STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
The Honorable William P. Keesley

Case No. 2010-CP-32-5076

RON O'NEAL FINKLEA, SK6025

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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STANDARD OF REVIEW

The standard of review for the appeal of a PCR matter "depends on the specific issue before [the court]." The Supreme Court reviews questions of law *de novo*, and no deference is given to the trial court's decision. *Smalls v. State*, 422 S.C. 174, 181, 810 S.E.2d 836, 839 (2018), reh'g denied (Mar. 29, 2018). The South Carolina Supreme Court 'will reverse the decision of the PCR court when it is controlled by an error of law.' *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)(quoting *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012)).

ARGUMENT

I. South Carolina Rules of Evidence 602 and 703, along with the existing case law, demonstrate that the PCR Court committed legal error in granting relief solely on the basis of hearsay evidence from Applicant's experts that could not be offered for its underlying truth and where such hearsay was not supported by independent evidence or testimony from witnesses with personal knowledge of abuse.

SCRE 602 demands that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." By reference, SCRE 602 leaves room for the applicability of SCRE 703, which provides leeway for an expert to divulge hearsay statements when such serves as the basis of their opinion. However, it is a well-established rule that permitting the hearsay to be uttered by the expert does not cure the hearsay, is not an exception to hearsay, and does not equate to an admission of evidence that establishes the truth of the matter asserted. Such testimony by an expert is still hearsay, and absent an applicable exception it cannot be offered for its truth. The hearsay upon which the expert relied must still be proven by independent, competent, and admissible evidence. Respondent relied exclusively upon the testimony of their expert witnesses; while those witnesses expounded the alleged hearsay testimony of family members in explanation of their

expert opinions, the record lacks any non-hearsay evidence of abuse. As such, the PCR Court erred in its reliance upon hearsay admissible for the limited purpose of explanation of opinion under Rule 703 as proof of childhood abuse.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." SCRE 801; *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 690 (2007). The statements in question are those of Respondent's two expert witnesses, who testified that they conducted interviews with family members and revealed the alleged childhood abuse content of those interviews as the basis of their expert opinions. Neither expert had firsthand knowledge of such abuse as is required under SCRE 602. Thus, the family's purported interviews given by way of the expert is, without question, hearsay testimony. The alleged history of systematic abuse exists only through the testimony of Respondent's experts.

However, pursuant to South Carolina Rule of Evidence 703, the experts were properly permitted to testify as they did. The error lies in the difference between explanation of an opinion under Rule 703, and using an expert as the mere conduit for hearsay absent independent record evidence to support the underlying facts. The admissibility of the experts' testimony is not contested; *it is the purpose for which that testimony was admitted by the PCR Court that Petitioner argues was legal error.*

South Carolina Rule of Evidence 703 states, in its entirety,

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

SCRE 703. The combination of these two rules provides leeway to an expert to express their professional opinion and the information that the opinion is based upon. However, it does not permit the hearsay evidence to be used as proof of the matter asserted. Often stated another way, expert testimony cannot serve as a mere conduit for inadmissible hearsay. This is a substantial distinction that has been noted by numerous courts, including various courts of South Carolina and the United State Supreme Court.

Most notably, the United States Supreme Court has weighed in on the intricacies of Rule 703, and has comprehensively explained that while hearsay may be uttered by an expert in explanation of their opinion testimony, that hearsay cannot be introduced as truth of the matter asserted.[1] The Supreme Court explained that,

> [m]odern rules of evidence continue to permit experts to express opinions based on facts about which they lack personal knowledge, but these rules dispense with the need for hypothetical questions. Under both Illinois and the Federal Rules of Evidence, an expert may base an opinion on facts that are 'made known to the expert at or before the hearing,' but such reliance does not constitute admissible evidence of this underling information.

Williams v. Illinois, 567 U.S. 50, 69, 132 S. Ct. 2221, 2234, 183 L. Ed. 2d 89 (2012)(citing Ill. Rule Evid. 703; Fed. Rule Evid. 703). The Court goes on to demonstrate that "in jury trials, both Illinois and federal law generally bar an expert from disclosing such inadmissible evidence." *Id.* However, in bench trials "there is no restriction on the revelation of such information to the factfinder." *Id.* at 69-70, 132 S.Ct. at 2235. The Court noted that it is presumed that the judge will understand and limit the reason for the disclosure of the underlying inadmissible information

[1] The Court in *Williams* was addressing Rule 703 in the context of the Confrontation Clause. However, the explanation of Rule 703, the limitations that accompany the rule, and the safeguards to abuse of the rule laid out by the Court are universally applicable. Moreover, the Court specifically references that both the Illinois Rule of Evidence and the Federal Rule of Evidence share the same limitation. The South Carolina Rule 703 is identical to the Illinois Rule.

and will not rely on that information for any improper purpose; judges routinely hear and are presumed to ignore inadmissible evidence in making decisions, and that the judge is also presumed to adhere 'to basic rules of procedure' when acting as the factfinder. *Id.* (citing *Harris v. Rivera*, 454 U.S. 339, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1078, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (Rehnquist, C.J., dissenting); See also *Walton v. Arizona*, 497 U.S. 639, 653, 110 S. Ct. 3047, 3057, 111 L. Ed. 2d 511 (1990), overruled on other grounds by *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (noting that "[t]rial judges are presumed to know the law and to apply it in making their decisions."). To add to the distinction between bench trials and jury trials, the Court also noted that "it is not necessary for the judge to stop and make a formal statement on the record regarding the limited reason for which the testimony is admitted." *Williams,* 567 U.S. at 78-79, 132 S.Ct. at 2240.

The United States Supreme Court made clear in this excerpt that, (1) an expert may testify to hearsay when such is the basis of their opinion, but (2) such testimony does not constitute admissible evidence for the truth of the matter asserted. In addition to the explanation of the rule, the Court likewise made clear that the trial court, when serving as factfinder, is expected to properly abide by procedure and admit the evidence within the confines of Rule 703, and can do so without interruption. Even if the *Williams* Court had said nothing further toward their explanation of Rule 703, it would still soundly demonstrate the precise legal error identified by Petitioner in this matter. However, the Court in *Williams* had more to add to the dangers of abuse of Rule 703.

It adds that since the matter was a bench trial, the facts presented in *Williams* directed that the Court could assume that the trial judge understood the contentious testimony was not

admissible to prove the truth of the matter asserted, found no basis to conclude otherwise, and noted that the record contained other independent evidence pertinent to controversial issue. *Id.* at 72-73, 79, 132 S.Ct. at 2236-41. This is in precise contrast to the Order of the PCR Court which explicitly references the existence of hearsay and its reliance upon hearsay for evidence of systemic abuse, deemed unqualifiedly admissible by the PCR Court. (App., pp. 3049-3050; 3059; 3063).

The Court in *Williams* goes on to explain the intricacies of introducing hearsay evidence for plausible non-hearsay purposes. The Court states, "Under the Rule, "basis evidence" that is not admissible for its truth may be disclosed even in a jury trial under appropriate circumstances. The purpose for allowing this disclosure is that it may 'assis[t] the jury to evaluate the expert's opinion'" or likewise help the factfinder understand the expert's thought process and determine what weight to assign the opinion testimony. The Court then gave marked examples of why this may be important: (1) that the factfinder might suspect that the expert relied on factual premises with no support in the record, or (2) the expert drew an unwarranted inference from the premises relied upon by the expert. Either circumstance would seriously undermine the probative value and credibility of the expert's opinion. The rule permits the expert to demonstrate a well-reasoned basis for his opinion that corresponds to other established record evidence – "not to prove the truth of the underlying facts." *Id.* at 78, 132 S.Ct. at 2240. The *Williams* Court concludes by addressing the safeguards against the potential abuses of Rule 703, stating:

> ***In the hypothetical situations posited [by the dissent], an expert expresses an opinion based on factual premises not supported by any admissible evidence, and may also reveal the out-of-court statements on which the expert relied. There are at least four safeguards to prevent such abuses.*** First, trial courts can screen out experts who would act as mere conduits for hearsay by strictly enforcing the requirements that experts display some genuine "scientific, technical, or other specialized knowledge [that] will

> help their trier of fact to understand the evidence or to determine a fact in issue." Fed. Rule Evid. 702(a). Second, experts are generally precluded from disclosing inadmissible evidence to a jury. See Fed. Rule Evid. 703; People v. Pasch, 152 Ill.2d 133, 175-176, 178 Ill.Dec. 38, 604 N.E.2d 294, 310-311 (1992). ***Third, if such evidence is disclosed, the trial judge may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises.*** See Fed. Rules Evid. 105, 703; People v. Scott, 148 Ill.2d 479, 527-528, 171 Ill.Dec. 365, 594 N.E.2d 217, 236-247 (1992). ***And fourth, if the [party offering the evidence] cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact.***

Id. at 80-81, 132 S.Ct. at 2241 (emphasis added).

The reasoning expounded by the United State Supreme Court can be found reiterated in South Carolina jurisprudence, as well as other jurisdictions. See *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013)(citing All*egro, Inc. v. Scully*, 400 S.C. 33, 46–47, 733 S.E.2d 114, 122 (Ct.App.2012))(finding "Rule 703 of the South Carolina Rules of Evidence allows an expert giving an opinion to rely on facts and data that are not admitted into evidence or even admissible into evidence if they are of a type reasonably relied upon by experts in the particular field. Rule 703, SCRE. The rule does not, however, make hearsay automatically admissible simply because it was relied upon by the expert."); *State v. Slocumb*, 336 S.C. 619, 521 S.E.2d 507 (1999) (citing Michael H. Graham, Handbook of Federal Evidence § 703.1, at 110 (4th ed. 1996) (holding that the facts and data reasonably relied upon by an expert may be disclosed under Rule 703 during direct or cross-examination to assist the jury in evaluating the basis of the expert's opinion. This may be done even if the facts themselves had not been admitted, and thus they may not be considered for their truth); *Jones v. Doe*, 372 S.C. 53, 55, 640 S.E.2d 514, 515 (Ct. App. 2006)(finding summary judgment warranted wherein, pursuant to Rule 703, Plaintiff's

expert relied upon inadmissible hearsay evidence of notice to healthcare professionals about decedent's condition prior to death for purposes of establishing breach of standard of care, but noting specifically that Plaintiff had not provided any admissible non-hearsay evidence that would establish the requisite notice at trial); *High v. High*, 389 S.C. 226, 238, 697 S.E.2d 690, 696 (Ct. App. 2010); *State v. Chavis*, 412 S.C. 101, 107, 771 S.E.2d 336, 339 (2015); See also *James v. Ruiz*, 440 N.J. Super. 45, 66-70, 111 A.3d. 123, 135-139 (2015)(The New Jersey Supreme Court found that when facts from a hearsay source are referred to by an expert pursuant to Rule 703, the factfinder must consider the information solely for purpose of understanding the expert's opinion; the testifying expert "must not function as a mere 'conduit' for substantive admission of inadmissible hearsay." The Court further found that if such evidence is presented to the jury, it is incumbent upon the court to give a limiting instruction to assure that the jurors do not improperly consider those outside sources for their truth.").

The rationale that the admissibility of hearsay evidence by an expert under Rule 703 is limited to explanation of the expert's opinion and may not be introduced as evidence of the truth of the underlying facts is well-established law. The PCR Court erred when it accepted as fact the alleged hearsay evidence of systematic childhood abuse detailed by Respondent's experts, absent any independent admissible evidence establishing that underlying fact. The error is so substantial that it erodes the PCR Court's entire basis for which error and prejudice were found under *Strickland.* This is legal error warranting a grant of Certiorari and reversal of the PCR Court's granted relief.

ADDITIONAL ARGUMENTS

Petitioner also takes this opportunity to respond directly to certain assertions made by Respondent in his Return to the Petition for Writ of Certiorari.

First, in Respondent's section titled "Trial Counsel's Inadequate Investigation" Respondent summarizes what he believes to be the entirety of Petitioner's investigative efforts. However, outside of a footnoted reference, Respondent failed to discuss or even mention the hiring of Dr. Maddox as the defense teams forensic psychiatrist, who likewise conducted interviews with Finklea, his family, and his various treating doctors prior to trial. The absence of even a mention of Dr. Maddox's efforts is a curious and substantial omission from "the sum total of counsel's efforts to obtain social history information about their client's life." (App., p. 3045; 3048; Respondent's Return, pp. 2-3; pp.4-5, footnote 3).

Next, Petitioner takes issue with the arguments made by Respondent that no objection to hearsay evidence was raised during the hearing, and that objection was only first made known in Petitioner's Rule 59(e) motion. (Respondent's Return, p. 10). Respondent's argument misunderstands Rule 703. The evidentiary rules set forth that the testimony offered by Respondent's experts was admissible, but Respondent and the PCR court failed to recognize that the purpose of that admissibility is limited. As argued extensively above, the testimony cannot be offered as proof of the underlying facts relied upon in forming the opinion, and moreover, in the context of a bench trial, the trial judge as factfinder is expected to understand this limitation and apply the expert's testimony properly. The opportunity to object to the PCR court's application of the Rule 703 expert testimony evidence was not demonstrated until the PCR court actually made factual findings on the case within its Order granting relief. Thus, the earliest opportunity to object to the Court's improper application of Rule 703 testimony was the Rule 59(e) Motion to Amend or Alter Judgment. To do so beforehand would be to presuppose an error of the court in its application of law, when no such indication of legal error had been demonstrated. The same principle would hold true if an out-of-court statement were to be admitted for a purpose other

than proof of the matter asserted, but the court nevertheless relied upon the statement as such proof. Petitioner's objection is not to the court permitting the testimony at hearing, but to the court's application of law in allowing that evidence to improperly guide its findings of fact.

Moreover, this distinction in Rule 703 was addressed when, separate from the offer of testimony, Respondent sought to admit Dr. Knight's Report. In such circumstance it was made clear for the record that admission of the Report was for purposes of the expert's opinion, not the supposed facts relied upon in the Report. (App., p. 2778, line 23 through p. 2787, line 2). This objection was raised because Rule 602, and its incorporation of Rule 703, addresses a witness "testifying" and not the introduction of physical evidence such as the expert's Report. Given that the introduction of testimony provided by the experts in support of their expert opinions, is itself not objectionable, Respondent's arguments that the issue is not preserved misses the mark.

Respondent then follows with the argument that if Petitioner was worried about the reliability of the hearsay testimony admitted via their experts, the State was free to call the family members present in the courtroom during the hearing so as examine them personally for evidence of abuse. (Respondent's Return, p. 14). Petitioner noted the presence of Respondent's various family members at hearing to demonstrate the weakness his case, such that he would choose not to put forth any firsthand knowledge of the abuse that he asserts went undiscovered by his trial counsel. It is the applicant's burden of proof to establish the necessary facts and evidence to support his claim for post-conviction relief. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984); SCRCP 71.1(e). It is not the burden of the State to call applicant's own witnesses to address the applicant's lack of admissible evidence presented at hearing.

Petitioner offers the above arguments in reply to the arguments offered by Respondent in his Return. For each allegation of the Return not specifically addressed herein, Petitioner relies upon the facts and arguments set forth in its Petition for Writ of Certiorari.

CONCLUSION

Petitioner asserts the above arguments, in addition to the arguments set forth in the Petition for Writ of Certiorari, and argues that certiorari is warranted in this case for each of its asserted questions presented.

Respectfully submitted,

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January 27, 2019

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PROOF OF SERVICE

I, W. Joseph Maye, hereby certify that true copies of the Petitioner's Reply to Return to Petition for Writ of Certiorari has been served upon opposing counsel by depositing copies in the United States mail, postage prepaid, to the following:

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This 27th day of January, 2020.

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