THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Honorable Kristi F Curtis, Circuit Judge

Case No.: 2016-CP-26-5170

Jon Jarrard, Jr. 243625.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Jon Jarrard, Jr. appeals the Honorable Kristi F Curtis' April 21, 2020 Order Denying Motion for Reconsideration and April 3, 2020 Order of Dismissal. Undersigned counsel received notice of the order Denying Motion for Reconsideration on April 23, 2020. Copies of the orders on appeal are attached hereto.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
Jon W. Jarrard, Jr., S.C.D.C. No. 243625,	)	Case No.: 2016-CP-26-05170
Applicant,	)	
	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Jon W. Jarrard ("Applicant") on August 3, 2016. Respondent made its return on or about February 23, 2017. The Court convened an evidentiary hearing into the matter on November 26, 2018, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by James K. Falk, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, T. Kirk Truslow, Esq. ("Trial Counsel"); Applicant's appellate counsel, Craig R. Stanley, Esq. ("Appellate Counsel"); and the solicitor who prosecuted the case, Candice Lively, Esq. ("Solicitor") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript,[1] the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records (including the entire Record on Appeal), and the pleadings. The Court finds as follows:

[1] This case involves a minor victim and requires reference to an additional minor child. Thus, notwithstanding Applicant's complaints on this very issue, this Court refers to the minor victim throughout this filing as "Victim" and the other minor child as "Minor."

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I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the January 2011 term of the Horry County Grand Jury for lewd act on a minor (2011-GS-26-00365). Applicant was further indicted at the April 2011 term for criminal sexual conduct with a minor, first degree (2011-GS-26-01335). T. Kirk Truslow, Esq. represented Applicant, and Candice A. Lively, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On June 11, 2012, Applicant proceeded to trial before the Honorable Larry B. Hyman, Jr. and a jury. The jury found Applicant guilty as indicted on June 12, 2012. Judge Hyman sentenced Applicant to imprisonment for concurrent terms of fifteen years for each conviction.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Craig R. Stanley, Esq., who raised the following issue:

> Did the trial court err when it allowed the State to proceed under § 16-3[-]655(A)(2) for the sole purpose of circumventing the traditional rules of evidence and to use the Defendants prior conviction, as propensity evidence in violation of due process?

The parties proceeded to oral arguments before the South Carolina Court of Appeals on November 4, 2014. Applicant was represented by attorney Stanley. Deborah R.J. Shupe, Esq., of the South Carolina Attorney General's Office, represented the State. By opinion decided December 17, 2014, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Jarrard, Op. No. 2014-UP-470 (S.C. Ct. App. filed Dec. 17, 2014). Applicant filed a petition for rehearing on December 30, 2014, which was denied by the Court of Appeals on January 23, 2015.

Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari, which raised the following two issues:

1. The trial court's admission of an improperly remote, unrelated prior conviction as an element of the crime denied Petitioner due process.
2. The trial court failed to conduct on the record Rule 403 balancing test before allowing the introduction of the prior bad acts.

The Supreme Court of South Carolina granted certiorari as to the first issue and denied as to the second issue by order filed February 16, 2016. After further briefing, the parties appeared before the Supreme Court for oral arguments on June 14, 2016. Applicant was again represented by counsel Stanley. Mark R. Farthing, Esq., of the South Carolina Attorney General's Office, represented the State. By memorandum opinion filed June 29, 2016, the Supreme Court dismissed certiorari as improvidently granted. State v. Jarrard, Op. No. 2016-MO-022 (S.C. Sup. Ct. filed June 29, 2016). The remittitur was issued on June 29, 2016.

Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons (excerpts verbatim):

1. Ineffective assistance of trial counsel, in that:
    a. "In a motion hearing on April 3, 2012, counsel failed to object to solicitor's statement of no intent for retaliation"
    b. Trial Counsel failed "to object to the accuser of applicant as a 'victim.'"
    c. Trial Counsel failed to "properly review[] the evidence and for not know facts and circumstances of the case. He was unprepared for trial."
    d. "Over and over in the trial, the solicitor referred to allegations of what the applicant was accused of as fact. Counsel was ineffective for failing to object to allegations referred to as fact."
    e. Trial Counsel failed "to object to recantation video and/or [affidavits] being presented as a part of what was supposed to be the petitioner's defense"
    f. Trial Counsel failed "to subpoena admittedly important defense witnesses or provide for an expert witness. He further did not call as a witness the only eye witness to the incident between [Victim], the alleged victim and [Minor] the babysitter's daughter. Or call Rebecca (grandmother) to the stand."
    g. Trial Counsel failed "to impeach or properly cross examine Pamela Gause about statements she made in her testimony."
    h. Trial Counsel failed "to object to hearsay evidence given by Pamela Gause."

i. Trial Counsel "was ineffective for eliciting further hearsay testimony from Pamela Gause about the incident between [Victim] and [Minor]."
j. Trial Counsel failed to "object to Judge's statement that after closing remarks by the state there would be closing remarks by the defense."
k. Trial Counsel failed "to object to inflammatory statement in closing argument 'Don't let Nana win.'"
l. Trial Counsel failed "to object during the trial to the forensic interviewer, who also did the medical exam being stipulated as an expert in the area of child sexual assault examinations."
m. Trial Counsel "failed to object to the forensic interview as untrustworthy, prejudicial and bolstering thereby saving the decision for review on appeal."
n. Trial Counsel failed "to object to hearsay statements by the alleged victim that 'Nana told her what to write in a letter to applicant in the P.S. part.' He also failed to call 'Nana' as a witness to dispute hearsay he did not object to."
o. Trial Counsel failed to object to Detective Large's identification of Applicant as the defendant.
p. Trial Counsel failed "to highlight to the jury that no investigation was actually done before obtaining a warrant for the applicant's arrest."
q. Trial Counsel failed "to object to the multiple times the prior conviction was brought out in trial."
r. Trial Counsel failed "to object to statements made by Solicitor in closing arguments."
s. Trial Counsel failed "to object to forensic interview based upon inability to separate incidents alleged to have happened in two different jurisdictions."
t. Trial Counsel "elicited testimony from Rebecca Ann about whether or not she believed that this happened."
u. Trial Counsel failed "to bring up the fact of Rebecca Ann's ex husband being in prison in Tennessee for statutory rape" for the purpose of showing an alternative possible source for Victim's sexual knowledge.

2. Ineffective assistance of appellate counsel, in that:
    a. Appellate Counsel failed "to bring up to the appeals court the issue of procedure in the forensic interview coming out at trial even though trial counsel objected to it."
        i. Raised twice in 10.n and 10.ff
    b. Appellate Counsel failed to raise the admissibility of forensic interview as untrustworthy, prejudicial, and bolstering.
    c. Appellate Counsel failed "to be familiar with the facts of the case and thus submitting information on the appeal process under 'facts of the case.'"
    d. Appellate Counsel failed to raise issue of "missing evidence in discovery."
3. Violation of Applicant's right to due process:
    a. "[D]ue to the admission of the forensic interviewer/medical examiner as an expert witness."

b. "[W]hen Judge admitted forensic interview into evidence and allowed it to be played before the jury, the forensic interview was redacted and the judge further violated applicant's right to due process by allowing a redacted transcript of the forensic interview to be given to the jury."
c. "[W]hen on the stand, Detective Large identified the applicant as the defendant."
d. "I was deprived of my due process and my presumption of innocence by the way the prior remote conviction was handled in court."
e. "[B]y the judge participating in the trial."
f. "Applicant was denied due process as a result of Solicitor's closing comments."
g. "[W]hen the solicitor was allowed to waive the right to go first in closing arguments."
h. "[B]y not getting all pertinent items in discovery."

By and through PCR counsel Falk, Applicant filed an amendment to his application on February 15, 2018, to raise the following additional allegations (excerpts verbatim):

1. Ineffective assistance of trial counsel, in that:
    a. Trial Counsel failed to object "to the introduction of the redacted 1997 conviction for Lewd Acts on a Minor on the grounds that at the time of Applicant's trial the crime of Lewd Acts on a Minor was not listed in SC Code Ann § 23-3-430(C), therefore the introduction of Applicant's prior offense was not probative of an element of the offense charged in Applicant's indictment (SC Code Ann §16-3-655(A)(2)) and its introduction was highly prejudicial.
    b. "Since Lewd Acts on a Minor was not listed under SC Code 23-3-430(C), and an element of the Applicant's indicted offense is proof of a prior conviction listed in SC Code 23-3-430(C), trial counsel provided ineffective assistance of counsel by not arguing in his motion for directed verdict that the State failed to provide any evidence on this element of the offense."

By and through PCR counsel Falk, Applicant filed a second amendment to his application on April 30, 2018, which withdrew the first amendment and raised the following additional allegations (excerpts verbatim):

1. Ineffective assistance of trial counsel, in that:
    a. "Trial counsel failed to object during the direct examination of Rebecca Ann Jarrard to introduction of State's exhibits 1, 2 & 4. Exhibits 1 & 2 were affidavits made by Rebecca Ann Jarrard who is the mother of the child/accuser. In the affidavits Rebeca Ann Jarrard stated that her daughter told her that nothing happened and that she (the daughter) was sorry for what she had done. The content of the affidavits were published

to the jury at Page 11 lines 3-6 and 113 lines 1-4."
"Exhibit 4 was a DVD in which the child/accuser stated essentially the same testimony as was referred to in Exhibits 1 & 2, namely that she lied and that the Defendant never touched her. Exhibit 4 was published to the jury Page 123 lines 20-23."
"The contents of both the affidavits and the video amount to the child's out-of-court statements. These out-of-court statements would not fit under the definition of non hearsay found at Rule 801(d) (A); Rule 801(d) (B); and or, Rule 801(d) (D) SCRE. Moreover the statements could not be admitted under Rule 613 SCRE because they were not offered as prior inconsistent statements in order to impeach either Rebecca Ann Jarrard's or the child's in-court testimony."

b. "Trial counsel failed to object to Pam Gause's hearsay statements uttered by her daughter at Page 82 line 13; or the hearsay statements uttered by the child/accuser at Page 83 lines 10-16. Specifically with respect to the child's hearsay statements found on Page 83, this testimony would not fit under the description of non hearsay found at Rule 801(d) (D) SCRE because the statements go beyond the limitation of statements as to the time and place of the incident."
c. "Trial counsel failed to apprise Defendant that if he were to testify at trial he would lose the right for his counsel to have the last word in his closing argument."
d. "Trial counsel failed to seek redaction of a portion of the forensic interview found at Page 245 line 11. The entire forensic interview was published to the jury at Page 238 ll. 3, through 258 ll. 4. The forensic interviewer was inquiring about incidents alleged to have occurred in both Kershaw County and Horry County. The Defendant resided in Kershaw County and the child and her mother Rebecca Ann resided in Horry County. On page 245 line 11 the child states that her grandfather touched her 'either ten or twenty times.' However in response to the specific question of how many times it happened at her house she stated 'five.' (Page 249 l. 22-24). Counsel is informed and believes that the differences in the child's two responses is the result of allegations occurring in both counties. Since the trial was limited to those incidents alleged to have occurred in Horry County, the admission of testimony regarding the additional incidents was prejudicial and inadmissible 'bad acts' evidence under Rule 404B SCRE."
e. "Trial counsel was ineffective for failing to object to Dr. Rahter:"
    i. "Testifying as an expert regarding the results of the forensic medical exam as well as introducing the tape of the forensic interview."
    ii. "Speculative testimony on Page 213 lines 15 through 19."
    iii. "Testifying Regarding the procedure used to insure reliability of the forensic interview which is found at Page 222 l. 15 through 223 l. 12."

iv. "Testifying to hearsay statements outside the limitations found at Rule 801(d) (D). (page 225 line 9-10)."
v. "Providing bolstering testimony as to assurances that forensic interviewees are telling the truth. (page 270 l. 8-24)."

f. "Trial counsel was ineffective for not objecting to that portion of the Jury Charge that: *For prosecutions under this charge the testimony of the victim need not be corroborated.* Page 343 lines 8-9. Additionally Trial Counsel was ineffective for not objecting to the Solicitor's reference to in her closing argument that the State does not have to corroborate the testimony of the child. Page 319 line 7- through 320 line 6."
g. "An element of the offense under former SC Code § 16-15-140 was proof that defendant committed the acts with the *intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child.* The State offered no direct proof as to this element of the offense and trial counsel was ineffective for failing to raise that ground in support of his motion for directed verdict."

2. Ineffective assistance of appellate counsel, in that:
   a. "Appellate counsel was ineffective for not raising for appellate review the propriety of Dr. Rahter's testimony at Page 222, line 15 through 223 line 12. (Note: the record is not clear whether trial counsel's objection on page 221 line 11 would have been sufficient to preserve the issue for appellate review)."

Applicant requests relief as follows:

- "Applicant seeks relief from his convictions and sentences."

During his testimony at the evidentiary hearing, Applicant additionally contended the prosecution elicited impermissible bolstering testimony on seventeen different discrete instances, and through every referral to the "truth room" and every reference to the minor victim as "victim."

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

As an organizational matter, the subsections below address first those allegations raised in the April 30, 2018, amendment, followed thereafter by those allegations raised in the original application, followed by those complaints raised by Applicant during his testimony. Where Applicant's original allegations can be addressed together with those raised in subsequent amendment (e.g. allegations regarding alleged hearsay testimony of Pamela Gause), or where allegations may be resolved together on a common basis (e.g. failure to call witnesses), they are addressed together.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 687; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence

required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Failure to Object to State's Exhibits 1, 2, and 3: Victim's Denials

Applicant alleges Trial Counsel was ineffective in failing to object to the admission of State's Exhibits 1, 2, and 3[2] at trial as inadmissible hearsay prohibited by Crawford v. Washington, 541 U.S. 36 (2004). "'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." Rule 801(c), SCRE. However, a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony[.]" Rule 801(d)(1), SCRE.

Irrespective of the parameters of the South Carolina Rules of Evidence, "[t]he Sixth Amendment's Confrontation Clause provides that, 'in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Crawford, 541 U.S. at 42; cf. State v. Campbell, 30 S.C.L. (1 Rich.) 124 (1844) (finding under the common law that defendants similarly were entitled to the right of cross-examination, such that the depositions of even dead witnesses were to be excluded where no prior opportunity for cross-examination was presented). The Confrontation Clause applies to both federal and state prosecutions. Crawford,

[2] Applicant makes reference to State's Exhibit #4, but refers to the DVD containing the video recording of Victim's recantation. The DVD was introduced as State's Exhibit #3, and State's Exhibit #4 was a safety plan prepared in cooperation with the Solicitor's Office and the Department of Social Services. This Court concludes the reference to State's Exhibit #4 is a scrivener's error, and instead considers Counsel's treatment of State's Exhibit #3.

541 U.S. at 42 (citing Pointer v. Texas, 380 U.S. 400, 406 (1965)). The Confrontation Clause applies to "'witnesses' against the accused—in other words, those who 'bear testimony.'" Id. at 51. Thus, under Crawford, "the admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant." State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) (citing Crawford, 541 U.S. at 54).

As is the case in any analysis of an allegation of ineffective assistance of counsel, "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Trial

Rebecca Ann Jarrard ("Rebecca Ann"), mother to Victim and Minor and daughter of Applicant, testified at trial as a witness for the State. (Tr. 96-146). After Victim's disclosure and her forensic interview, Rebecca Ann testified that she, at the behest of her mother and Applicant's wife Rebecca Jarrard ("Nana"), brought to the Solicitor's Office a video recording in which Victim recanted her accusations against Applicant. (Tr. 107-09). Rebecca Ann additionally provided the Solicitor two affidavits. (Tr. 109-13). In an affidavit prepared by Nana, Rebecca Ann swore:

> "After talking with my daughter further I believe that nothing happened, her story has changed. She is sorry for what she has done. I hope this video resolves everything."

(Tr. 111-13, quotation at Tr. 113, ll. 1-4; State's Trial Exhibit #2). While at the Solicitor's Office, Rebecca Ann additionally filled out a second statement, in which she swore:

> "My daughter [Victim] states that what she had originally told investigators and police is false. She feels much remorse and wishes the charges to be dropped."

(Tr. 109-11, quotation at Tr. 111, ll. 3-6; State's Trial Exhibit #1). Confronted by the Solicitor, Rebecca Ann denied any real recantation ever occurred, and that she only produced the affidavits because the allegations were ripping her family apart, and because Nana asked her to do so. (Tr. 111, ll. 7-17). The video recorded recantation was published to the jury and recorded in the trial transcript:

> "I'm sorry I lied to everyone because a bunch of us were talking at school and I thought it would be cool and when I told you Papa touched me there when he really didn't."

(Tr. 123, ll. 18-23; State's Trial Exhibit #3). Rebecca Ann admitted she lied about Victim's recantation, that Victim had never point blank recanted to her, and that she had been financially supported by Nana in the past. (Tr. 120-21). Trial Counsel did not object to the introduction of the affidavits or video.

On cross-examination, Rebecca Ann admitted that she was afraid she would be arrested when she took the affidavits and video to the Solicitor's Office. (Tr. 125-26). Rebecca Ann agreed with Trial Counsel that she was "put in the position then to choose [her] parents or [her] child," and that she chose her child. (Tr. 126, ll. 6-15). Rebecca Ann acknowledged seeing the video when it was published in court, and that Victim recanted in the video recording. (Tr. 126-27). Rebecca Ann further acknowledged that she was present at the time of the recording and witnessed her daughter recant the testimony, but asserted Victim "was told what to say." (Tr. 127, ll. 5-23).

Victim was qualified *in camera* and testified after Rebecca Ann. (Tr. 146-94). After testifying to Applicant's abuse, the State asked Victim about the video recording:

> "Q. And, [Victim] we saw yesterday a video where you were sitting on a bed and you were talking about maybe that you had made these things up; can you explain that to the jury?
>
> A. My grandmother made me say what I said.

Q. How did you feel about having to do that?

A. I didn't feel right."

(Tr. 170-71). On cross-examination, Trial Counsel elicited from Victim affirmations that she was present in the courtroom when State's Exhibit #3 was published, and that her mother and uncle were both present at the time of the recording. (Tr. 185, ll. 15-22). Victim affirmed prior conversations with Rebecca Ann about the potential that Victim could be separated from her mother, but she could not remember any further details. (Tr. 186, ll. 4-18).

PCR Evidentiary Hearing

At the evidentiary hearing, Applicant testified he directed his wife, Nana, and his son to produce the tape of Victim recanting—Nana did so. The video was then taken to the prosecutor's office and turned over. Applicant opined that the introduction of the video at trial amounted to a violation of his rights under Crawford.

Trial Counsel testified on cross-examination that his overarching strategy was to attack the credibility of the witnesses with their differing stories and motivations to lie (for example, Rebecca Ann's fear that DSS would take custody of her children), and argue that Victim adopted the allegation from Minor and was coached. Trial Counsel testified that he wanted the prior denials of abuse included in evidence in order to cast doubt on the allegations.

Findings

The Court finds no ineffectiveness on the part of Trial Counsel. First, the Court finds that the introduction of Rebecca Ann's written statements (State's Exhibits #1 & #2) and the video recording of Victim's recantation (State's Exhibit #3) did not run afoul of Applicant's rights under the Confrontation Clause. Both Rebecca Ann and Victim testified at trial and were cross-examined regarding the prior recantation statements, as well as the circumstances surrounding the recantations. Therefore, there was no basis for Trial Counsel to object on Crawford grounds.

Second, the Court finds that the introduction of State's Exhibits #1, #2, and #3, did not run afoul of the prohibition against hearsay set forth in the South Carolina Rules of Evidence. All three exhibits constituted prior statements inconsistent with the trial testimony of Rebecca Ann and Victim, such that they were not hearsay. Therefore, there was no basis for Trial Counsel to object on hearsay grounds. Third, the Court finds Trial Counsel articulated a valid strategic reason to permit the introduction of the recantations: to cast doubt on the allegations of abuse. Trial Counsel, in a trial for criminal sexual conduct with a minor, cannot be held ineffective for making the conscious decision to permit admission of prior denials of the abuse at issue. Fourth, Applicant's argument in the original application for relief—that Trial Counsel should have objected because the recantation video and affidavits were going to be part of the defense case—is wholly without merit and only goes to show that Applicant and Trial Counsel intended for that evidence to be introduced anyway. For all of these reasons, the Court finds no ineffectiveness on the part of Trial Counsel, and Applicant's request for relief by way of this allegation is **DENIED.**

2. Failure to Object to, Eliciting Hearsay Testimony of Pamela Gause

Applicant alleges Trial Counsel was ineffective by failing to object to alleged hearsay testimony by witness Pamela Gause; in particular, portions of Gause's testimony as provided in pages 82-83 of the trial transcript. The general definition of hearsay was reviewed in the previous section, along with the definitional exclusion of prior inconsistent statements. Additionally, a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place

of the incident[.]" Rule 801(d)(1)(D), SCRE. Under the rule, "corroborative testimony cannot include 'details or particulars' regarding the assault." Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010); see also, e.g. State v. Simmons, 423 S.C. 552, 816 S.E.2d 566 (2018) (holding a pediatrician's testimony of a minor victim's disclosure that his father watched pornography with them and made the victims fellate him was impermissible hearsay which did not fall under the medical diagnosis exception); Huggler v. State, 360 S.C. 627, 602 S.E.2d 753 (2004) (holding written statements provided by children victims to police which detailed sexual acts that they engaged in with the defendant constituted impermissible hearsay, and that trial counsel's failure to object constituted deficient performance, but that the defendant was not prejudiced because the evidence was overwhelming); Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001) (holding testimony by four witnesses recounting a minor victim's disclosure of the identity of her abuser constituted impermissible hearsay, and that trial counsel's failure to object constituted ineffective assistance); State v. Whisonant, 335 S.C. 148, 154-55, 515 S.E.2d 768, 771 (Ct. App. 1999) (holding stepmother's testimony to be hearsay where she recounted in graphic detail the nature of the abuse disclosed to her by the victim).

"Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless." State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93-94 (2011) (citing State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978)); see also Thompson v. State, 423 S.C. 235, 246, 814 S.E.2d 487, 492 (2018) (recognizing the concurrence and dissent in Jennings collectively overruled Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994) "and its progeny to the extent those cases impose a categorical or per se rule precluding a finding of harmless error"). In considering whether improperly admitted testimony was harmless and whether an Applicant was prejudiced under Strickland, the Court must "consider the strength of

the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object." Thompson, 423 S.C. at 246, 814 S.E.2d at 492-93.

As noted in the previous section, "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith, 386 S.C. at 567, 689 S.E.2d at 632 (citing Caprood, 338 S.C. at 110, 525 S.E.2d at 517).

Trial

Trial Counsel set forth his theory of the case very plainly during his opening statements, arguing that Victim fabricated the allegations against Applicant after her babysitter caught her engaged in inappropriate "shenanigans without clothes" with the babysitter's daughter. (Tr. 70-72). Trial Counsel informed the jury that he would point out to them "at a minimum of three lies that were told that we know were untruths[,]" and that the jury would be unable to convict Applicant once they knew Victim had already lied. (Tr. 75, ll. 6-12).

Pamela Gause, Victim's babysitter, then testified as the State's first witness. (Tr. 76-96). Gause claimed she babysat Victim on roughly 150 occasions. (Tr. 80, ll. 7-15). Gause recalled that during the week of May 17, 2010, Victim and one of Gause's daughters "were discovered in my daughter's bedroom with their pants down touching each other." (Tr. 80-81). Prodded to be more specific, Gause explained the children "had their pants down in my daughter's bed under the covers and when the covers were pulled back they were touching each other's vagina." (Tr. 81, ll. 2-8). Gause testified that when the children were discovered, she "took both of them out onto the front porch away from the other children and we talked about it." (Tr. 81, ll. 9-12). After denying the children were in trouble or put in time out, Gause recounted the conversation she had with both children:

> "A. I discussed with them about how their bodies were meant for their husband some day and asked them individually how it felt to touch someone that way and

how it felt to be touched that way and my daughter said it felt nasty, [Victim] in turn said it felt gross. *I asked my daughter how, if she had ever been touched that way or touched anyone else that way and she said, no. I then asked [Victim] had she ever touched anyone else that way and said, no,* and I asked her had that ever happened to her before, had anyone else ever touched her that way. She didn't answer me right away."

(Tr. 81-82, quoted portion at Tr. 82, ll. 7-17) (emphasis added). Gause stopped questioning upon Victim's refusal to answer a second time. (Tr. 82, ll. 23-25). Subsequently, Gause and Victim resumed conversation on the subject:

"Q. Okay, and in the information that she gave you was she able to tell you something had happened to her?

A. She did.

Q. Okay, and what type of thing had happened to her?

A. *She indicated oral sex, digital penetration, and penile penetration.*"

(Tr. 83, ll. 1-16, quoted portion at Tr. 83, ll. 10-16) (emphasis added). Gause indicated that Victim provided a name, but Gause did not testify as to what name was provided. (Tr. 83, ll. 17-24). Gause denied listing names of potential perpetrators to Victim. (Tr. 83-84).

In closing arguments, Trial Counsel argued that Gause was the instigator of the allegations against Applicant through her persistent badgering of Victim. (Tr. 302-03). Trial Counsel also emphasized the changes in Victim's story and the nature of the abuse she reported over time, starting with what she told Gause, later comparing that to Victim's denial on the witness stand that she ever suffered digital or penile penetration. (Tr. 303, ll. 5-23; Tr. 306-07). Trial Counsel offered that Victim was caught in a compromising situation, made up the allegations on the spot to get out of trouble, and that the truth of the matter was accurately reflected in Victim's initial denial, Rebecca Ann's letter reporting her recantation, and Victim's letter to Applicant apologizing for lying. (Tr. 303-04). Trial Counsel pointed out Victim's trial assertion that Gause was lying, argued one of the two must be lying, and opined that Gause was

truthful and Victim was not being honest. (Tr. 303, ll. 12-17; Tr. 306-07). Trial Counsel also insisted upon differences in details provided by Victim to other witnesses, such as how Victim testified that her panties would be on the bed, but that she told Rebecca Ann that her panties would be down around the ankles; Trial Counsel argued that "it's the little things you've got to look at, cause when that kind of thing happens to you you don't, you don't forget that much about it." (Tr. 307-08). Trial Counsel asserted "when you put all this stuff together you've got reasonable doubt at least." (Tr. 308, ll. 5-6).

The prosecution only fleetingly made reference to Gause in laying out the timeline of when the abuse was suspected to have occurred and when Victim disclosed to Gause. (Tr. 324, ll. 12-15).

PCR Evidentiary Hearing

At the evidentiary hearing, Applicant claimed that Gause possessed no first-hand knowledge, and described his trial as plagued by "more bolstering than you can shake a stick at." Applicant asserted Trial Counsel thus failed to object to hearsay in Gause's testimony because all of Gause's testimony was hearsay.

Trial Counsel testified that he was retained a year prior to trial to represent Applicant on his Horry County charges. Trial Counsel interviewed the witnesses and reviewed the materials produced as a result of the forensic interview. Trial Counsel testified that he had not previously been aware of Applicant's claim that all of Gause's testimony was hearsay, but Trial Counsel acknowledged Victim's testimony subsequent to Gause which indicated that Gause was not the person who caught Victim engaged in improprieties with Minor 2, and that he had previously argued Gause was engaged in hearsay. (See Tr. 161-62). Trial Counsel initially asserted his theory of the case was that "nothing happened" and that he wanted to bring in all of Victim's

different stories and statements in order to show their inconsistencies. As noted in the prior section, Trial Counsel testified that his overarching strategy was to attack the credibility of the witnesses with their differing stories and motivations to lie, and argue that Victim adopted the allegation from Minor and was coached. Trial Counsel testified that he wanted the prior denials of abuse included in evidence in order to cast doubt on the allegations.

Findings

The Court finds no ineffectiveness on the part of Trial Counsel. Gause's testimony, which offers nothing in the form of time or place of the abuse, but instead offers a restrained, clinical description of the abuse reported, does not fall within the parameters of Rule 801(d)(1)(D), SCRE. However, the Court finds Trial Counsel articulated a valid strategic basis for not objecting in that Trial Counsel wished to permit the introduction of Victim's denials and inconsistent allegations. That Trial Counsel floated other arguments to diminish Gause's testimony in motions or hearings outside the presence of the jury did not foreclose him from making the ultimate tactical choice to let Gause's testimony in. The Court finds Trial counsel made his strategic determinations based upon a thorough and adequate investigation. The Court notes Trial Counsel's initial testimony at the evidentiary hearing that he was unware Gause had not personally witnessed the children inappropriately touching one another. From the passage of time between the trial and the evidentiary hearing, it appears Trial Counsel forgot his prior awareness of Gause's questionable presence, knowledge of which he demonstrated in passing during pre-trial motions. (Tr. 43-44).

Even if this Court did not find Trial Counsel's strategic reasoning valid, such that his failure to object could be deficient, this Court finds that the inclusion of Gause's hearsay testimony of Victim's disclosure could not have prejudiced Applicant. First, Gause's testimony

provided substance both beneficial to Applicant (Victim's initial denials) and harmful to Applicant (Victim's disclosure of various forms of sexual abuse). This Court declines to find that the outcome of trial would have been different but for the inclusion of ambiguously helpful and harmful testimony. Second, the harmful portion of Gause's testimony, while it provided inadmissible details, did so sparingly and technically—a far cry from the various emotional, egregious examples cited above which required reversal in their respective cases. Third, Gause's ability to testify to Applicant's disclosures—including their details—was inevitable as they were inconsistent with Victim's trial testimony, such that merely calling Gause again at a later point in the trial would have rendered the testimony question not hearsay under Rule 801(d)(1)(A), SCRE. Fourth, to the extent that it was not inconsistent, Gause's testimony was merely cumulative to Victim's other disclosures.

For all of these reasons, the Court finds Applicant cannot meet his burden as to either prong of Strickland by way of this allegation, and his request for relief is **DENIED.**

3. Failure to Advise Regarding Final Closing Argument

Applicant alleges Trial Counsel was ineffective by failing to advise him that if he testified, he would lose his right to "last word" in closing arguments. The order and content of closing arguments are determined by a patchwork of cases and common law which provide that "in cases in which no defendant introduces evidence, the defendant(s) have the right to open and close, but may waive the right to both or may waive opening and present full argument after the State's closing argument". State v. Beaty, 423 S.C. 26, 42, 813 S.E.2d 502, 510 (2018). "[I]n cases in which a defendant introduces evidence of any kind, even through a prosecution witness, the State has the final closing argument." Id., 423 S.C. at 42, 813 S.E.2d at 510-11.

During the trial court's opening remarks to the jury, the judge explained that after the presentation of witnesses and evidence, "there will be closing remarks by the State, closing remarks by the defense, and I will then charge you on the law and give you the case. That's how we will proceed." (Tr. 61, ll. 1-4).

After denying the motions for a directed verdict, the trial court asked Trial Counsel if he had discussed with Applicant "the issue of testifying" to which Trial Counsel replied that Applicant was going to testify. (Tr. 286, ll. 1-3). The trial court explained to Applicant his right to testify or not testify, that he could be impeached with certain prior convictions if he did testify, and that if Applicant did not testify the trial court would instruct the jury to infer nothing from the decision; Applicant repeatedly affirmed he understood. (Tr. 286-87). Applicant answered the trial court that he did not have any questions, had discussed the question of whether to testify with Trial Counsel, that he did not desire to speak further with Trial Counsel, and that he wished to testify. (Tr. 288, ll. 1-12).

Shortly into Trial Counsel's closing argument, he noted that "the way things go I have to go first" and that the solicitor would address the jury last, such that it was important for the jury pay very close attention. (Tr. 299, ll. 19-25). The solicitor opened the final closing argument by acknowledging "you could say there is some benefit in getting to go last because I will be the last word you get to hear," but thereafter downplayed the value of the opportunity in favor of empowering the jury. (Tr. 313-14).

At the evidentiary hearing, Applicant testified he and Trial Counsel never discussed how the court determined "last word" and opined that there was some advantage in the matter. Applicant was not more specific. Trial Counsel testified he could not recall discussing the issue of "last word," but that he did advise Applicant to testify since his prior conviction had already

been introduced and could not be excluded at the time. On cross-examination, Trial Counsel indicated that Applicant affirmatively wanted to testify at trial.

The Court finds Applicant has failed to meet his burden under either prong of Strickland. Applicant cites to no authority or precedent to establish that Trial Counsel was obliged under the prevailing norms of professional conduct to advise him of how "last argument" would be determined. Applicant cites to no authority or precedent to show that such knowledge would be necessary to make a knowing and voluntary decision on whether to testify. Furthermore, Applicant does not indicate with any specificity what, if anything, could have been done differently by Trial Counsel in closing arguments had Trial Counsel enjoyed the right to final argument. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

4. Failure to Move to Redact Kershaw Allegations from Forensic Interview

Applicant alleges Trial Counsel was ineffective in failing to move to redact the portion of the forensic interview as reflected at page 245, lines 9-12 of the trial transcript, which Applicant contends is inclusive of allegations occurring in Kershaw County, rather than Horry County, such that the question and answer constitutes impermissible evidence of other bad acts.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE; see also State v. Weaverling, 337 S.C. 460, 467, 523 S.E.2d 787, 791 (Ct. App. 1999) (citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)) ("Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged.") "Courts must weigh the probative value of prior bad acts against its prejudicial effect." State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774

(1984). "Such evidence is inadmissible 'unless the close similarity of the charged offense and the previous act[s] enhances the probative value of the evidence so as to overrule the prejudicial effect.'" Id. (quoting State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979)). In considering whether there is a close degree of similarity between the bad act and the crime charged, trial courts should consider "(1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery[,]" as well as any other factors deemed appropriate in the trial court's discretion. State v. Wallace, 384 S.C. 428, 433-34, 683 S.E.2d 275, 278 (2009) (citing State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984)).

Additionally, "[u]nder the *res gestae* theory, 'evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred.'" State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (Ct. App. 2013) (quoting State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) (italics added), overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005). As reasoned by the appellate courts:

> "One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context . . . . And where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*."

Id., 402 S.C. at 635-36, 742 S.E.2d at 26. (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)). Evidence considered for admission as part of the *res gestae* must be weighed under Rule 403, SCRE. Id., 402 S.C. at 636, 742 S.E.2d at 26.

Even if the admission of evidence was improper, such error is harmless where the evidence is merely cumulative to other evidence entered without objection. State v. Baccus, 367 S.C. 41, 55-56, 625 S.E.2d 216, 224 (2006) (citing State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)).

Trial

During Rebecca Ann's testimony, Solicitor inquired as to where Applicant and Nana lived, to which Rebecca Ann answered that they lived in Kershaw County. (Tr. 101, ll. 17-18). Whenever Applicant and Nana came to visit, they would stay at Rebecca Ann and Vicitm's home. (Tr. 101-02).

Pam Gause later testified her understanding was that Applicant lived in Columbia, South Carolina. (Tr. 84, ll. 20-24).

Victim testified Applicant lived in Lugoff, South Carolina. (Tr. 159, ll. 5-13). Victim located the abuse in her own bedroom. (Tr. 167, ll. 18-25). When asked how many times "it happened[,]" Victim answered that Applicant abused her ten times, and that he always did the same thing. (Tr. 176, ll. 1-15).

During the testimony of Dr. Carol Ann Rahter, the parties approached the bench and, after a brief bench conference, excused the jury. (Tr. 225, ll. 12-20). Solicitor informed the trial court that she needed to redact a reference in the forensic interview to a polygraph test. (Tr. 225-26). Solicitor additionally explained to the trial court:

> "[Ms. Lively:] . . . Your Honor, I did not have the opportunity, and this was my fault, to advise Dr. Rahter that we are not discussing through testimony that the events occurred anywhere other than the jurisdiction of Horry County even though ---
>
> The Court: That's correct.
>
> Ms. Lively: Yeah, even though the child mentions in the forensic interview we're not taking out of the forensic interview but in regards to your testimony as soon as

I was asking you about time and place I realized that's where you were getting ready to go and that's my fault. I should have told you we already discussed yesterday.

The Court: Is that in the forensic interview?

Ms. Lively: Well she talks about on Acoon's Road. Remember we talked about - -

The Court: I thought she was just saying where he lived.

Ms. Lively: Where he lived and that might be the case but I thought she had talked about that it occurred in two places."

(Tr. 226-27). After the trial court reviewed the portion of the transcript of the forensic interview which discussed abuse occurring at "Acoon Road" in Columbia, South Carolina, and sought input from Trial Counsel, Trial Counsel replied "[i]t's up to you if you want to leave it out there. If you want to clean it up or it doesn't matter to me." (Tr. 227-28). Trial Counsel inquired as to the simplest solution, to which Solicitor replied she would attempt to simply mute the video during the portion of the forensic interview in question. (Tr. 228, ll.7-22). Trial Counsel and Solicitor then went through the transcript of the forensic interview and redacted portions referencing events occurring at Applicant's house. (Tr. 228-30). After a short break, Solicitor informed the trial court and Trial Counsel that she would just "turn it off when I gets to the parts that I'm redacting and I've shown Mr. Truslow." (Tr. 231-32, quoted portion at Tr. 232, ll. 2-4). The jury returned to the courtroom and examination of Dr. Rahter resumed. (Tr. 232, ll. 7-11).

After some additional testimony from Dr. Rahter, Solicitor moved to introduce the video of the forensic interview as State's Exhibit #5. (Tr. 236, ll. 13-14). Trial Counsel objected to the video as hearsay, and cited to Crawford v. Washington, 541 U.S. 36 (2004) and Davis v. Washington, 547 U.S. 813 (2006). (Tr. 236, ll. 15-16). The trial court overruled the objection and the video was introduced into evidence and published to the jury. (Tr. 236-58). The trial court informed the jury that two portions of the tape would be muted as irrelevant at the trial

court's direction. (Tr. 236-37). The transcript was not placed into evidence, but also published to the jury through copies provided to assist during the playback of the video. (Tr. 237, ll. 4-12).

During the forensic interview as published to the jury, Dr. Rahter and Victim had the following exchange:

> "[Dr. Rahter:] So, remembering that this is the truth room. Tell me if anybody has touched your boo, titties, your hoo-ha, or your tushie?
>
> [Victim:] My grandfather.
>
> Dr. Rahter: Okay. Do you know when that happened?
>
> [Victim:] About when I was seven.
>
> Dr. Rahter: Do you know how many times that happened?
>
> [Victim:] Ten or either twenty."

(Tr. 245, ll. 2-11). After discussing the details of Applicant's first abuse of Victim, Dr. Rahter narrowed the scope of her prior question:

> "Dr. Rahter: Do you know how many times it happened at your house?
>
> [Victim:] Five."

(Tr. 249, ll. 22-24). No specific reference was ever made in the redacted forensic interview to Kershaw County, Applicant's home, or that abuse occurred anywhere other than in Victim's home in Horry County.

PCR Evidentiary Hearing

At the evidentiary hearing, Applicant simply noted the portions of the forensic interview discussed above: Victim reported she was abused ten or twenty times, then indicated only five instances of abuse at her home.

Trial Counsel testified that he could not recall any specific reference to the number of instances of abuse in particular counties. Throughout his examination, Trial Counsel testified that he did not wish to object too frequently but instead reserve objection for more important

concerns. On cross-examination, Trial Counsel testified he could not recall any discussion of Kershaw County abuse during the trial.

Findings

The Court finds no ineffectiveness on the part of Trial Counsel. The Court finds the evidence complained of does not constitute inadmissible evidence of other bad acts. "It has been said that it is neither charity, nor common sense, nor law, to infer the worst intent which the facts will admit of; the reverse being true rule both of justice and of law." United States v. Williams, 479 F.2d 1138, 1141 n.3 (4th Cir. 1973) (quoting State v. Hill, 107 S.E. 140, 141 (N.C. 1921)). The different enumerations of instances of abuse do not inexorably lead to the inference that Applicant must have committed other bad acts, from which a jury could then derive a belief in Applicant's propensity to commit the crime charged. Though multiple witnesses testified that Applicant and Nana resided in the Columbia metropolitan area, no witness testified before the jury in any fashion as to indicate that abuse occurred there, or for that matter anywhere other than at Victim's home. All references to abuse at Applicant's residence in Kershaw County were redacted from the version of the forensic interview published to the jury. This Court can find no other evidence in the record which, if taken together with the different enumerations of abuse, could provide the jury a clear inference that additional abuse occurred in other jurisdictions. Consequently, the jury could have inferred other conclusions with equal confidence; for example, that the different numbers reflected uncertainty or inconsistency in Victim's recollection, especially as she was a minor child. Where multiple equally valid inferences from evidence exist, this Court cannot, upon collateral review, conclude the evidence in question was of an improper form and purpose; thus, this Court cannot conclude Trial Counsel had a basis for

objection or to seek redaction; thus, this Court cannot conclude Trial Counsel's failure to object or seek a redaction constituted deficient performance under Strickland.

The Court also finds Trial Counsel lacked a basis for objection because the evidence, to the extent it could reflect upon the existence of other bad acts, formed a part of the *res gestae* of Applicant's serial abuse of Victim, and was admissible to show a common scheme or plan, identity, and the absence of mistake or accident. Assuming *ad arguendo* the enumeration refers to other bad acts, taken together with other evidence the enumeration refers to the same or similar acts, against the same victim, of the same age, of the same relation to the perpetrator, as part of an ongoing process of sexual abuse—the only difference being location. This Court finds the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. Indeed, the probative value of evidence of Applicant's continuing abuse of Victim at his own home in addition to Victim's home would be very strong to: (1) foreclose the possibility it was anybody else who was present or with access to only Victim's home; (2) refute any argument of accidental penetration, especially in light of Applicant's statement to Victim as reported by Victim in the forensic interview that he was simply trying to "feel how heavy" Victim was; and (3) establish the totality of the scheme of ongoing abuse for which Applicant was charged.

Additionally, the Court finds Applicant cannot show prejudice. First, the portion of the forensic interview complained of is merely cumulative to the trial testimony offered by Victim, for which Applicant raises no specified complaint. Second, for the reasons discussed above, the potential inference of other bad acts is so attenuated that there is no reasonable probability that, but for the introduction of the "ten or twenty times" portion of the forensic interview, the outcome at trial would have been different.

For all of these reasons, Applicant cannot meet his burden of proof as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

5. Failure to Object to Expert Qualification of Dr. Rahter

Applicant alleges Trial Counsel was ineffective in failing to object to the qualification of Dr. Carol Ann Rahter as an expert witness regarding the results of the forensic medical exam when she also conducted the forensic interview. Although the appellate courts have not recognized the narrow field of "forensic interviewing" as a basis for qualification as an expert witness, forensic interviewers may be qualified as experts in related areas such as "child abuse assessment." Briggs v. State, 421 S.C. 316, 331-33, 806 S.E.2d 713, 721-22 (2017); see also State v. Anderson, 413 S.C. 212, 218, 776 S.E.2d 76, 79 (2015) (noting that "child abuse assessment" is a well-recognized form of expertise). For the purposes of introducing testimony regarding the characteristics of child abuse—behavioral characteristics of victims, for example—the best and safest practice is to call an independent, "blind" expert who did not treat or meet with the child, so as to all but eliminate the risk of vouching. Anderson, 413 S.C. at 218-19, 776 S.E.2d at 79. However, "although the Anderson court offered cautionary advice, it did not prohibit outright the practice of qualifying the forensic interviewer who conducted the alleged victim's forensic interview as an expert in child abuse assessment." State v. Barrett, 416 S.C. 124, 130, 785 S.E.2d 387, 390 (Ct. App. 2016); see also State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018) (favorably citing Barrett in concluding that a forensic interviewer was properly qualified as an expert in the behavioral characteristics of sexually abused children); Briggs, 421 S.C. at 332-33, 806 S.E.2d at 722 (favorably citing Barrett in declining to conclude it was unreasonable for trial counsel to not object to the qualification of the forensic interviewer as an expert in child abuse assessment in a 2010 trial).

Trial

Dr. Carol Anne Rahter, an emergency room physician at Waccamaw Hospital and medical director of the Children's Recovery Center, testified for the State. (Tr. 207, ll. 14-19). Trial Counsel promptly stipulated to Dr. Rahter's qualification as an expert witness "in the area of child sexual assault examinations." (Tr. 207, ll. 20-23). Dr. Rahter was so qualified. (Tr. 207-08). Dr. Rahter explained her role at the Children's Recovery Center, and explained that the center conducts "forensic interviews and then forensic medical exams on children that have been abused in some way or allegedly abused in some way." (Tr. 208, ll. 8-14). Dr. Rahter informed the jury that she had examined over two thousand children and conducted over a thousand forensic interviews in the course of her seventeen year career. (Tr. 208, ll. 14-17). Dr. Rahter thereafter summarized the materials considered in conducting the medical examination, the equipment available in the Children's Recovery Center for conducting medical examinations, and the differences between adult and child sexual assault examinations. (Tr. 208-11). Dr. Rahter explained that data produced from her examinations was entered into "the National Children's Alliance Database" by one of her colleagues as a requirement of the center's accreditation. (Tr. 211-12).

Dr. Rahter thereafter discussed the concept of "delayed disclosure," and explained to the jury that because children frequently delay in disclosing sexual abuse, a "normal" result from a medical exam is "totally normal in children who have had penile penetration, . . . because you don't see them thirty minutes after it occurred and all that tissue down there heals very rapidly." (Tr. 212, ll. 11-25). Dr. Rahter continued by explaining how the mucosal tissue in the genital area was comparable to the inside of one's cheek, and could be fully healed within days, such that abnormal findings may only be discovered if the child is seen within an hour to twenty-four

hours of claimed abuse. (Tr. 212-13). Consequently, Dr. Rahter testified that only ten percent of medical examinations after disclosures of sexual abuse returned abnormal findings. (Tr. 213, ll. 10-22). Dr. Rahter asserted that the absence of scarring or damage to the hymen was to be expected, and cited to medical publications including journals from the North American Society for Pediatric and Adolescent Gynecology, and the American Academy of Pediatrics. (Tr. 213-17).

Solicitor then directed Dr. Rahter to questions regarding her factual involvement in the case. Dr. Rahter met with Victim in June 2010 to conduct a forensic interview and conduct the forensic medical exam, upon the referral of Detective Allen Large of the Horry County Police Department. (Tr. 217-19). At the time, Dr. Rahter conducted all of the forensic interviews at the center. (Tr. 218, ll. 11-18). The Children's Advocacy Center collected prior medical history and other information regarding Victim, and Dr. Rahter was aware that the report was "because of something that happened with another child." (Tr. 219-20).

Dr. Rahter testified that she was trained to conduct forensic interviews, but that she had been performing them since before any of the modern protocols had been developed and published. (Tr. 220-21). Before she could proceed any further, Trial Counsel objected:

> "Mr. Truslow: Your Honor, I'm going to object. I think we're getting beyond the level of her expertise into the interview process. I think that pretrial rulings were that she was going to be a custodian or the person to put the interview tape in through and that was it based on recent case law. She was an expert onto the medical findings only."

(Tr. 221, ll. 11-17). Solicitor replied that she was only asking Dr. Rahter to explain her procedure and was not qualifying her as an expert in forensic interviewing or "asking for her opinion regarding the type of questioning." (Tr. 221, ll. 20-25). Rather, Solicitor compared her questions regarding Dr. Rahter's procedure to those questions she had already asked of Detective

Large, the lead investigator. (Tr. 222, ll. 1-2). The trial court indicated it would permit Dr. Rahter to answer Solicitor's question, to which Trial Counsel replied:

> "Mr. Truslow: Judge, based on the case law we went through before she should simply say she interviewed the child and put the interview into evidence and let the jury decide for themselves, otherwise she is commenting on the truth or veracity of the interview."

(Tr. 222, ll. 3-8). The trial court indicated it would not permit Dr. Rahter to so comment and Solicitor indicated she had no intention of asking any such questions. (Tr. 222, ll. 9-12). Dr. Rahter then briefly explained her interview procedure: build rapport, talk about truth, ask open ended questions, and make sure the child feels safe. (Tr. 222-23). Dr. Rahter testified that Victim indicated no learning disabilities, but to the contrary demonstrated that she was "very bright[,]" was able to follow the procedure through the interview, and produced a full statement. (Tr. 223-24). Dr. Rahter did not permit any interruptions or outside contacts during the interview. (Tr. 224, ll. 10-24).

Dr. Rahter confirmed that Victim disclosed abuse. (Tr. 224-25). As to time and place, Dr. Rahter testified Vicitm "reported that it occurred ten or twenty times in one house." (Tr. 225, ll. 9-10). The jury was then excused for the bench conference discussed in the prior section. (Tr. 225-32). When the jury returned, Dr. Rahter again testified as to Victim's time/place disclosure, stating that Victim "told me it occurred when she was seven" and that the abuse occurred "at her house in her bed" in Horry County. (Tr. 232-33).

After the forensic interview, Dr. Rahter performed a medical examination, which was "without abnormalities which does not rule in or rule out sexual abuse." (Tr. 233-34). Solicitor attempted to also introduce the underlying learned treatises on which Dr. Rahter's opinions were based, but the trial court excluded them as exhibits upon Trial Counsel's objection. (Tr. 234-35). Solicitor then introduced the recording of the forensic interview as State's Exhibit #5, to which

Trial Counsel renewed his objection. (Tr. 235-36). The forensic interview was then published to the jury and recorded in the trial transcript. (Tr. 238-58). Solicitor asked no further questions of Dr. Rahter after the forensic interview was published.

On cross-examination, Dr. Rahter testified she worked two jobs for a total of two hundred twenty hours a month. (Tr. 258, ll. 20-24). Trial Counsel noted the Children's Advocacy Center's mission statement and inquired what Dr. Rahter understood "advocacy" to mean; she replied "Advocacy means that you do everything that you can to protect the child and to facilitate treatment of the child." (Tr. 259, ll. 4-15). Trial Counsel intoned that Dr. Rahter was not a neutral actor. (Tr. 259, ll. 16-18). Trial Counsel pressed Dr. Rahter on the results of the medical exam and questioned the idea that abuse by a grown man upon a seven-year-old girl would leave no signs of trauma. (Tr. 260-61). Once again, Trial Counsel suggested Dr. Rahter's bias in favor of Victim, asking if she was advocating for Victim, and Dr. Rahter answered "I'm always a child advocate." (Tr. 261-62). Trial Counsel returned to the results of the medical exam and elicited confirmation that an exam without abnormalities did not rule in or rule out sexual abuse. (Tr. 262, ll. 2-18)..

Moving on to the forensic interview, Trial Counsel asked if Dr. Rahter had noticed that she was "praising the child somewhat" after answers, "telling them that it's really good that they're telling the truth[;]" Dr. Rahter explained she thought "that's very important that children know that." (Tr. 262, ll. 19-25). Dr. Rahter expressed no concerns about Victim knowing the purpose of the interview prior to her appearance at the center. (Tr. 263, ll. 1-13).

Trial Counsel availed himself of Dr. Rahter's expert qualification and asked her about the expected behavior response of children who have suffered sexual abuse. Dr. Rahter explained that children's reactions vary: some do not act out, some act out a little, some act out a lot. (Tr.

263-64). Dr. Rahter confirmed that anxiety, depression, shame, fear, loneliness, self-blame, poor self esteem, anger, changes in school performance, and changes in hygiene habits were—to varying degrees of commonality—characteristics observed in children victimized by sexual abuse. (Tr. 264-65). Dr. Rahter also "absolutely" agreed that sometimes children make false allegations of sexual abuse. (Tr. 265, ll. 12-17). Trial Counsel and Dr. Rahter then discussed the merits of a single forensic interview versus multiple interviews at some length before concluding cross-examination. (Tr. 266-68).

On redirect examination, Dr. Rahter elaborated on the likelihood of deception by a child, and explained a child was more likely to lie in order to conceal or minimize abuse than to fabricate abuse which did not occur. (Tr. 269, ll. 9-23). Dr. Rahter, without specific reference to her forensic interview of Victim, confirmed that she asks certain questions during forensic interviews to elicit information and details that a victimized child could answer that an adult would not know to tell them. (Tr. 269-71). Dr. Rahter testified that recantation by children was common, as families often put pressure on victims, and openly wondered why "they don't all recant because of what occurs to them after they make a disclosure of sexual abuse. Their life is completely changed." (Tr. 271-72).

In closing arguments, Trial Counsel contended Victim was "wrapped up in this thing" when authorities conducted the forensic interview, and that she merely told the authoritative person in the interview what the interviewer wanted to hear in order to receive praise. (Tr. 308, ll. 12-22). Turning to the physical examination, Trial Counsel asserted that if Applicant penetrated Victim, common sense dictated there would be scarring, tearing, or some other abnormality of Victim's vagina. (Tr. 308-09). Trial Counsel opined that the report from the physical exam should have stopped upon its conclusion that it found no abnormalities, and noted

that it instead continued by emphasizing that it did not "rule in or rule out sexual abuse cause they're still not willing to give up on it." (Tr. 309, ll. 7-11). Trial Counsel argued Dr. Rahter was biased from her various roles at the hospital:

> "Now Dr. Rahter works two jobs. She's an E.R. doctor and she's also started this outfit for children. She's told you what she is, she's an advocate for children, so she did not meet with a neutral and independent person. She met with somebody who believes whatever child they bring in there from the get go and that's what she did, so what she's done now is taken a report that should help us gain some knowledge into this case and said well, guess what, you know things can heal and whatever, and that's what you call back-peddling cause you know what, this is one thing I have that they can't get away from. This is the one thing, an eight-year-old or at that time they said seven-year-old girl penetrated by having fingers jammed in her, or by being penetrated by a penis not having any symptoms whatsoever but having the most normal vagina that's ever been seen. They have to still say well she could have still been sexually abused. It could have healed itself up.
>
> I'm telling you where that's coming from, it's coming from the bias of Dr. Rahter. She is not going to testify a child was not sexually abused when that child tells her that she was sexually abused even when her own medical report say so. She cannot bring herself to do it, she cannot bring herself to do it. I told her, I said, well at least let me ask you this, this is also consistent with nothing happening and she said yes, because that's common sense, she has to admit that."

(Tr. 309-10). After touching on the absence of physical evidence, the burden of proof, and weighing the credibility of the witnesses (Tr. 310-12), Trial Counsel additionally noted that Dr. Rahter agreed with him that sexual abuse victims "go on to experience all kinds of other difficulties[.]" (Tr. 312, ll. 2-4). Trial Counsel then reviewed Victim's testimony for the absence of such difficulties: good grades, friendships, positive outlook, and good hygiene. (Tr. 312, ll. 4-8). Trial Counsel argued that not only was there no physical evidence, there was no evidence of mental anguish either. (Tr. 312, ll. 8-16).

Solicitor, roughly midway through closing arguments, emphasized the importance of the forensic interview as a "snapshot of the child at the time of the disclosure[,]" since the passage of time between disclosure and trial would likely result in memory lapses and outside influences. (Tr. 320-21). While reviewing the timeline of events, Solicitor reached the forensic interviewer

and again began to emphasize the value and importance of the process until Trial Counsel objected, prompting her to simply state "[s]o the forensic interview is done" and then move on. (Tr. 325, ll. 3-21). Solicitor again returned to the forensic interview, pointed out the details Victim was able to provide, and echoed Dr. Rahter's explanation that detailed questions are asked to ferret out genuine disclosures from false accusations. (Tr. 328-30). Solicitor affirmed the physical examination returned "normal," and recalled Dr. Rahter's explanation that 90% of such examinations returned "normal" because delays in disclosure would permit the victim's body time to heal. (Tr. 330, ll. 3-17).

PCR Evidentiary Hearing

At the evidentiary hearing, Applicant asserted Dr. Rahter's testimony constituted impermissible bolstering in numerous instances. When asked about the qualification of Dr. Rahter, Trial Counsel glibly opined "they've gotten away with that for a while."

Findings

The Court finds no ineffectiveness on the part of Counsel. Applicant's only contention on this ground is that Dr. Rahter's multiple roles *per se* foreclosed the propriety of qualifying her as an expert witness in child sexual assault examinations. But as observed in Barrett, Carwright, and Briggs, that a witness offered as an expert also acted as a forensic interviewer is not in and of itself a basis to disqualify the witness from testifying in a field in which he or she is otherwise qualified to give an opinion. The facts of this case demonstrate precisely why such a rule would be impractical and contrary to the interests of justice—Dr. Rahter conducted two separate investigatory actions for which only she could testify: the forensic interview and the medical exam. It appears from the record that only Dr. Rahter could competently appear as a witness to

lay the foundation for introduction of the forensic interview under the statute, and only Dr. Rahter could competently appear as a witness to provide the results of the medical examination.

Dr. Rahter, as explicitly acknowledged by Solicitor upon Trial Counsel's objection, was *not* qualified as an expert in the field of forensic interviewing; she was qualified as an expert in child sexual assault examinations. The field in which Dr. Rahter was qualified has been repeatedly recognized as a valid field of expertise, and Dr. Rahter's qualifications in the field—as provided in the record despite Trial Counsel's attempt to obviate the need for them by way of stipulation—are overwhelming. The Court is provided no reasonable basis on which Trial Counsel could have validly contested the qualification of Dr. Rahter as an expert, nor does this Court perceive any. Thus, Applicant cannot show deficiency on the part of Trial Counsel for failing to object to Dr. Rahter's qualification.

As to prejudice, this Court is not convinced that exclusion of Dr. Rahter as an expert would have inured to Applicant's benefit. The central element of Dr. Rahter's expert testimony was that the medical evaluation of Victim returned a "normal" result. This Court declines to find that the outcome of trial would have been different but for the inclusion of ambiguously helpful and harmful testimony.

Dr. Rahter's more academic explanation of delayed disclosures and the ability of mucosal tissue to heal was harmful to Applicant's argument that the "normal" result indicated the falsehood of the allegations against Applicant, but this Court is not convinced that excluding Dr. Rahter as an expert would have prevented such testimony from coming in; potentially through a "blind" expert as is now the increasingly common practice.

Additionally, Trial Counsel, throughout his cross-examination of Dr. Rahter and his closing arguments, effectively turned Dr. Rather's multiplicity of responsibilities against her to

argue that she was an overworked, biased actor who was already primed to accept and believe Victim's allegations. Trial Counsel *repeatedly* returned to the question of "what is advocacy" or "what is an advocate" in challenging Dr. Rahter's objectivity. Trial Counsel's strategic design is evident from the record, though never articulated in his evidentiary hearing testimony. Taking all of these observations together, this Court finds no prejudice to Applicant from the deficiency alleged.

For all of these reasons, Applicant cannot meet his burden under Strickland, and his request for relief by way of this allegation is **DENIED.**

6. Failure to Object to Dr. Rahter's Testimony – Percentage of Abnormal Examinations

Applicant alleges Trial Counsel was ineffective in failing to object to allegedly speculative testimony by Dr. Carol Ann Rahter which provided that less than ten percent of sexual assault examinations of children reporting abuse returned with abnormal findings. "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." Rule 703, SCRE. "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." Id. Additionally, Rule 803(19), SCRE, provides an exception to the hearsay rule for such evidence, stating, "[t]o the extent . . . relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice."

As repeatedly noted in prior sections, "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."

Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

As noted in the prior section, Dr. Rahter testified that data regarding "injuries found on children, all kinds of different information, age, who the perpetrator is, time of disclosure, all that information" was collected and recorded in the regular course of operations at the Children's Advocacy Center. (Tr. 211, ll. 4-25). Solicitor thereafter asked:

> "Q. Okay, and in your job in doing the sexual assault examinations on children do you have any type of data in percentages that you keep up with as to how many times a child would have a normal exam in comparison to abnormal?
>
> A. We do have that data at the Children's Recovery Center. I don't have that with me today but I would estimate that less than ten percent.
>
> Q. Less than ten percent have findings?
>
> A. Correct.
>
> Q. Okay, and so about ninety percent of them will be what you refer to as normal?
>
> A. Correct."

(Tr. 213, ll. 10-22). Dr. Rahter thereafter explored—based upon learned treatises and research data—how a "normal" result from a sexual assault examination does not necessarily foreclose the possibility that a sexual assault has occurred. (Tr. 213-17). On cross-examination, Counsel opened by intoning that Dr. Rahter was overworked and biased in favor of the children making allegations, and explored the differences between normal and abnormal medical examinations. (Tr. 258-63).

At the evidentiary hearing, Trial Counsel acknowledged he did not object and asserted he would not have done so as he intended to delve into the same general subject matter.

The Court finds no ineffectiveness on the part of Counsel. First, the record provides that Dr. Rahter's testimony was not based upon speculation, but rather was based upon a combination

of data from her extraordinarily vast experience and on learned treatises, upon which she was entitled to rely as an expert witness. Applicant's contention that her testimony was objectionable as speculative is baseless, and Trial Counsel was not deficient for failing to advance that argument. Second, Trial Counsel articulated a reasonable basis for why he would not have objected to Dr. Rahter's testimony regarding the percentage of normal versus abnormal examinations—he intended to explore the same subject matter, and did so in an evident effort to discredit Dr. Rahter. Third, the Court finds the statistic provided by Dr. Rahter is facially neutral, and is strained to conceive of how its inclusion or exclusion could have helped or harmed Applicant's case. Applicant offers no compelling argument as to precisely how the inclusion of the percentages harmed him, or how but for their exclusion the outcome at trial would have been different. That only ten percent of child sex abuse examinations return abnormal results is a datum which can be argued in support of or against allegations of abuse. The Court finds Applicant cannot show prejudice. Accordingly, the Court finds no ineffectiveness on the part of Trial Counsel, and Applicant's request for relief by way of this allegation is **DENIED**.

7. Failure to Object to Dr. Rahter's Testimony – Forensic Interview Process

Applicant alleges Trial Counsel was ineffective in failing to object to testimony by Dr. Carol Ann Rahter explaining the process of the forensic interview. The deficiency alleged by Applicant is not more specifically set forth in writing; the amendment does not clearly articulate whether the problem is that Trial Counsel failed to object to Dr. Rahter's qualification as an expert, or failed to object to the testimony on grounds that it was bolstering, or failed to object to the testimony on some other grounds. However, based on the testimony and questions asked

with respect to this issue, the Court interprets this as an allegation that Trial Counsel failed to object to the testimony as impermissible bolstering.

"Improper bolstering is 'testimony that indicates the witness believes the victim, but does not serve some other valid purpose.'" Chappell v. State, 429 S.C. 68, 75, 837 S.E.2d 496, 499-500 (Ct. App. 2019) (quoting Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017)). "Improper bolstering also occurs when a witness testifies for the purpose of informing the jury that the witness believes the victim, or when there is no other way to interpret the testimony other than to mean the witness believes the victim is telling the truth." Id. "However, an expert's testimony is not improper bolstering 'when the expert witness gives no indication about the victim's veracity[.]" Id. (quoting State v. Perry, 420 S.C. 643, 663, 803 S.E.2d 899, 910 (Ct. App. 2017)).

The relevant testimony was set forth in greater detail in Section II.A.5, above. During Dr. Rahter's testimony at trial, Trial Counsel objected as Solicitor began asking questions regarding the type of procedure followed during the forensic interview. (Tr. 221, ll. 4-17). Trial Counsel argued that the testimony was "getting beyond the level of her expertise[.]" (Tr. 221, ll. 12-13). Solicitor replied that she was only attempting to show why certain questions were asked, much as she did in the context of the lead investigator, and that she was not attempting to elicit any expert opinion regarding the type of questioning. (Tr. 221-22). The trial court ruled it would let Dr. Rahter answer the question. (Tr. 222, line 3). Trial Counsel continued arguing, asserting that Dr. Rahter's testimony should be limited to the foundation for the forensic interview, "otherwise she is commenting on the truth or veracity of the interview." (Tr. 222, ll. 4-8). The trial court answered that it was "not going to let her comment on that." (Tr. 222, ll. 9-10). Dr. Rahter then testified briefly regarding the procedure of the interview. (Tr. 222-23).

At the evidentiary hearing, Applicant broadly declared that Dr. Rahter bolstered Victim's testimony, and additionally listed a great number of excerpts from the trial testimony, but curiously did not specifically cite to her testimony regarding the interview process as an example of bolstering.

Trial Counsel acknowledged he did not object to the testimony regarding Dr. Rahter's interview process, and declined to agree that it constituted impermissible bolstering.

The Court finds no ineffectiveness on the part of Trial Counsel. As a preliminary issue, given PCR Counsel's questioning on this subject was limited to whether the testimony constituted bolstering, this Court concordantly limits its analysis to the same question. Dr. Rahter's limited testimony regarding the interview process did not constitute impermissible bolstering at the time of trial. To the contrary, Dr. Rahter's testimony compares favorably to the testimony considered in State v. Douglas, which was found to not contain any bolstering:

> "Herod testified only that, in conducting forensic interviews and building a rapport with a child, they talk about things. She stated, 'I'm introducing myself to her, telling her what my role is and going over the rules of the interview, we talk a lot about telling the truth and telling the lie and we make an agreement with each other that I will tell her the truth and that she will tell me the truth, if we get past that, if the child agrees to do that, we go on.'"

380 S.C. 499, 504, 671 S.E.2d 606, 609 (2009); see also Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713, 718 (2017) (acknowledging the Supreme Court's struggle to identify whether testimony was bolstering where a forensic interviewer told a victim to tell the truth, and that it was condoned by Douglas in 2009 and only subsequently held impermissible in State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015)). Nothing in Dr. Rahter's testimony regarding the interview process suggests that she believed Victim was telling the truth. Solicitor did not attempt to use Dr. Rahter as a human lie detector. At a minimum, Trial Counsel was reasonable in his determination that the testimony in question did not constitute impermissible bolstering at

the time of trial and was reasonable in not objecting on that ground. Thus, Applicant cannot meet his burden of showing deficient performance of counsel. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

8. Failure to Object to Dr. Rahter's Testimony – Hearsay

Applicant alleges Trial Counsel was ineffective in failing to object to alleged hearsay testimony by Dr. Carol Ann Rahter as reflected on page 225, lines 9-10 of the trial transcript. As previously noted, a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is "consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident[.]" Rule 801(d)(1)(D), SCRE. Under the rule, "corroborative testimony cannot include 'details or particulars' regarding the assault." Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010).

At trial, Solicitor asked Dr. Rahter if Victim disclosed abuse to her, which Dr. Rahter confirmed:

> "Q. Was [Victim] able to provide you with details of the abuse?
>
> A. Yes.
>
> Q. And, and in any of those details was she able to give you any time and place information as to the abuse?
>
> A. Yes.
>
> Q. Okay, will you, please, tell us the time that she gave you in regards to when the abuse occurred?
>
> *A. She occur, she reported that it occurred ten or twenty times in one house.*"

(Tr. 224-25) (emphasis added to testimony in contention). The jury was then excused for the parties and the trial court to discuss potential redactions to the forensic interview.

The Court finds the testimony in question did not constitute hearsay as it remained within the parameters of Rule 801(d)(1)(D), SCRE. The testimony in question only provided time (framed as a number of occurrences) and place (one house). The testimony did not provide any further particulars or details. Thus, Trial Counsel could not have objected to the testimony as hearsay, and could not be considered to have performed deficiently for failing to do so. Even if Trial Counsel could have objected, the testimony is devoid of substantial detail, and is not only merely cumulative, but merely mirrors the exact statements made by Victim in the forensic interview as it was published to the jury. The Court finds that even if the testimony was objectionable, Applicant cannot show prejudice under Strickland. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

9. Failure to Object to Dr. Rahter's Testimony – Bolstering

Applicant alleges Trial Counsel was ineffective in failing to object to alleged improper bolstering testimony by Dr. Carol Ann Rahter as reflected on page 270, lines 8-24 of the trial transcript. The relevant law is set forth in Section II.A.7, above.

Applicant takes exception to the following exchange during the State's redirect examination of Dr. Rahter at trial:

> "Q. And in regards to concerns of false allegations by a child do you ask other details regarding the sexual battery and assault?
>
> A. The forensic interview is all about detail. It's about where you were, what it looked like, what it smelled like, what it tasted like, what it felt like, all of those forensic details are what allow some other people to determine whether or not something occurred.
>
> Q. Okay, so just hypothetically speaking in regards to the false allegation issue, if a child is unable to tell you where their clothes were when someone was touching them or whether they were in the bedroom or something like that if you're unable to get those details do you have concerns?
>
> A. I think the more forensic detail that is there the easier it is for law enforcement or DSS to determine if something has occurred.

Q. Okay, so the details are what you're trying to get in your forensic interview?

A. Correct."

(Tr. 270-71). No specific testimony addressing this portion of the transcript was offered at the evidentiary hearing beyond the broader remarks already discussed in prior sections.

The Court finds no ineffectiveness on the part of Trial Counsel. The testimony excerpted above compares very favorably to that considered in Briggs v. State. 421 S.C. 316, 806 S.E.2d 713 (2017). In Briggs, the forensic interviewer was asked if she observed any indicia of coaching, to which she replied very explicitly that she attempted to find signs of coaching and found no evidence of coaching. 421 S.C. at 326, 806 S.E.2d at 718. The Supreme Court in Briggs hesitated to describe the testimony as impermissible bolstering, and ultimately determined it was not, because trial counsel raised the question of coaching in his opening statements. Id., 421 S.C. at 326-27, 806 S.E.2d at 718.[3] Here, even as Solicitor prodded Dr. Rahter to give an explicit answer to a specific "hypothetical," Dr. Rahter answered with restraint and offered no opinion as to the existence of evidence of coaching, but rather explained how she approached the interview in an effort to *enable others* to make that determination. While explanation of the investigatory purpose of a forensic interview in the presence of the jury is disfavored, it has been so disfavored because doing so may invade the province of the jury to make determinations as to what did or did not occur. Briggs, 421 S.C. at 328, 806 S.E.2d at 719-20 (discussing State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015)). Dr. Rahter's testimony artfully avoids doing so by specifically deferring any such responsibility for determinations to persons other than herself. Dr. Rahter never opined as to

[3] The Briggs court subsequently faulted counsel for failing to object to testimony by the forensic interviewer which asserted her role was to determine whether the child knew the difference between the truth and a lie, and to find out if something had occurred. 421 S.C. at 327-29, 806 S.E.2d at 719-20.

whether Victim was telling the truth, or advanced herself as the determinant of what did or did not occur. The Court finds the testimony was proper, such that Trial Counsel had no basis on which to enter an objection, and thus Applicant cannot show deficiency. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

10. Failure to Object to Non-Corroboration Jury Instruction

Applicant alleges Trial Counsel was ineffective in failing to object to the trial court's charge to the jury that "[f]or prosecutions under this charge the testimony of the victim need not be corroborated." (Tr. 343, ll. 8-9). Jury instructions regarding S.C. Code Ann. §16-3-657 are not permitted by the South Carolina Constitution, given its prohibition against judicial comments regarding the facts of the case. State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016); see also S.C. Const. art. V, §21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.")

However, "[f]or an ineffective assistance claim, the PCR court must 'determine whether counsel was ineffective at the time of the alleged error.'" Chappell v. State, 429 S.C. 68, 79, 837 S.E.2d 496, 501 (Ct. App. 2019) (quoting Pantovich v. State, 427 S.C. 555, 562-63, 832 S.E.2d 596, 600 (2019)) (emphasis excluded). "Accordingly, trial counsel will not be found deficient for failing 'to be clairvoyant or anticipate changes in the law[.]" Id., 429 S.C. at 79, 837 S.E.2d at 501-02 (quoting Gilmore v. State, 314 S.C. 453, 457, 445 S.E2.d 454, 456 (1994)).

This allegation is simply resolved by reference to the law and a calendar. Applicant's trial took place on June 11-13, 2012. The Supreme Court's opinion in Stukes was filed May 4, 2016. Prior to Stukes, the non-corroboration charge based on §16-3-657 was considered permissible under State v. Rayfield, 369 S.C. 106, 631 S.E.2d 244 (2006).[4] Thus, Trial Counsel

[4] Trial Counsel, in his testimony at the evidentiary hearing, seemed to argue or imply that he knew he could have made just such an objection based upon Rayfield. To the extent Trial Counsel's testimony suggests he thought of

had no reason to enter an objection and this Court cannot hold him accountable for not predicting the change in Stukes. Accordingly, Applicant cannot establish Trial Counsel was deficient for failing to object to the charge, and his request for relief by way of this allegation is **DENIED.**

11. Failure to Raise "Intent" Issue in Directed Verdict Motion

Applicant alleges Trial Counsel was ineffective in failing to argue in his motion for a directed verdict that the State failed to present evidence that Applicant committed the acts charged with "the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child." (emphasis omitted). "On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment." Rule 19(a), SCCrimP. "In ruling on the motion, the trial judge shall consider only the existence or non-existence of the evidence and not its weight." Id.

In considering existence or non-existence of evidence of intent, courts must be cautious to remember that "[i]ntent is seldom susceptible to proof by direct evidence and must ordinarily be proved by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971). "The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in light of the given circumstances." Id. (citing State v. Johnson, 84 S.C. 45, 65 S.E. 1023 (1909)). Accordingly, "[t]he question of the intent with which an act is done is one of fact and is ordinarily for jury determination except in extreme cases where there is no evidence thereon." Id.

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making such an objection at the time of trial, or believed at or around that time that he could have made such an objection, this Court finds his testimony to be mere puffery and is not credible.

Trial Counsel did not argue a lack of evidence to show intent during his motion for a directed verdict at trial. (Tr. 282-85). When questioned at the evidentiary hearing regarding the directed verdict, Trial Counsel testified there was no strategic basis for not arguing intent, but rather he believed that gratification could be inferred from the evidence presented.

The Court concurs in Trial Counsel's assessment and finds that evidence existed from which Applicant's intent of sexual gratification could be inferred. Victim testified Applicant digitally penetrated her, awaking her from sleep in the middle of the night. (Tr. 167-68). During the forensic interview published to the jury, Victim additionally disclosed that Applicant fellated her (Tr. 246, ll. 5-21), and that Applicant told her not to tell anyone about his actions (Tr. 248, line 1). Victim's prior inconsistent statement to Pamela Gause additionally indicated penile penetration. (Tr. 83, ll. 13-16). Any one portion of this evidence would be sufficient to sustain submitting the case to the jury, let alone all of it taken together, and no valid basis existed for Trial Counsel to argue there was insufficient evidence to show Applicant's intent. Had Trial Counsel so argued, the motion for a directed verdict still would have been denied. Accordingly, Applicant cannot meet his burden of proof as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

12. Failure to Object to Solicitor's Statement during Motion Hearing

Applicant alleges in the original application that Trial Counsel was ineffective in failing to object during a motion hearing on April 3, 2012,[5] to Solicitor's "statement of no intent for retaliation." Trial Counsel moved to quash the State's indictment and sought to prohibit the State from prosecuting Applicant under S.C. Code Ann. §16-3-655(A)(2), arguing that Solicitor re-indicted Applicant under that subsection only after, and in retaliation for, retaining Trial

[5] The transcript of the motion hearing is partly included in the Record on Appeal. (R. 1-19).

Counsel and exercising his right to a jury trial. (R. 4-5; R. 7; R. 11). Solicitor answered "that there was no intent on my part for any kind of retaliation." (R. 11). Rather, Solicitor explained she re-indicted Applicant upon learning the subsection was applicable to Applicant's case and that the prior conviction could be used to prove an element of the crime under the subsection. (R. 11-12).

No evidence to establish a basis for objection was presented at the evidentiary hearing, nor can this Court independently perceive one. That Applicant thinks Solicitor's motives were contrary to her stated intent does not provide a basis for objection in a motion hearing. No evidence was presented to show how any such objection could have changed the outcome of trial. Applicant has failed to present anything in support of this claim or to meet his burden of proof for either prong of Strickland, and his request for relief is **DENIED.**

13. Failure to Object to Characterization of Accuser as "Victim"

Applicant alleges in the original application that Trial Counsel was ineffective in failing to object to every description of and reference to Victim throughout trial as "the victim." Applicant argues that referring to Victim as such "serves to promote the belief that the defendant committed the crime."

Applicant cites to no authority from which this Court could conclude that Trial Counsel should have reasonably known to enter such an objection, nor is this Court independently aware of any. A *very* brief survey of the question as it has arisen in other jurisdictions offers some significant arguments to the opposite extreme: that victims are arguably entitled to be described as "victims" under the state constitution. Compare Z.W. v. Foster, 422 P.3d 582, 585 (Az. Ct. App. 2018) (Benne, J., dissenting) ("Because a person against whom a crime has allegedly been committed is afforded several, substantive pre-trial rights pursuant to Arizona law, logic dictates

this individual is a 'victim' and should be referred to as such."); S.C. Const. Art. I, §24 (defining "victim" and extending to victims various rights applicable throughout the criminal adjudication process); S.C. Code Ann. §16-3-1510 (defining "victim" and other terms for the purposes of victim's services provided by statute). Applicant's argument that calling the Victim a "victim" constitutes implicit bolstering is meritless—if calling a victim "the victim" constitutes impermissible bolstering, it is difficult to imagine how even mentioning the indictment or prosecuting at all would be possible, as every act of the State in pursuit of a conviction carries with it the implicit affirmation of belief that a crime has occurred and that it was committed by the defendant. In any event, because no precedent exists to support such an objection, this Court cannot find Trial Counsel performed deficiently for failing to make one, and Applicant cannot prevail under Strickland by way of this claim; his request for relief is **DENIED.**

14. Failure to Prepare for Trial

Applicant alleges in the original application that Trial Counsel was ineffective in failing to review the evidence against Applicant and for not knowing the facts and circumstances of the case: specifically with Trial Counsel's preparation for the testimony of Pamela Gause.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id., 466 U.S. at 691, 104 S.Ct. at 2066. "In any ineffectiveness case, a particular decision not to investigate must be

directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

The testimony of Pamela Gause, trial arguments thereon, and the evidentiary hearing questioning with respect to Trial Counsel's preparation and her testimony are already set forth in Section II.A.2., above. Of additional note, during the forensic interview published to the jury, Victim explains to Dr. Rahter that she was inappropriately touched by Minor, and that Victim's sister saw the event and reported it to adults—ultimately reaching Gause. (Tr. 250-51).

The Court finds no ineffectiveness on the part of Trial Counsel. The Court finds credible Trial Counsel's assertion that he interviewed relevant witnesses and reviewed discovery, including in particular the forensic interview. To the extent Applicant's claim relates specifically to Gause's testimony, the Court again incorporates its findings as set forth in Section II.A.2., above: Trial Counsel was aware that Gause may not have been present at the time the children were caught inappropriately touching one another and made the affirmative tactical choice to sidestep that issue in favor of permitting the introduction of an inconsistent disclosure. Applicant has failed to meet his burden of proof under either prong of Strickland, and his request for relief is **DENIED**.

15. Failure to Object to Characterization of Allegations as "Fact"

Applicant alleges in the original application that Trial Counsel was ineffective in failing to object to the Solicitor's characterization of the allegations as "fact." Applicant asserts that "[b]y stating allegations as fact over and over without identifying them as allegations serves to unlawfully bolster the [alleged] victim's testimony." This claim is wholly without any legal merit and Applicant identifies no precedent in support—the prosecution may argue upon evidence in the record and reasonable inferences therefrom, including the credibility of the witnesses. Applicant's request for relief by way of this allegation is **DENIED**.

16. Failure to Call Witnesses, Expert Witnesses

Applicant alleges in his original application that Trial Counsel was ineffective in failing to call various witnesses at trial. The Supreme Court of South Carolina "has repeatedly held a PCR applicant *must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 509

S.E.2d 807 (1998) (emphasis original). No such witnesses were presented at the evidentiary hearing. Applicant has failed to present any evidence to support this claim and his request for relief is **DENIED.**

17. Failure to Impeach, Adequately Cross-Examine Pamela Gause

Applicant alleges in his original application that Trial Counsel was ineffective by failing to impeach Pamela Gause with prior bad acts involving narcotics abuse which resulted in her unemployment. "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." Rule 608(b), SCRE. "They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." Id.

The Court finds no evidence was presented to support Applicant's claims and, even assuming Applicant's claims to be true, the Court finds such evidence would not be relevant, would not be probative of truthfulness or untruthfulness, would be a waste of time, and would be contrary to the strategic design of Trial Counsel as discussed in Sections II.A.2. and II.A.14., above. The Court finds Applicant has failed to present any evidence to meet his burden of proof as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

18. Failure to Object to Solicitor's Closing Arguments

Applicant alleges in his original application that Trial Counsel was ineffective in failing to object to various portions of the Solicitor's closing argument:

i. Solicitor's argument defending her response to the recantation video, and her description of the recantation video (Tr. 314-15);

ii. Solicitor's argument as to her job versus the jury's job (Tr. 315, ll. 8-9);
iii. Solicitor's description of Victim's testimony as presenting details that nobody else could have provided (Tr. 317, ll. 1-6);
iv. Solicitor's description of her meeting with Rebecca Ann Jarrard after the recantation video was provided to the State (Tr. 317, ll. 6-10);
v. Solicitor's argument against Applicant's denial during testimony (Tr. 318-19);
vi. Solicitor's arguments explaining the legislature's reasoning for the law providing for the introduction of the forensic interview (Tr. 320-21);
vii. Solicitor's descriptions of the allegations as though they are facts throughout closing;
viii. Solicitor's descriptions of testimony and of Victim's statements in the forensic interview;
ix. Solicitor's assertion that "[t]he defendant did it" (Tr. 331, line 21);
x. Solicitor's final emphasis to the jury: "Don't let Nana win." (Tr. 332, line 19).

To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." Id., 428 S.C. at 550, 837 S.E.2d at 40 (quoting Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the Applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Id.

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994); see also State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.") A prosecutor should "prosecute with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88

(1935). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." New, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." Id. "[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger, 295 U.S. at 88.

A thorough review of the Solicitor's closing argument convinces the court that the comments made were fair inferences from the evidence presented at trial and did not contain any improper suggestions, insinuations, or improper assertions of personal knowledge. The Court finds Applicant has failed to present any evidence to meet his burden of proof as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

19. Failure to Object to Introduction of Forensic Interview

Applicant alleges in his original application that Trial Counsel was ineffective in failing to object to the introduction of the forensic interview. In support of this argument, Applicant cites inconsistencies between Victim's statements to the forensic interviewer and her testimony at trial.

An out-of-court statement of a child is admissible in a general sessions court proceeding if the statement was given in response to questioning conducted during an investigative interview of the child, an audio and visual recording of the statement is preserved on film, and the child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement. S.C. Code Ann. §17-23-175(A). The court must find, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness

before the statement is admissible. S.C. Code Ann. §17-23-175(A). In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors: (1) whether the statement was elicited by leading questions; (2) whether the interviewer has been trained in conducting investigative interviews of children; (3) whether the statement represents a detailed account of the alleged offense; (4) whether the statement has internal coherence; and (5) sworn testimony of any participant which may be determined as necessary by the court. S.C. Code Ann. §17-23-175(B).

Trial

The record indicates a pre-trial motion hearing was conducted on April 3, 2012. At the outset of the hearing, Trial Counsel indicated that he is "not going to contest" the forensic interview. [Record 4]. The State then proffered the testimony of Dr. Carol Ann Rahter. [R. 19] At the conclusion of the testimony, the Trial Judge made findings regarding the "guarantees of trustworthiness" of the interview, pursuant to S.C. Code Ann. § 17-23-275. [R. 1-2] While neither the substance of the proffer nor the trial judge's pre-trial rulings on the admissibility of the forensic interview are part of the Transcript provided to this Court or the Record on Appeal, Applicant's own original PCR application states that the trial judge "stated in a pretrial hearing that it had a particular guarantee of trustworthiness" and "he also stated that its probative value far outweighs any prejudicial value or effect it might have."

When the state offered the interview at trial, Trial Counsel again objected to its admission, stating "the days of using those interviews have come to an end whether it winds up being this case or another case that based on Crawford that that interview is inadmissible hearsay." The trial judge ruled the interview was admissible and stated he had reviewed the tape and transcript, reviewed the factors set forth in S.C. Code Ann. §17-23-175. He further stated, "I

make a specific finding that the circumstances surrounding the taping of this particular statement has particularized guarantees of trustworthiness to make an exception to Crawford." [Tr. 153] The Court went on to state that the child would be called to testify and subject to cross-examination, the interview was conducted by a professional who was trained in conducting investigative interviews with children, the statement was not elicited by leading questions, and the statement was a detailed account of the alleged offense with internal coherence. He further found that its probative value far outweighed any prejudicial effect. [Tr. 154-55]

Findings

The forensic interview was admissible at trial pursuant to S.C. Code Ann. §17-23-275. As required by statute, a pre-trial hearing was conducted outside of the presence of the jury where the State proffered the testimony of Dr. Rahter. The trial judge then made findings consistent with the requirements of the statute. Trial Counsel renewed his objection to the introduction of the interview during the trial. Any inconsistencies between the Victim's statements to Dr. Rahter and her trial testimony went to the weight or credibility of the statement and not its admissibility. Given the age of the Victim at the time of the interview with Dr. Rahter and the two-year lapse of time between the interview and the trial, some inconsistencies in the testimony are to be expected. The Court finds Applicant has failed to present any evidence to meet his burden of proof as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

20. Failure to Object to Hearsay Testimony of Victim: Nana's Commands

Applicant alleges in his original application that Trial Counsel was ineffective in failing to object to "hearsay statements by the alleged victim that 'Nana told her what to write in a letter

to Applicant in the P.S. part,'" and in failing to call "Nana" as a witness to counter this testimony.

"Hearsay is not admissible except as provided by" the rules of evidence, other rules prescribed by the Supreme Court, or by statutes. Rule 802, SCRE. 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." Rule 801(c), SCRE. A statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE.

Questions, commands, and requests are not "assertions," and therefore do not constitute hearsay. See, e.g. United States v. Thomas, 453 F.3d 838, 845 (7th Cir. 2006) (describing a remark as a question, and therefore not hearsay); United States v. Bellomo, 176 F.3d 580, 586 (2d Cir. 1999) ("statements offered as evidence of commands or threats directed to the witness, rather than for the truth of the matter asserted, are not hearsay."); United States v. Jackson, 88 F.3d 845, 848 (10th Cir. 1996) (finding the question "Is this Kenny?" could not reasonably be construed to be an intended assertion, express or implied, and thus was not hearsay); United States v. Oguns, 921 F.2d 442, 449 (2d Cir. 1990) ("An inquiry is not an 'assertion,' and accordingly is not and cannot be a hearsay statement."); United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir. 1990) (explaining most questions and inquiries are not hearsay, and rejecting the defendant's argument that there were assertions implicit in the question "did you get the stuff?"); State v. Carillo, 750 P.2d 878, 882-83 (Ariz. Ct. App. 1987), aff'd in part, vacated in part on other grounds, 750 P.2d 883 (Ariz. 1988) (finding out-of-court remarks directed to the defendant instructing him "don't do that now," and "we will do that later," did not assert anything and thus did not constitute hearsay); People v. Jones, 579 N.W.2d 82, 87-88 (Mich. Ct. App. 1998),

modified in part on other grounds, 587 N.W.2d 637 (Mich. 1998) (ruling the command "[b]itch, come out" contained no assertion and was incapable of being true or false, such that it was not a statement and could not be hearsay); cf. Rule 801, SCRE, advisory committee's note ("With the exception of subsection (d)(1), this rule is identical to the federal rule").

Trial

On cross-examination, Trial Counsel elicited testimony from Victim that she had sent Applicant a letter that stated, "I am sorry I lied and got you in trouble, I love you and miss you so much." [Tr. 185]. On re-direct, the Solicitor asked Victim why she wrote the letter to Applicant. Victim responded, "Cause my Nana wanted us to write him letters and send them to him." [Tr. 193-94] The following colloquy then ensued:

"Solicitor: So your Nana asked you to write this letter?

Victim: Yes.

Solicitor: Did she tell you what to write?

Victim: Down at the p.s. part, yes.

Solicitor: She told you to write that?

Victim: Yes." [Tr. 194]

Findings

Victim's testimony as to "Nana's" instructions to her to write the note and postscript does not constitute hearsay. Nana's instructions were commands, and contained no information which could be tested as true or false. Counsel thus could not have objected to the testimony on the basis of hearsay. Further, Applicant has failed to show by testimony, affidavit or other proffer what "Nana's" testimony would have been if called to testify. This Court will not second guess Trial Counsel's strategy in the absence of any evidence to show that this witness's testimony

would have affected the outcome of the trial. Applicant cannot show deficiency of Counsel by way of this allegation, and accordingly Applicant's request for relief by way of this allegation is **DENIED.**

21. Failure to Object to Identification by Detective Large

Applicant argues in his Original Application that Trial Counsel was ineffective in failing to object to Detective Large's identification of Applicant as the Defendant.

Detective Large testified he became involved in the case by receiving a report from Victim's mother. [Tr. 196-97]. After a brief interview with Victim and her mother, Detective Large referred them to the Children's Recovery Center for a more in-depth forensic interview and medical exam. [Tr. 198-99]. Detective Large further testified that he did a background check on the "alleged suspect" which revealed that Applicant had a prior conviction for lewd act on a minor. [Tr. 201].

Victim and Applicant were family members and well known to each other. Victim identified her grandfather as the individual who molested her. Applicant himself also testified and identified himself as the Victim's grandfather. Victim claimed she was abused by Applicant, and he denied it. Identification of the perpetrator was therefore not an issue during trial. Applicant cannot show any deficiency of Counsel by way of this allegation, and accordingly Applicant's request for relief by way of this allegation is **DENIED.**

22. Failure to Argue Inadequate Investigation Prior to Applicant's Arrest

Applicant argues in his Original Application that Trial Counsel was ineffective in failing to "highlight to the jury that no investigation was actually done before obtaining a warrant for the applicant's arrest."

As detailed in number 21 above, Detective Large testified he interviewed Victim and her mother briefly before referring them to the Children's Recovery Center for an in-depth forensic interview and medical exam. He also testified as to Applicant's prior conviction for lewd act on a minor. On cross-examination, Trial Counsel asked, among other things, "Did you ever interview the defendant?" When Detective Large he admitted that he did not, Trial Counsel ended his questioning. [Tr. 205-6]

This Court finds no ineffectiveness on the part of Trial Counsel. By ending his questioning on Detective Large's admission that he never interviewed the Defendant, he highlighted that fact to the jury. Applicant cannot show deficiency of Counsel by way of this allegation, and accordingly Applicant's request for relief by way of this allegation is **DENIED.**

23. Failure to Object to Introduction, Use of Prior Conviction

Applicant argues in his Original Application that Trial Counsel was ineffective in failing to object to the "multiple times" Applicant's prior conviction was brought out in trial. Specifically, Applicant argues the State introduced the testimony of Detective Large that he found Applicant's prior conviction during a background check. The State then offered a certified copy of the prior conviction through Investigator Collins. Applicant complains that the judge then mentioned the prior conviction in limiting instructions. His attorney questioned him regarding the prior conviction, the Solicitor discussed it three times during closing arguments, and the judge "brings it up again" during jury charges. Applicant argues the jury was prejudiced by the "multiple times that the prior remote conviction was referred to."

Trial

Applicant was indicted under S.C. Code Ann. §16-5-655(a) which states, "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; or (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of . . . an offense listed in Section 23-3-430(C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430(D)." The State initially indicted Applicant under subsection (a)(1), but prior to trial re-indicted Applicant under subsection (a)(2).

In pre-trial motions, Trial Counsel argued that the State only re-indicted Applicant under subsection (a)(2) after Applicant hired a new attorney and elected to go to trial. Trial Counsel argued the State's actions in re-indicting him was in retaliation for him exercising his constitutional rights and also so the State could introduce evidence of a fifteen-year old conviction for "lewd act on a minor" which would otherwise have been inadmissible at trial. [Tr. 4-11]

Solicitor argued it was within her discretion to determine the appropriate offense, it was not done in retaliation, and the prior conviction was an element of the offense and therefore admissible at trial. [Tr. 11-12] The trial judge ruled the State could go forward under subsection (a)(2), but could not go into the facts surrounding the prior conviction. [Tr. 16]

Again, immediately after jury selection, Trial Counsel addressed the issue of the prior conviction. Trial Counsel argued the State should be limited to introducing only the prior conviction and should be prohibited from also mentioning that Applicant was on the sex offender registry, as only one of those factors is necessary to proceed under subsection (a)(2). The State agreed. [Tr. 36-37] Solicitor clarified she intended to elicit Detective Large's testimony that he ran a background check and found the prior conviction, and they intended to introduce a certified copy of the conviction into evidence. Trial Counsel objected to the State introducing a certified copy of the conviction, arguing that Detective Large's testimony alone was sufficient to establish

the requirements of the statute. [Tr. 37-8] The trial judge ruled the certified copy was admissible, over Trial Counsel's objection, but granted Trial Counsel's motion to redact the sentence Applicant received, along with all of the sentencing judge's notes regarding the "other conditions" of Applicant's sentence. [Tr. 41-43] [ROA 268-69] Trial Counsel also requested a limiting instruction at the time the certified copy was offered into evidence. The trial judge agreed, as did Solicitor. [Tr. 53-54]

During the trial, Detective Large testified he discovered the prior conviction while running a background check on Applicant. [Tr. 201] Tony Collins, the Investigator for the Horry County Solicitor's Office, testified he obtained a certified copy of the prior conviction, and the State offered the redacted version into evidence. [Tr. 275-76]. Trial Counsel renewed his pre-trial objections, stating, "I'd like to preserve my objection as to the motion to quash the indictment not received under this subsection." [Tr. 276] The trial judge admitted the copy into evidence over Trial Counsel's objection.

Findings

The Court finds no ineffectiveness on the part of Trial Counsel. Trial Counsel attempted to keep out the evidence of the prior conviction by way of pre-trial motions. He further sought to limit the evidence the State could use to prove the prior conviction, and was successful. Trial Counsel renewed his objection to the introduction of the evidence when it was offered at trial, and appropriately requested a limiting instruction, in keeping with the case law at that time. See State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (to reduce possible prejudicial effect of evidence of a prior burglary conviction, a trial court should (1) limit evidence solely to the prior burglary convictions without admitting particular facts of the convictions and (2) on request, instruct the jury on the limited purpose for which the prior conviction can be considered); Rule

105, SCRE ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."). Once the evidence of the prior conviction was admitted, there was no basis for Trial Counsel to object to Solicitor's reference to the prior conviction in closing arguments.

The Court notes the recent decision of State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019) in which the South Carolina Supreme Court held it is reversible error to deny a motion to bifurcate the trial under circumstances similar to Applicant's case. However, given our appellate courts' holdings in State v. Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997) and State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (evidence of other crimes is admissible to establish a material fact or element of the crime charged and the probative value of admitting the prior conviction is not outweighed by its prejudicial effect), we find no fault with Trial Counsel's trial strategy. "[T]he PCR court must 'determine whether counsel was ineffective at the time of the alleged error.'" Chappell v. State, 429 S.C. 68, 79, 837 S.E.2d 496, 501 (Ct. App. 2019) (quoting Pantovich v. State, 427 S.C. 555, 562-63, 832 S.E.2d 596, 600 (2019)) (emphasis excluded). "Accordingly, trial counsel will not be found deficient for failing 'to be clairvoyant or anticipate changes in the law[.]" Id., 837 S.E.2d at 501-02 (quoting Gilmore v. State, 314 S.C. 453, 457, 445 S.E2.d 454, 456 (1994)). Applicant cannot show deficiency of Counsel by way of this allegation, and accordingly Applicant's request for relief by way of this allegation is **DENIED.**

24. Elicited Testimony from Rebecca Ann Regarding Her Personal Beliefs

Applicant argues in his Original Application that Trial Counsel was ineffective in eliciting testimony from Rebecca Ann Jarrard about "whether or not she believed that this had happened."

Trial

Solicitor questioned Victim's mother, Rebecca Ann Jarrard, about Affidavits she signed and delivered to the Solicitor's office after reporting the assault but before trial. Rebecca Ann testified she signed an affidavit stating, "My daughter . . . states that what she had originally told investigators and police is false. She feels much remorse and wishes the charges to be dropped." [Tr. 111]. Rebecca Ann delivered a second affidavit to Solicitor that stated, "After talking with my daughter further I believe that nothing happened, her story has changed. She is sorry for what she has done. I hope this video resolves everything." [Tr. 113] In the video, Victim states, "I'm sorry I lied to everyone because a bunch of us were talking at school and I thought it would be cool and when I told you Papa touched me there when he really didn't." [Tr. 123]

Trial Counsel questioned Rebecca Ann about these affidavits during cross examination and elicited testimony from her that when she gave the recantation video to Solicitor and tried to get the charges dropped, she was threatened with losing custody of her children. Trial Counsel asked, "So at this point you're looking at losing your children or playing ball with the Solicitor's office, correct?" Rebecca Ann answered, "I guess." Trial Counsel continued to question Rebecca Ann about her efforts to get the charges dropped.

"Trial Counsel: At some point you were scared that you could lose your children?

Rebecca Ann: Yes.

Trial Counsel: Do you remember saying that?

Rebecca Ann: I do.

Trial Counsel: And that was when you were meeting with Candice, the prosecutor?

Rebecca Ann: Yes.

Trial Counsel: And you went from Candice to DSS, correct?

Rebecca Ann: Yes.

Trial Counsel: And at that point you signed a safety order that they told you if you violated you could lose your children, correct?

Rebecca Ann: Yes, and then Candice –

Trial Counsel: Ever since that time now you're saying that in fact you believe this did happen?

Rebecca Ann: I do believe it happened.

Trial Counsel: Right, but you didn't before?

Rebecca Ann: I did even then." [Tr. 134-35]

Findings

While Trial Counsel did elicit testimony from Rebecca Ann as to whether she believed Victim's allegations, it was clearly in the context of suggesting that she only believed the allegations when threatened with losing custody of her children. This Court will not second guess Trial Counsel's trial strategy and finds no ineffectiveness. The Court finds Applicant has failed to present any evidence to meet his burden of proof as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

25. Failure to Introduce Evidence of Alternative Potential Source of Sexual Knowledge

Applicant alleges Trial Counsel was ineffective by failing to raise the possibility that Victim acquired her sexual knowledge from circumstances surrounding the incarceration of "Rebecca Ann's ex husband . . . in Tennessee for statutory rape[.]" The Court finds Applicant presented *no evidence* in support of this allegation. Thus, Applicant has failed to meet his burden of proof as to either prong of Strickland and his claim for relief by way of this allegation is **DENIED.**

B. Ineffective Assistance of Appellate Counsel

Applicant's allegations of ineffective assistance of appellate counsel are also without merit. In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .")

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the allegedly ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

1. Failure to Raise Issue: Dr. Rahter's Testimony Regarding Interview Method

Applicant alleges appellate counsel was ineffective in failing to raise on appeal the admissibility of the forensic interviewer's testimony regarding the steps and methods of her interview. As noted in a previous section, "[f]or an ineffective assistance claim, the PCR court must 'determine whether counsel was ineffective at the time of the alleged error.'" Chappell v. State, 429 S.C. 68, 79, 837 S.E.2d 496, 501 (Ct. App. 2019) (quoting Pantovich v. State, 427 S.C. 555, 562-63, 832 S.E.2d 596, 600 (2019)) (emphasis excluded). "Accordingly, trial counsel will not be found deficient for failing 'to be clairvoyant or anticipate changes in the law[.]" Id., 429 S.C. at 79, 837 S.E.2d at 501-02 (quoting Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994)).

The substance of Dr. Rahter's testimony was already thoroughly explored and set forth in considering Applicant's various claims of ineffective assistance of trial counsel and will not be here again restated.

At the evidentiary hearing, Appellate Counsel testified he represented Applicant through the appellate advocacy program with the Office of Appellate Defense. Appellate Counsel

explained that he focused his attention and efforts on the admission of the prior conviction during the case-in-chief with respect to S.C. Code Ann. §16-3-655(A)(2). Appellate Counsel recalled that he read cases regarding the admissibility of certain forensic interviewer testimony and concluded that the law was not clear at the time. Appellate Counsel opined that the testimony reflected on transcript pages 222-23 was admissible at the time, that the interviewer could explain how she could establish rapport with the interviewee, and that Trial Counsel and Solicitor did the best they could with what guidance they had at the time of trial. Appellate Counsel intoned disapproval of a "kitchen sink" approach to appellate advocacy. Appellate Counsel reaffirmed his belief that the issue he raised regarding the admissibility of the prior conviction during the case-in-chief was the best issue preserved for appeal, and described it as the lynchpin of the State's case.

On cross-examination, Appellate Counsel opined that the forensic interviewer's testimony at 222-23 was not clearly preserved, and that he felt the prior conviction was a stronger issue. On redirect examination, Appellate Counsel again reaffirmed his belief that the prior conviction was the best issue even assuming the forensic interviewer's testimony was fully and properly preserved for further challenge on appeal.

The Court finds no ineffectiveness by Appellate Counsel. The Court finds Appellate Counsel's judgment that the propriety and prejudicial value of the forensic interviewer's comments were not clear at the time of the appeal was reasonable. The Court finds that the issue of the forensic interviewer's testimony was not clearly superior to the issue which Appellate Counsel ultimately raised: the propriety of admitting Applicant's prior conviction. Appellate Counsel had good cause to question the propriety of the statute and process in light of Old Chief v. United States, 519 U.S. 172, 191 (1997), and was subsequently proven to be justified in

focusing on the prior conviction by the South Carolina Supreme Court's holding in State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), subtle differences in the arguments advanced notwithstanding. Appellate Counsel's work and testimony reflect skilled effort and the affirmative use of educated judgment in choosing the best issue for appeal, and this Court will not second guess his judgment. The Court finds no deficiency on the part of Counsel.

Furthermore, the Court is not convinced that raising the issue on appeal would have produced a different result. While the appellate courts have increasingly frowned upon the introduction of testimony regarding the process of the interview, and all but adopted the position asserted by Trial Counsel, the appellate courts have also held testimony comparable to Dr. Rahter's to be harmless. See, e.g. State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (finding it was error to qualify forensic interviewer as an expert for purpose of providing testimony regarding RATAC method, but holding there was no conceivable prejudice because the only opinion offered by the forensic interviewer was that the victim needed a medical exam). The Court finds no deficiency on the part of Appellate Counsel, and Applicant's request for relief by way of this allegation is **DENIED.**

2. Failure to Raise Issue: Admissibility of Forensic Interview

Applicant alleges in his Original Application that Appellate Counsel was ineffective in failing to appeal the Trial Court's ruling admitting the forensic interview. As discussed in detail in section II(A)(19) above, the Court finds the forensic interview was admissible under S.C. Code Ann. §17-23-175(A). The Court finds no deficiency on the part of Appellate Counsel, and Applicant's request for relief by way of this allegation is **DENIED.**

3. Failure to Prepare

Applicant alleges Appellate Counsel was ineffective in failing to adequately familiarize himself with the facts of the case. Specifically, Applicant alleges, "Appeal counsel ineffective for failing to be familiar with the facts of the case and thus submitting information on the appeal process under 'facts of the case.' . . . He was continuing on with hearsay testimony that should not have been presented."

The Court has reviewed Appellate Counsel's Final Brief to the appellate courts and finds no deficiency in either the "Statement of the Case" or "Statement of Facts" contained therein. Pursuant to Rule 208(C), SCACR, Appellant's brief is to contain a Statement of the Case, which "shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters." The Rules also provide, "A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions." Rule 208(D), SCACR. Appellate Counsel's brief complies with the Appellate Court Rules and makes accurate and persuasive reference to the testimony in the trial transcript. The Court finds no deficiency on the part of Appellate Counsel, and Applicant's request for relief by way of this allegation is **DENIED.**

4. Failure to Raise Issue: Missing Evidence in Discovery

Applicant contends Appellate Counsel was ineffective in failing to raise to the appellate court Applicant's claims that evidence was missing from the discovery materials provided by the State. The Court will not belabor this issue: no Brady issue was preserved for Appellate Counsel to raise on appeal. Accordingly, Applicant cannot show any deficiency by Appellate

Counsel in failing to raise this issue, and his request for relief by way of this allegation is **DENIED.**

C. Due Process Violations

Applicant alleges his rights to due process of law were violated. "Due process considerations apply in contested cases or hearings which affect an individual's property or liberty interests as contemplated by the federal and state constitutions." Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 352, 353-54 (2008) (citing U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3). "The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review." Id., 376 S.C. at 179, 656 S.E.2d at 354 (citing State v. Hill, 368 S.C. 649, 656, 630 S.E.2d 274, 278 (2006)). The substantive component of due process, meanwhile, "requires a rational basis for legislation depriving a person of life, liberty, or property." In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 311 (2003).

However, when asserting a violation of a constitutional right in a post-conviction relief action, the applicant "generally must frame the issue as one of ineffective assistance of counsel." Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) (citing Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993)); but see Fortune v. State, 428 S.C. 545, 559, 837 S.E.2d 37, 44 (2019) ("In some circumstances, however, an inmate may present a claim for PCR based on constitutional violations other than ineffective assistance of counsel[;]" thereafter finding the prosecutor's misconduct could only be reviewed as a due process claim in PCR). Issues which could have been raised at trial or on direct appeal are not cognizable in an action

for post-conviction relief. S.C. Code Ann. §17-27-20(b); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). But for those deprivations which cannot be addressed in either the context of a direct appeal or a claim of ineffective assistance of counsel, an applicant who contends his due process rights were violated must show he was deprived of those rights by representation that fell below an objective standard of reasonableness, and that but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Fortune, 428 S.C. 558-59, 837 S.E.2d at 44-45.

1. Brady Violation

Applicant alleges that the State failed to disclose evidence in its possession in violation of Brady v. Maryland, 373 U.S. 83 (1963). "Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment." Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993). "A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). The mandate of Brady extends to evidence "that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the police." State v. Kennerly, 331 S.C. 442, 452-53, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Kyles v. Whitley, 514 U.S. 419 (1995)). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)).

In his application, Applicant makes reference to an interview with Victim and a phone interview with Pamela Gause which he asserts was not included in his discovery. However, no testimony or other evidence was introduced at the evidentiary hearing to support Applicant's claims. Accordingly, Applicant has failed to meet his burden of proving his Brady claim, and his request for relief thereby is **DENIED.**

2. Remaining Due Process Claims

As to Applicant's remaining claims that his due process rights were violated, this Court finds that the claims (1) have been adequately addressed in the context of ineffective assistance of counsel and (2) would otherwise amount to a substitute for direct appeal. None of the remaining seven due process allegations rise to the level of offense and procedural deprivation as was the case and exception in Fortune. Thus, this Court would not be justified in again reviewing the claims on their merits distinct from the Sixth Amendment context. Accordingly, Applicant's requests for relief based on his remaining due process allegations are **DENIED.**

[*Conclusion and signature on following page*]

III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 3rd **day of** April **, 2020.**

Kristi Curtis

KRISTI F. CURTIS
CIRCUIT COURT JUDGE, 3RD JUDICIAL CIRCUIT

Sumter, South Carolina