failed to present a cognizable defense. To the contrary, counsel made a "non-frivolous motion" for dismissal, actively participated at trial, and presented three defenses (albeit unsuccessful ones). See id. Thus, while the representation had problems necessitating review under Strickland, it was not a total failure to meaningfully contest the government's case.

Likewise, the State points to Fusi as an example where a lawyer's belated entry into a case and failure to interview property owners where the rape occurred as insufficient under Cronic. See Pet. Br. 32–33. This reliance is misplaced. In Fusi, the court concluded the record supported the view that trial counsel “performed something more than a minim of work during the pre-trial phase[,]” thus placing questions concerning the representation beyond Cronic, but within Strickland. See Fusi, 621 F.3d at 9. However, whatever the First Circuit said about the applicant's Cronic theory, its decision denying relief turned first on the applicant's failure to exhaust that claim before seeking a federal forum: “For the foregoing reasons, Fusi failed to exhaust fully his Cronic claim before the state court. ... Fusi's failure to rely upon Cronic in state court is fatal to his habeas petition.” Fusi, 621 F.3d at 7. Thus, the court's Cronic discussion is, at most, very fact specific dicta of little persuasive value here.

Finally, the State cites Lorenzen and Nance, but offers no explanation of their import here. In Lorenzen, the Court rejected five theories of specific error by trial counsel and reasoned, “[b]ecause none of the alleged errors are meritorious, we hold the PCR judge incorrectly relied on Nance in finding that the cumulative effect of these alleged errors established a claim of ineffective assistance of counsel.” Lorenzen, 376 S.C. at 535, 657 S.E.2d at 779. Thus, Lorenzen failed to point to one specific error, let alone a systemic breakdown in representation. Nance warranted Cronic's presumption because it presented a troubling record in which counsel “abandoned his role as defense counsel” and elicited harmful testimony that “helped to bolster the case against his client.” Nance, 367 S.C. at 557, 626 S.E.2d at 883. The Nance representation bears other indicia similar to this one. Nance cited the incapacity of lead counsel, the appointment of inexperienced co-counsel, the defendant's mother as the only witness interviewed, the presentation of no mitigation as evidence, the failure to qualify an expert, and unpursued mitigation theories—all

parallels here—as evidence supporting its conclusion the applicant was presumptively prejudiced. See id. at 553–58, 626 S.E.2d at 881–83.

Moreover, the presumed prejudice doctrine is not limited to affirmative actions by counsel that undermine the representation. The Fourth Circuit found presumed prejudice where a lawyer slept through portions of his client’s trial because it was an error that prevented the trial from “reliably serving its function as a vehicle for determination of guilt or innocence.” See United States v. Ragin, 820 F.3d 609, 618 (4th Cir. 2016) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). The court did not first discern whether the portions of trial slept through were sufficiently important before granting relief. In this case, counsel may not have intentionally sought to undermine their client’s defense, but their lack of preparation denied Respondent an opportunity to present his defense to the jury. The appearance of an adversarial process does not foreclose an inquiry into whether it was, in fact, adversarial and here it was not.

The State’s argues poor performance claims arise under Strickland, while Cronic claims are limited to non-performance, and this record (the State argues) fails to evidence non-performance. See Pet. Br. 33. Put differently, *the appearance* of a contested proceeding—i.e., a record memorializing counsel doing *something* no matter how ineffectual—is all that is necessary to pass constitutional muster under Cronic. This view is evident from the State’s emphasis of facts of little or no consequence to the problems identified by the PCR court. For example, the State points to trial counsel’s claim that he worked on the case for almost a year, work that entailed “review[ing] and organiz[ing] the discovery”, hiring an investigator, and consulting with experts (experts that never testified). See Pet. Br., 10–11. The State points to unsuccessful pretrial motions and a failed effort to convince the trial court to prohibit the State’s expert from referring to the child’s injuries as a “sexual assault” (see Pet. Br. 13)—facts of dubious significance other than as

evidence trial counsel knew the touching did not need to be in furtherance of sexual gratification to violate the CSC statute. The State places great emphasis on “concessions” purportedly “extracted” from State witnesses (see Pet. Br. 14–16), but these concessions are of little or no consequence to Respondent’s defense he was performing a medically necessary and legally permissible touching. The State points to trial counsel’s claims that Respondent’s position evolved during the representation (see Pet. Br. 24), but the only statement from Respondent was the one he gave to police (see App. 873–74) and Dr. Friedlander’s testimony corroborated that statement. See App. 875–76. And while trial counsel maintained his former client “would not have been in agreement with retaining a witness like this or presenting this type of defense[,]” he was forced to concede that when he put Respondent on the stand, Respondent testified consistent with the very defense trial counsel told the PCR court his client would not allow. See App. 877 (“Q. And when you put him on the stand during the trial, that’s exactly what he said? A. Correct. Yes, sir.”).

Thus, this argument turns largely on whether this Court is willing to substitute its findings for that of the PCR court’s findings. See, e.g., Pet. Br. 30–31 (arguing the facts), 33–36 (same, and claiming, “There is no evidence to support the PCR court’s finding of fact. The record establishes....”). Precedent does not condone this proverbial second bite so long as the PCR court’s findings are supported. E.g., Briggs v. State, 421 S.C. 316, 334, 806 S.E.2d 713, 723 (2017) (“While all of this evidence could indicate the jury was certain to find [the applicant] guilty ... our decision is governed by the standard of review. We defer to a PCR court’s findings of fact, and we will uphold them if there is evidence in the record to support them.”). Here, they are.

The critical piece of evidence at trial was Dr. Luberoff’s opinion. She speculated that Respondent bit the child’s pubic area and digitally penetrated the vagina. See Pet. Br. 16–17 (summarizing Luberoff testimony); see also App. 343–45. The State argues here, “[a]ccording to

Dr. Luberoff, digital penetration *could* cause this type of injury, but standard medical care, including a routine diaper change, would not.” Pet. Br. 17 (emphasis added). While trial counsel and co-counsel may have *argued* the markings on the child were the product of a rough diaper change, neither lawyer was prepared to *show* the jury that was, in fact, the case. Without expert testimony from a medical professional capable of rebutting Dr. Luberoff’s conclusions, there was no adversarial dispute on *the* critical factual issue concerning the genesis on the markings on the child. Going through the motions of a trial is not the same as providing meaningful adversarial testing. Based on competent evidence, the PCR court found trial counsel did not investigate or prepare a legally efficacious defense—notwithstanding the availability of one—and ceded almost all trial work to co-counsel retained just 24 hours earlier. Thus, the State’s only recourse here is to claim trial counsel’s erroneous emphasis on the lack of vaginal penetration was, in fact, “integral” to a “strategy” that “tends” to prove a defense theory. See Pet. Br. 35. Trial counsel told the PCR court his client’s defense was the medical touching defense, but he never prepared that defense. The notion that this is not presumptively prejudicial to Respondent’s defense because it does not mirror the facts of some of the most egregious failures by counsel (like Nance) gives insufficient weight to the record here and the completeness of counsels’ failures at trial.

ii. The failure to timely disclose discoverable reports was grounds to exclude prosecution experts or obtain a continuance.

The State takes issue with the PCR court’s observation that counsel failed to challenge the timeliness of the disclosure of expert reports under Rule 5 of the rules of criminal procedure because doing so might have been grounds to exclude the evidence or obtain a continuance. See Pet. Br. 37–38; see also App. 1216–17. The State maintains this was “an additional ground” for presumed prejudice. See Pet. Br. 37–38. This overstates the significance of the order’s Rule 5 analysis, which is also correct.

The PCR court’s explanation of Rule 5 is accurate: non- or belated disclosure entitles a defendant to relief. Upon request, the rule requires the disclosure of reports of examinations. See Rule 5(a)(1)(D), SCRCrimP (“Upon request of a defendant the prosecution shall permit the defendant to inspect and copy any results or reports of physical or mental examinations, ...”).⁴ The time for disclosure is “no later than thirty (30) days after the request is made, or within such other time as may be ordered by the court.” Rule 5(a)(1)(3), SCRCrimP. “Where a party fails to comply with Rule 5, the court may order the noncomplying party to permit inspection, grant a continuance, prohibit introduction of the nondisclosed evidence, or enter such order as it deems just under the circumstances.” Earley v. State, 418 S.C. 255, 267, 792 S.E.2d 226, 232 (2016) (quoting State v. Kerr, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998)). The consequence for the use of undisclosed evidence can include reversing a conviction. See, e.g., State v. Lawton, 382 S.C. 122, 127–28, 675 S.E.2d 454, 457 (Ct. App. 2009).

Trial counsel filed a Rule 5 discovery request soon after Respondent was arrested. See App. 1217 (citing App. 867). The nurse examiner compiled a discoverable report and relied on it during her testimony. See App. 238–40. Counsel first learned she would be offered as an expert when she took the stand. See App. 1216–17 (quoting App. 860–61 & 865). Notwithstanding awareness of the State’s disclosure obligation, counsel never objected (see App. 1216 (citing App. 859–60)), and neither of Respondent’s lawyers were able to point to a strategic reason for failing to object. See App. 1217 (citing App. 861–62 & 1008–10). The PCR court found this lack of adversarial testing *instructive* because “she was the witness through which the State sought and obtained the admission of photographs of the child’s vagina into evidence.” App. 1217. The State did disclose

⁴ Note that the order’s reference to Rule 5(e)(4) of the criminal rules appears to be a scrivener’s error as that subsection is limited to alibi defense disclosures. See App. 1217.

a report by Dr. Luberoff, but the disclosure came just five days before trial, which trial counsel conceded was “late” and grounds for a continuance. See id. (citing App. 867). Given these facts, the PCR court was correct to observe that the State’s failure to comply with Rule 5 could have been grounds to exclude (had an objection been made) or for a continuance. See App. 1217–18.

Further, this is not an “additional ground”—i.e., alternative theory—for relief. Respondent did not seek relief under a Rule 5 theory and the PCR court did not grant it on that basis. Instead, Respondent alleged counsel rendered ineffective assistance because of their lack of preparation, which was actually and presumptively prejudicial. See App. 1185. Those are the theories the PCR court considered and ruled on. See App. 1194 & 1210–18. The court’s findings over the failure to challenge critical state witnesses, based on the failure to timely disclose one witness and failure to make any disclosure as to the other, was cited as evidence informing the PCR court’s lack-of-preparation analysis. See, e.g., App. 1216 (“This lack of adversarial testing is *evidenced* in other ways. For instance...”). “When coupled with other significant evidence detailed [earlier in the PCR order,]” these facts informed the conclusion that trial counsel “failed to provide [Respondent] with the adversarial representation the Constitution requires such that prejudice must be presumed.” App. 1217–18. Put differently, the failure to assert Respondent’s right to timely pre-trial notice of Dr. Luberoff and the nurse examiner was further evidence of a breakdown in adversarial testing. In light of the significance these witnesses played in securing Respondent’s conviction, and co-counsel’s need to get up to speed, the failure to raise the discovery objection and, at a minimum, seek a continuance is compelling evidence.

* * *

For these reasons, the Court should conclude that counsel was ineffective in failing to prepare and that lack of preparation was actually and presumptively prejudicial.

II. The failure to call a known medical expert to establish an available defense is deficient performance under prevailing professional norms and prejudiced Respondent at trial.

The PCR court correctly held trial counsel was deficient and Respondent was prejudiced by counsel's "fail[ure] to call an available medical expert to offer testimony the child's injuries were consistent with a rough diaper change." App. 1218–19. The State challenges this conclusion claiming (1) trial counsel had "valid reasons" not to call Dr. Friedlander and (2) that his testimony would not have changed the outcome at trial. See Pet. Br. 43–49. Neither contention is correct.

a. The State presented forensic experts to prove genital penetration.

The State set out to prove genital penetration with forensic evidence from two experts. The nurse examiner testified she observed the child's swollen labia and an abrasion but was uncertain whether the hymen was intact—observations she concluded were evidence of trauma. See App. 1198–99 (citing App. 254, 267–68 & 270–71). Dr. Luberoff concluded the child was abused, speculated the markings represented "bite marks", opined "the most common type of sexual abuse that ends up being discovered to be true or that a finding is made involves digital fondling or digital penetration of the child's genital area[.]" See App. 1200 (citing App. 310, 313–17, 321–23, 333, 335, 340–41 & 345). In Dr. Luberoff's view, the arc pattern on the child's pubic area and bruising on the hymen were "diagnostic of vaginal penetration." Id. (citing App. 342–43) ("...And the only way to get there is by penetrating into that area. So these were penetrating injuries.").

b. There is a reasonable likelihood Dr. Friedlander's testimony would have changed the outcome.

The critical medical question at trial should have been whether the markings on the child were consistent with Respondent's statements and testimony he was too rough when changing a messy diaper. Instead, the jury only heard from the State's experts who concluded they were not. The PCR court held the decision not to retain Dr. Friedlander "was objectively not reasonable

because it denied Applicant a defense” and counsel’s belief Dr. Friedlander’s testimony was not helpful “overlooked that it provided the factual predicate to a legal defense.” App. 1218. The PCR court found Dr. Friedlander offered a “credible alternative theory of how the child sustained the genital injuries during a diaper change—the only person to offer such a view.” App. 1218.

Prior to trial, Dr. Friedlander told trial counsel that State’s case summary was “in error” because the markings were consistent with Respondent’s explanation. App. 1200, 1205–06 (citing App. 872, 950–51, 953 & 966–67). During the PCR hearing, Dr. Friedlander used the State’s exhibits—graphic photography of the child’s genitals—to illustrate how two “little scratch[es]” on the child’s vulva, a bruise on the hymen, and three small bruises on the pubic area were consistent with Respondent “holding her down too hard and he’s opening the lips here [indicating] so he can with the other hand remove the feces and this is scratching probably by his nails.” App. 1205–06 (quoting App. 950–51, 953 & 966–67). Resolving a point of much confusion to trial counsel, Dr. Friedlander explained the hymen was *not* penetrated. App. 1206 (quoting App. 978 (“A. Okay. The vulva was penetrated. The hymen is not penetrated.”)). Dr. Friedlander also explained that touching the child to clean feces off her genitals is a legitimate and medically necessary act that is part of a child’s “basic medical care.” *Id.* (citing App. 950, 958).

Dr. Friedlander disputed Dr. Luberoff’s conclusions in two critical ways. First, he criticized Dr. Luberoff’s anatomical description of the child’s genitals, explaining “[i]t’s sloppy usage to call the vulva the vagina” because, the vulva is an exterior structure to the genitals, while the vagina is located behind the hymen—“it’s common speech but it’s not scientific.” App. 1206 (quoting App. 947–48). Second, Dr. Friedlander disagreed the arc bruise was consistent with a bite and explained it was a “good fit” for finger impressions, which was also consistent with holding the child too firmly while cleaning her and changing her diaper. *See* App. 1206 (citing App. 961–62 & 974).

Based on this evidence, the PCR court correctly concluded that trial counsel's failure to call this witness to testify was "objectively not reasonable" and constituted ineffective assistance that prejudiced Respondent by denying him an available defense. App. 1218–19.

This conclusion was bolstered by the testimony of co-counsel who the PCR court described as "an experienced criminal defense lawyer with 42 years' experience during which he has tried 'hundreds' of criminal cases." See App. 1207 (citing App. 988–90). At the PCR hearing, co-counsel testified that, in his mind, Respondent's defense was a medically appropriate diaper change and Dr. Friedlander demonstrated how the child's injuries corresponded to that claim. Id. Co-counsel explained he "would have emphasized that [testimony]' had he known about Dr. Friedlander because doing so would have created a dispute of fact." Id. (quoting App. 1021). The PCR court reasoned,

Instead, the only medical testimony on which the jury could rely was that of Dr. Luberoff, which suggested the 15-month old child might have been digitally penetrated and bitten on the pelvic bone. This Court found Dr. Friedlander's explanation as to why Dr. Luberoff was wrong about penetration and the bite mark to be credible and persuasive. A jury should have been afforded *an opportunity* to do the same.

Id. (emphasis added). Notably, the jury did have questions about Dr. Luberoff's testimony, as it asked the trial court to rehear it and sought on the law of CSC first. See App. 1004, 1006. Citing the note as evidence of "serious questions" over the interplay of Dr. Luberoff's testimony and the law, the PCR court concluded there was "a reasonable likelihood the jury could have come to a different conclusion had Dr. Friedlander testified" (see App. 1219–20), which is precisely what Strickland's prejudice analysis requires.

The error in this case is more egregious than the habeas grant in Hinton v. Alabama, 571 U.S. 263 (2014), which also turned on the failure to call an expert. Unlike Respondent's counsel, defense counsel in Hinton recognized the core of the prosecution's case was an expert linking the

bullets to the gun. See id. at 273. Defense counsel’s error, however, was the mistaken belief he was stuck with an inadequate defense expert because there was no procedural mechanism to obtain more than \$1,000 to cover expert fees. See id. That belief was wrong because state law allowed for a funding order, but counsel failed to seek additional funds. See id. The U.S. Supreme Court held the decision not to replace an inadequate expert because of this mistaken belief “constituted deficient performance.” Id. at 274. The Court explained further: “An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.” Id. (citing e.g., Williams v. Taylor, 529 U.S. 362, 395 (2000) (failure to investigate predicated on erroneous view that record disclosure was barred); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (failure to conduct discovery based on mistaken view that state disclosure was automatic)). Like Hinton, Respondent’s counsel acted on flawed assumptions, but this left Respondent worse off than the defendant in Hinton because an inadequate expert is better than no expert at all.

c. Assertions that trial counsel provided effective representation even though he failed to call a known, available forensic witness are flawed.

The State advances numerous theories as to why trial counsel rendered effective assistance, none of which are persuasive.

First, the State argues trial counsel was reasonable in not calling Dr. Friedlander because he “solicits his medical consulting business on the internet” and trial counsel “believed such advertising resembled more of a sales pitch to vulnerable family members than legitimate medical evaluation.” Pet. Br. 44 (citing App. 906). To be clear, the Internet “advertising” that purportedly gave rise to trial counsel’s concerns, is a simple website where Dr. Friedlander lists his credentials and services. See App. 944 (describing his website). In fact, Dr. Friedlander testified that he has “made no money” from his website and received the Missouri Bar Association’s highest non-

lawyer honor for pro bono work. App. 944–45. And Dr. Friedlander did not “pitch” anyone; Respondent’s mother contacted him, and he told her to have trial counsel contact him so he could get the discovery materials. See App. 944–46. Put differently, the concerns trial counsel reported to the PCR court have no basis in fact. Moreover, these so-called concerns do not appear to comport with trial counsel’s own business practices. E.g., <https://www.snelllaw.com/> (“NO CASE IS HOPELESS Whether you’ve made a mistake or are being falsely accused of a crime, we are the compassionate and experienced criminal defense team you need in your corner.”) (last accessed Jan. 9, 2020). The PCR court found Dr. Friedlander qualified and offered a “credible alternative theory” of how the child was injured (App. 1204 & 1218) while trial counsel “was not clear as to why Dr. Friedlander was not retained.” App. 1204. Citing trial counsel’s efforts to malign Dr. Friedlander as evidence of legitimate strategic decision making, the State seeks to quarrel with the PCR court’s credibility determinations. The record does not support such a finding.

Second, the State contends trial counsel was reasonable not to call Dr. Friedlander because doing so would “would involve serious risk” because Dr. Friedlander would have testified that Respondent was too rough with the child. Pet. Br. 45. While that might be a legitimate concern if his client disputed all liability, here Respondent took the stand and *admitted* he was aggravated and too rough with the child and trial counsel elicited that very testimony. App. 499–503; see also App. 504 (Respondent testifying it was “very wrong” to pop the child on the right side of her head). Thus, Dr. Friedlander’s opinion that Respondent was too rough with the child comported with precisely with what Respondent told the jury. It was also in complete agreement with what trial counsel told the PCR court was his client’s defense:

Q. And that was the defense? The defense was a rough diaper change basically?

A. Rough diaper change. Yes, sir.

Q. Okay. Dr. Friedlander's opinion was consistent with that?

A. It was.

App. 877. Thus, the risk the State claims trial counsel was reasonable in seeking to avoid was, by trial counsel's own admission, a concession essential to his client's defense—he was too rough with the child. While courts do not deem “valid” strategic judgments to be ineffective assistance, that deference is predicated on a *valid* reason, not any reason. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) (“counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.” (collecting cases)). Moreover, Dr. Friedlander's willingness to criticize Respondent's conduct would presumably add to his credibility, not detract from it. Thus, as for the State's theory that trial counsel made a valid risk assessment as to Dr. Friedlander, it is unsupported by the record.

Third, the State argues the failure to call Dr. Friedlander was reasonable because trial counsel “had another expert lined up to testify” who would testify (1) a diaper change requires physical contact with the genital area, (2) the child's injuries were not permanent, and (3) the injuries were not the result of penile penetration, but there was no need for this testimony because Dr. Luberoff conceded these points. Pet. Br. 45 (citing App. 856, 879 & 897). This argument misses the point entirely. The relevant question was whether the markings on the child's pubic area and genitals evidenced a rough diaper change or a sexual assault. While Dr. Luberoff may have conceded the points above, she also speculated that Respondent bit the child on the pubic area (App. 342 (“...it raises the concern for a bite mark.”)) and digitally penetrated, not just the genitals—as would be necessary to clean feces from between the labia—but the child's vagina. App. 343 (“Yes, they're diagnostic of vaginal penetration.”). This testimony went unanswered.

Fourth, the State concludes Respondent was not prejudiced by the absence of Dr. Friedlander's testimony based on the bizarre conclusion that Dr. Friedlander "never established that level of force was medically recognized or necessary." Pet. Br. 45–46. This argument (largely relegated to a footnote), appears to turn on the belief that in order to substantiate Respondent's medical-touching defense, Dr. Friedlander would have had to opine that a certain level of force was permissible, after which the otherwise privileged touching is converted into a sexual battery. See Pet. Br. 45–46. The State cites no law outside of its footnote making a confused claim about when ABHAN is a lesser-included offense of CSC and that "Dr. Friedlander was clear that a sexual battery occurred" Pet. Br. 46 n.25 (citing App. 957). This appears to be yet another example of the State's willingness to torture the record and make *any* claim to hold onto a deeply flawed conviction. Cf. App. 1247–59 (detailing numerous misrepresentations in the State's motion to alter or amend). In fact, the testimony the State cites as evidence Dr. Friedlander "was clear that a sexual battery occurred" reads as follows:

Q. Right. And you said clearly there was penetration of the vulva?

A. Yes.

App. 957. Again, state law expressly permits penetration for a medical purpose and the State's expert agrees it is necessary to penetrate the genitals to clean a child after a messy diaper. See App. 377–78. The relevant issue is whether Respondent was prejudiced by the absence of testimony that markings on the child indicate a diaper change. In suggesting Dr. Friedlander establishes something other than what the record supports, the State should be more mindful of its role "in a criminal prosecution is not that it shall win a case, but that justice shall be done." State v. Moses, 390 S.C. 502, 516, 702 S.E.2d 395, 402 (Ct. App. 2010).

Fifth, the State seeks to quarrel with Dr. Friedlander's opinion that the arc-pattern bruising on the child did not represent a bite mark by claiming he failed to provide evidence on this point. See Pet. Br. 47. To the contrary, Dr. Friedlander provided detailed testimony about why the markings were consistent with Respondent holding the child down while changing her diaper. As detailed by the PCR court:

Using the State's trial exhibits to illustrate his testimony, Dr. Friedlander pointed to two "little scratch[es]" on the vulva and a bruise on the hymen. See App. 954 (discussing Trial Ex. 19/Pl.'s Ex. 5). Dr. Friedlander also highlighted "three little bruises consistent with finger impressions[,] on the child's pubic area. See App. 955 (discussing Trial Ex. 20/Pl.'s Ex. 6). While illustrating with his hands, Dr. Friedlander explained:

Mr. Harpootlian: Are those two injuries that you see in those two photos consistent or inconsistent with your position that these injuries occurred while he was attempting to remove feces from the lips of this little girl's vagina?

Dr. Friedlander: It's a perfect match. He's holding her down too hard and he's opening the lips here so he can with the other hand remove the feces and this is scratching probably by his nails. These are two parts of the nails where the nails would rub up against and then the impression only on the back half, that's where the finger is going to strike [the hymen]. It's a perfect match.

App. 1205-06 (citing App. 953) (brackets original, citations replaced with reference to record).

Beyond the misrepresentation, the State is confused about the significance of Dr. Friedlander's testimony, arguing:

Thus, in the absence of Dr. Friedlander's testimony, the evidence was that the bruising *could be* a bite mark. With Dr. Friedlander's testimony, the evidence was still that the bruising *could be* a bite mark. As such, respondent again fails to establish any prejudice.

Pet. Br. 47 (emphasis original). The PCR court's role was not to decide who was right: Dr. Friedlander or Dr. Luberoff. The pertinent question was whether Dr. Friedlander offered credible,

competent evidence which, if believed by the jury, would have entitled Respondent to a legal defense. Cf. App. 1204 (noting Dr. Friedlander’s opinion “was consistent with what [Respondent] told police and the jury, which, if believed, would have entitled [Respondent] to a medical-touching defense.”). Co-counsel told the PCR court he would have highlighted this factual dispute for the jury. App. 1021. The PCR court agreed, explaining:

Dr. Friedlander’s testimony was critical because it would have given the jury a choice between Dr. Luberoff’s testimony and another opinion that corroborated [Respondent’s] statements and testimony. ... This Court found Dr. Friedlander’s explanation as to why Dr. Luberoff was wrong about penetration and the bite mark to be credible and persuasive. A jury should have been afforded an opportunity to do the same.

App. 1219. This was the proper question below and one the State seeks to avoid here by urging the Court to resolve a question never put to the jury because of trial counsel’s errors.

Finally, the State analogizes this case to Simpson v. Moore, 367 S.C. 587, 627 S.E. 701 (2006),⁵ where a PCR applicant claimed error in counsel’s failure to retain an expert. See Pet. Br. 47–49. However, the expert-retention issues in Simpson are entirely unrelated to the issue presented here. The applicant in that case raised two claims: (1) that trial counsel should have consulted a forensic expert and (2) that trial counsel should have retained an expert to discredit a child witness. Simpson, 367 S.C. at 595, 627 S.E. at 705. The failure to consult a forensic expert was not ineffective assistance because “the expert testimony presented at the PCR hearing added little either factually or theoretically, and did not negate the fact that all of the elements necessary for a murder conviction were present[,]” particularly where the defendant testified he shot the victim, once in the back, after the struggle ended. See id. at 597–98, 627 S.E.2d at 706–07. Likewise, the Court found that trial counsel employed a valid strategy by highlighting the fact that

⁵ Abrogated in part by Smalls, supra.

the child-witness's story changed through cross-examination. Id. at 603, 627 S.E.2d at 709–10 (“On both direct and cross, Nathan’s lack of accurate recall was exposed to the jury.”). Properly read, Simpson merely stands for the propositions that (1) prejudice does not attached from the failure to call an expert witness if doing so would not negate an element of the offense (or, in this case, give rise to a defense) and (2) counsel was not ineffective in failing to use an expert to challenge a witness’s credibility where the witness’s testimony demonstrates the inconsistency.

Neither proposition aids the State here. Indeed, the absence of Dr. Freidlander’s testimony is prejudicial to Respondent because it denied him the opportunity to present a defense no other witness at trial was able (or willing) to support through an opinion the markings on the child were consistent with a rough diaper change. Had Dr. Luberoff offered such a view, prejudice might be a closer question here. She did not; she offered the opposite view:

Q. Now, throughout your experience in pediatrics, can you tell us whether or not this type of injury is normally found following a standard diaper change?

A. It’s not.

Q. Or standard medical care to a child?

A. No, it’s not.

Q. Can you tell us whether or not this type of injury may occur as a result of digital penetration or insertion of a finger or fingers into the vagina?

A. Yes, it can happen with that if some force is used. It’s not going to happen with gentle care. For example, when I’m examining children, I often need to use a Q-tip or my gloved finder to examine those parts. Than that kind of care, that kind of intrusion does not result in injury.

App. 347–48.

The better analog here is McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008), where the Court concluded counsel “was ineffective in calling an expert witness whose testimony

undermined the defense and in failing to call an expert witness whose testimony supported the defense.” Id. at 43, 661 S.E.2d at 359. In McKnight, counsel failed to obtain a continuance or obtain *de bene esse* testimony from an expert able to dispute the victim child’s death was the result of cocaine use. See id. at 43–44, 661 S.E.2d at 359. Instead, counsel relied on an expert the State previously used to say the child’s cause of death was “undetermined” in the absence of pure-form cocaine in the fetus. Id. This Court rejected the suggestion trial counsel’s strategy was valid, explaining “counsel should have reasonably concluded that regardless of [the available expert’s] ultimate conclusion, her testimony went to the heart of the State’s case, and that substitute and/or additional testimony was needed.” Id. at 44, 661 S.E.2d at 359. So too here.

* * *

For the reasons above, trial counsel’s failure to call an available expert forensic pathologist to contradict the State’s experts, explain why the markings on the child were consistent with Respondent’s statements and testimony, and establish a medical touching defense was actually prejudicial to Respondent.

III. The failure to object to graphic images of the child’s genitals allowed graphic and unfairly prejudicial images to be sent to the jury that were unnecessary to prove a contention in dispute.

Finally, the PCR court held counsel was ineffective in failing to make a contemporaneous objection to images of the child’s genitals, which were not relevant to a matter in dispute and inflamed the passions and prejudices of the jury in a manner that invited a verdict on an improper basis. See App. 1220–23. The failure to object foreclosed Respondent’s ability to contest the admissibility of the exhibits on appeal. See Williams, 405 S.C. at 281–82, 747 S.E.2d at 204.

Otherwise relevant evidence can be excluded by a trial court when its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. To show unfair

prejudice, the evidence must have “a tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228–29 (2010); see also State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (same); State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008) (same). These judgments must be made based on the entire record. Kirton, 381 S.C. at 24, 671 S.E.2d at 115 (citing State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000)). Accordingly, “[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.” Torres, 390 S.C. at 623, 703 S.E.2d at 228.

The State argues the PCR court was wrong to hold that co-counsel’s failure to make a contemporaneous objection was prejudicial because “there is no reasonable probability that the trial court would have sustained an objection.” Pet. Br. 50. The PCR court found the images were graphic, therefore risking unfair prejudice, and unnecessary to prove genital penetration, having been introduced after two experts used anatomical diagrams to relay their findings. See App. 1222–23. In the State’s view, because Respondent claimed the injuries arose while changing the child’s diaper, “the severity of the child’s injuries is a key factor.” Pet. Br. 51. This is a fair point, but crediting this point underscores the gravity of the trial counsel’s error in not having Dr. Friedlander testify. Put differently, if the State is correct that the jury *must* see the photos because a visual depiction of the injuries is necessary to assess the merits of respondent’s defense (see id.), the absence of expert testimony to explain the injuries are consistent with Respondent’s testimony is all the more damning. But this is not what happened at trial.

Instead, when offered into evidence, the State had already established genital penetration, making admission of the photos unnecessary to prove any core contention. See Torres, 390 S.C.

at 623, 703 S.E.2d at 228 (“Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.”). The State offered two experts who testified about their forensic examinations. They described the injuries they found, and the extent of the injuries was irrelevant to the criminal sexual conduct charge because all the State needed to prove was penetration. To aid the jury, the trial court admitted anatomical diagrams used to identify the location of markings on the child’s body. See App. 1222. As the Court of Appeals explained, “[t]hey were not graphic at all; they were simply black and white diagrams of a child’s head, body, and vagina. They did not have any prejudicial effect. Therefore, the trial court did not err in admitting the diagrams.” Williams, 405 S.C. at 282, 747 S.E.2d at 204. While trial counsel entered a timely objection to the diagrams, the failure to do the same with the photos meant neither the trial court nor the appellate court were able to consider this issue. See id. (“Williams only objected to the admission of the anatomical diagram enlargements. He did not object to the admission of any of the photographs. ... Therefore, the admission of the photographs is not preserved” (parenthetical and footnote omitted)). Thus, the only court to conduct a Rule 403 analysis is the PCR court, which held they invited a decision on an improper basis and were unnecessary to prove a core contention.

Had an objection been made, there are any number of remedial steps the trial court could have employed to mitigate unfair prejudice like limiting the number of the photographs sent to the jury. But the trial court was never asked. In the context of victim impact testimony, this Court recently explained:

We do not intend with this discussion to define which of the five components would have been permissible for the trial court to admit within its discretion. Rather, we discuss them to demonstrate that, with varying degree, the admission of each one was debatable. Without an objection, however, there can be no debate; *and the trial court has no opportunity to exercise its discretion*. Here, even if the trial court was being “liberal” in allowing victim impact testimony, trial counsel should have

objected to those components of the law enforcement officers' testimony as to which counsel felt he had a reasonably persuasive argument for exclusion.

Stone v. State, 419 S.C. 370, 386, 798 S.E.2d 561, 569–70 (2017) (emphasis added). Thus, in Stone, the Court found counsel erred in failing to object eventhough the trial court could still act within its discretion and admit the evidence. “The fact the trial court has such wide discretion does not justify the decision not to object. Id. at 386, 798 S.E.2d at 570. “Rather, the debate that precedes the exercise of that discretion is part of the adversarial process Ard⁶] and Strickland require trial counsel to test.” Id.

The question here is whether there is a debatable point that might have resulted in the exclusion of the images to protect Respondent from unfair prejudice. The PCR court believed there was a reasonable possibiltiy of a different outcome. Respondent has urged this Court to review the images for itself. But the prospect that any one member of this Court might rule differently than the PCR court fails to address the question because the PCR court's Rule 403 analysis would have to be clearly erroneous, i.e., without *any* eviedentary support, to warrant reversal here. See State v. Scott, 406 S.C. 108, 113, 749 S.E.2d 160, 163 (Ct. App. 2013). In light of the jury's questions about Dr. Luberoff's testimony and the law, there is a real possibility of a different outcome at trial had the photographs not been admitted or been admitted subject to judicially crafted limitations designed to minimize unfair prejudice. That possibility of a different outcome renders counsels' failure to object prejudicial under Strickland.

CONCLUSION

Respondent's trial counsel did not prepare his case for trial. He was anticipating a plea to lesser charges. That expectation was frustrated by the State's refusal to deal. Instead of protecting

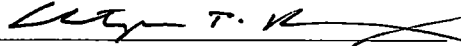
⁶ Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

his client by seeking a continuance, trial counsel pressed forward. On the eve of trial, Respondent's mother (not a lawyer) suggested retaining more experienced counsel to assist and paid to retain co-counsel to assist. Without prior knowledge or a plan, co-counsel ended up trying almost the entire case (including all critical witnesses) notwithstanding the fact he received the file just 24 hours earlier. For his part, trial counsel misapprehended facts and law that would determine his client's fate. More troubling still, trial counsel never presented expert testimony necessary to establish a defense under § 16-3-651 even though he had Dr. Friedlander's opinion and now concedes it corroborated Respondent's defense. Co-counsel was unaware of Dr. Friedlander's opinion. After listening to the forensic pathologist testify at the PCR hearing, co-counsel testified that expert medical opinion would have been "crucial" to defending the CSC charge with evidence the scratches and bruising on the child occurred during a diaper change—a medical touching and legal defense. This evidence is consistent with DNA evidence, Respondent's statements to police, and his testimony to the jury. Respondent is serving 25 years without a jury considering this medical-touching defense.

The PCR court's grant of post-conviction relief is legally sound and factually supported. The Court should affirm.

[signature page follows]

Respectfully submitted,



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January 13, 2020
Columbia, South Carolina.

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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

Appellate Case No. 2017-001877
Case No. 2014-CP-32-04769

Lance Austin Williams, SCDC No. 00345477.....Respondent,

v.

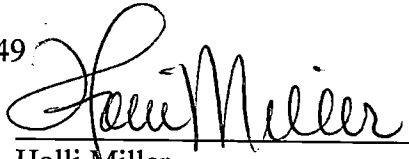
State of South Carolina.....Petitioner.

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Respondent, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on January 13, 2020 served by having the below document placed in the mail, first class postage affixed thereto, to the following mentioned person:

Document: Respondent's Brief

Served: Michael D. Ross, Assistant Attorney General
South Carolina Attorney General's Office
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Holli Miller