THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Aug 03 2020

S.C. SUPREME COURT

CERTIORARI TO UNION COUNTY
COURT OF COMMON PLEAS

The Honorable John C. Hayes, III, Trial Judge
The Honorable Thomas A. Russo, Post-Conviction Relief Judge

Appellate Case No. 2019 – 001092

STEPHEN DOUGLAS BERRY, # 188112,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MICHAEL D. DAVIDSON
Assistant Attorney General
SC Bar No. 104114
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

ISSUES PRESENTED ON CERTIORARI

Petitioner's Statement of Issues on Certiorari

1. The PCR judge erred in finding that Trial Counsel was not ineffective for failing to preserve her meritorious objections to the state's expert witness because Trial Counsel made numerous objections after significant amounts of objectionable testimony were presented before the jury, counsel's objections were sustained, and counsel failed to move to strike, ask for a curative instruction, or move for a mistrial, and therefore this Court found that these objections were not preserved for appellate review.

2. The PCR judge erred in finding that Appellate Counsel was not ineffective for failing to properly raise Trial Counsel's objection to the state's expert not being qualified to diagnose the alleged victim with post-traumatic stress disorder where this Court held that Appellate Counsel made a different argument on appeal than that which was argued below and therefore did not rule on the merits.

Respondent's Counterstatement of Issues on Certiorari

1. The PCR court properly found Trial Counsel was not constitutionally ineffective for failing to preserve her meritorious objections to the state's expert witness because Trial Counsel provided a valid trial strategy for why she did not move to strike the objectionable testimony, and Petitioner failed to show that had the issue been preserved it would be meritorious.

2. The PCR judge properly found Appellate Counsel was not constitutionally ineffective for failing to properly raise the issue of Trial Counsel's objection to the State's expert not being qualified to diagnose the alleged victim with post-traumatic stress disorder on appeal because Appellate Counsel used reasonable professional judgment in choosing the strongest, meritorious issues to raise on Petitioner's behalf, and even had the issue been raised, it would not have changed the outcome of Petitioner's appeal

STATEMENT OF THE CASE

Petitioner was convicted of criminal sexual conduct of a minor. During its July 2012 term, the Union County Grand Jury indicted Petitioner for criminal sexual conduct with a minor, second degree (2012-GS-44-0413). Assistant Public Defenders Erik Delaney and Melissa Inzerillo represented Petitioner. The case was prosecuted by Deputy Solicitor John Anthony of the Sixteenth Circuit Solicitor's Office.

On July 17, 2012, Petitioner proceeded to trial before the Honorable Edward Miller. After the jury was unable to reach a unanimous verdict, Judge Miller declared a mistrial. On February 5, 2013, Petitioner proceeded to trial again before the Honorable John C. Hayes, III. On February 8, 2013, the jury returned a guilty verdict and Judge Hayes sentenced Petitioner to imprisonment for fifteen years.

Petitioner filed a timely notice of appeal. League Creech, Esquire, and Chief Appellate Defender Robert Dudek, of the Office of Appellate Defense, perfected the appeal. In his brief to the Court of Appeals, Petitioner raised the following issues:

> I. Did the trial court err in allowing the victim to testify regarding alleged other acts which exceeded the scope of the indictment and which were not criminal in nature?
>
> II. Did the trial court err in failing to suppress inadmissible aspects of the State's expert's testimony?

Following briefing, the Court of Appeals affirmed Petitioner's conviction on July 15, 2015. *State v. Berry*, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015). Of importance to this Petition, on the second issue, the Court of Appeals found Trial Counsel did preserve this issue for appeal and did a full analysis of the State's expert's (Roseborough) testimony. In their analysis,

Roseborough's testimony did not violate *Kromah* and was admissible under *Schumpert*[1] and *Weaverling*[2]. The Court of Appeals held, "Roseborough's testimony explained the common behaviors and characteristics of a child sexual trauma victim. . . . Roseborough's testimony regarding behaviors she witnesses in the victim was proper because it was based on her personal observations." *State v. Berry*, 413 S.C. 118, 775 S.E.2d 51 (Ct. App. 2015). Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on August 14, 2015. The State filed its Return to Petition for Rehearing on September 21, 2015. The Court of Appeals denied the Petition for Rehearing by order dated November 20, 2015.

Petitioner subsequently filed a Petition for Writ of Certiorari on January 11, 2016. The State filed its Return to Petition for Writ of Certiorari t on February 9, 2016. On December 7, 2016, the Supreme Court affirmed the Court of Appeals' decision, as modified. *State v. Berry*, 418 S.C. 500, 795 S.E.2d 26 (2016). The South Carolina Supreme Court believed Roseborough's testimony consisted of three distinct parts: (1) testimony regarding the victim's demeanor witnessed by Roseborough during therapy; (2) testimony explaining and discussing delayed disclosure as part of the Child Sexual Abuse Accommodation Syndrome; and (3) testimony addressing trauma associated with sexual abuse and post-traumatic stress disorder (PTSD). *State v. Berry*, 418 S.C. 500, 795 S.E.2d 26 (2016). The Court held Roseborough's testimony as it pertains to section one and two above was not preserved for appellate review, but the testimony regarding trauma associated with sexual abuse and PTSD was preserved for appellate review. As such, the Court vacated the Court of Appeals analysis and affirmed Applicant's conviction as modified. The Remittitur was returned on December 30, 2016.

---

[1] *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993).
[2] *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999).

On June 30, 3017, Petitioner filed an application for post-conviction relief alleging:

1. "Ineffective assistance of trial, appeal counsel"
    a. "Failure to protect and preserve issue for appeal"
    b. "Did trial counsel for defendant failure to object to prejudicial remarks in the prosecutor's closing arguments, going into details about allege abuse amount to deficient performance?"
    c. "Did trial counsel for defendant failure to object to the inconsistency in the testimony by alleged victim and counsel's failure to raise motion of insufficient evidence deprive defendant of constitutional guarantee to effective assistance of counsel at trial stage?"
2. "Abuse of judge discretion, error of law"
    a. "Judge's ruling based on error of law."
    b. "Did trial judge abuse his discretion by swearing witness in and then limit the witness's testimony to what [sic] see may say given her testimony Ms. Berry?"
    c. "Did trial court [sic] error in allowing the victim to testify regarding alleged other acts which exceeded the scope of the indictment May 1, 2010 through November 22, 2010 which was not criminal in nature?"
    d. "Did trial court [sic] error in failing to suppress two inadmissible aspects of the State's expert witness's testimony by not distinguishing experts qualification field? Testimony exceeded field of expertise was not allowed to diagnose PTSD."
3. "Prosecutorial misconduct/failure to prove penetration"
    a. "Prosecutor stated defendant was guilty"
    b. "Did the opening argument of case the detailed sexual acts allegedly committed and to what each witness was going to testify [sic] too amount [sic] too hearsay and prosecutorial misconduct?"

The State filed a Return and Partial Motion to Dismiss on October 12, 2017, requesting an evidentiary hearing. On February 1, 2019 an evidentiary hearing into the matter was convened before the Honorable Thomas A. Russo. Petitioner was present at the hearing and represented by Assistant Appellate Defender, Leah Moody. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of the State. The State renewed the motion to dismiss Petitioner's allegations of trial court error under the doctrine of *res judicata* and section 17-27-20(b) of the South Carolina Code (2018). The State also renewed the motion to

dismiss Petitioner's allegations regarding abuse of discretion and error of law as not cognizable claims under the Post-Conviction Relief Act, S.C. Code Ann. §17-27-10 to -160. Petitioner proceeded with the hearing on the remaining allegations in his application.

At the hearing, Petitioner testified on his own behalf. Assistant Public Defenders Erik Delaney and Melissa Inzerillo of the Sixteenth Circuit Public Defender's Office testified. Appellate Counsel League Creech, also testified. On June 25, 2019, Judge Russo issued an Order of Dismissal denying relief on Petitioner's allegations of ineffective assistance of both Trial Counsel and Appellate Counsel, Petitioner's allegations regarding trial court err, and Petitioner's allegations regarding error of law and abuse of discretion. Petitioner appealed.

STATEMENT OF THE FACTS

Petitioner sexually molested Victim regularly from May 2010 until Victim reported the abuse to law enforcement in May 2011. Victim lived with her father and siblings after her parents divorced. She also spent time with her grandmother, who lived next door. (App. 101–102). Victim began attending New Life Baptist Church, where Petitioner served as the youth pastor. (App. 102; 142). Victim and Petitioner's daughter became close friends, and became even closer after Petitioner moved to a new house close to Victim's father's house. (App. 102).

After church one Sunday in May 2010, Victim intended to ride home with Petitioner. Instead, he took her to his previous residence telling her he had to pick up some items and make sure his daughter got everything. (App. 107–108). When they got to the home, Victim went into Petitioner's daughter's room to verify nothing was left behind. (App. 108–109). Petitioner came up behind Victim, hugged her, and touched her behind. (App. 109–110). After a brief conversation, Petitioner again approached Victim, hugged her, and told her she was beautiful. He then rubbed Victim's legs, unbuttoned her pants, and then unzipped them. Victim pushed Petitioner away, but he came back and pulled her pants and underwear down. Petitioner then placed his finger inside her vagina. (App. 110–111).

After briefly walking away, Petitioner turned and walked toward Victim again as he unbuttoned and unzipped his pants. Petitioner turned Victim around and attempted to sodomize her. After Victim was able to prevent him from doing so, despite his multiple attempts, Petitioner went to another part of the room and masturbated until he ejaculated. (App. 112–113).

On the second occasion, Petitioner lured Victim to his new house under the guise of showing her where all the bedrooms would be and letting her see the newly refurbished house. Once inside, they sat on the floor to talk about a boy from youth group that Victim liked. While

sitting on the floor, Petitioner attempted to stick his finger inside Victim's vagina. Although she resisted Petitioner several times, Victim "eventually gave in because there was no use in even trying to stop it." (App. 116–117).

Victim testified to several more incidents of sexual battery by Petitioner at his house and at her house. (App. 117–122). She testified the incidents would occur at least once a week during the 2010–2011 school year. She further testified the incidents occurred in her room at her father's house, or over at Petitioner's house. (App. 122–125). Victim testified to one incident where Petitioner went further than only putting his finger inside her vagina. She explained while lying on the floor watching a movie, Petitioner came up behind her and put his penis inside her vagina. Later he told her she "wasn't a virgin anymore." (App. 129–131). After an *in-camera* hearing, Victim testified Petitioner continued to put his finger in her vagina at various times after she turned sixteen. She explained the continuing incidents occurred at her house, in his house, or in his car. (App. 141).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is any probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Appellate court's give great deference to a PCR court's credibility findings because appellate court's lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court properly found Trial Counsel was not constitutionally ineffective for failing to preserve her meritorious objections to the state's expert witness because Trial Counsel provided a valid trial strategy for why she did not move to strike the objectionable testimony, and Petitioner failed to show that had the issue been preserved it would be meritorious.

On appeal, Petitioner claims the PCR court erred in finding that Melissa Inzerillo (Trial Counsel) was not ineffective for failing to preserve her meritorious objections to the State's expert witness because Trial Counsel made numerous objections after significant amounts of objectionable testimony were presented before the jury, counsel's objections were sustained, and counsel failed to move to strike, ask for a curative instruction, or move for a mistrial, and therefore this Court found that these objections were not preserved for appellate review. However, the PCR court properly found Trial Counsel was not constitutionally ineffective because she articulated a reasonably valid trial strategy to explain why she did not move to strike, ask for a curative instruction, or move for a mistrial and that Petitioner failed to show that had the issue been preserved it would be meritorious. This factual finding is supported by ample evidence of probative value and is not controlled by an error of law. Therefore, the PCR courts finding should be upheld and this Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his post-conviction relief action, and when alleging that Trial Counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686

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

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. 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. *Strickland*, 466 U.S. 668.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the

'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." *Id.* at 690.

Here, Petitioner claims that Trial Counsel was constitutionally deficient because she failed to preserve issues for appeal. Specifically, Petitioner argues Trial Counsel failed to move for a corrective instruction, which left the issues raised based on *State v. Kromah* unpreserved. 401 S.C. 340, 737 S.E.2d 490 (2013). However, the PCR court properly denied relief, finding Trial Counsel was not constitutionally deficient because she articulated a reasonable and valid strategic reason for not requesting a curative instruction.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland* at 688-89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. *Strickland* therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where

counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992).

At the PCR hearing, Trial counsel testified she objected to Roseborough's testimony pursuant to *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013), because she initially felt that the State wanted to use her testimony to bolster and to essentially corroborate what the victim had testified to. (App. 898). Trial counsel testified that after her objection, Judge Hayes stepped off the bench so he and the solicitor could read the *Kromah* opinion because it was decided about two weeks prior to Petitioner's trial. (App. 899). Trial Counsel testified she, the solicitor, and Judge Hayes had to "pick through what the case meant" because it was not nearly as well developed as it is now. Trial Counsel explained that ultimately, in synthesizing the case on the spot, Judge Hayes ruled that Ms. Roseborough could testify as to things that were "typical" behaviors but not behaviors that were "consistent". (App. 899). Trial counsel testified she continued to object, but did not move to strike because the defense team was "trying very hard to limit what the [witness] could get into." (App. 900). Trial counsel testified she felt her use of *Kromah* and the objections "gutted the State's use of that witness" because it limited Roseborough's testimony and prevented her from testifying in a way that validated or bolstered the victim. (App. 907).

The PCR court found Petitioner failed to establish how Trial Counsel was constitutionally deficient because Trial Counsel articulated a valid strategic reason for not moving to strike or move for a mistrial. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). Trial counsel testified she continued to object, but did not move to strike because the strategy of the defense team was "trying very hard to limit what the [witness] could get into." (App. 900). Trial counsel testified she felt her use of *Kromah* and the objections "gutted the State's use of that witness" because it limited Roseborough's testimony. (App. 907). The PCR court found this trial strategy valid. This

finding is supported by ample evidence of probative value and not controlled by an error of law; therefore, this finding should be upheld.

Further, the PCR court properly found Petitioner failed to establish any resulting prejudice from the alleged deficiency. Although Petitioner testified he believed the outcome of his case would have been different had Trial Counsel preserved her objections for appellate review, Petitioner failed to show that the claim regarding Roseborough's testimony was meritorious.

This Court previously held an issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. *McHam v. State*, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (*citing McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2003); *Foye v. State*, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. *McHam*, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (*citing Sikes v. State*, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in *McHam*)). Therefore, before a post-conviction relief court can find an applicant has prevailed on a claim of ineffective assistance of Trial Counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

On the merits of the behavioral testimony issue, the courts of this state have examined behavioral testimony in several cases. Initially in *State v. Hudnall*, 293 S.C. 97, 359 S.E.2d 59 (1987), this Court held expert testimony regarding common behavioral characteristics exhibited by child victims of sexual abuse was not admissible to establish abuse had occurred. The Court held this evidence admissible only to rebut a defense claim that the victim's response was inconsistent with such a trauma. *Id.* at 100-101, 359 S.E.2d at 61. This Court joined the majority of other jurisdictions in *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991), holding trauma testimony of a rape victim is relevant to prove the elements of criminal sexual conduct since such evidence makes it more or less probable that the offense occurred.

In *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993), this Court considered expert testimony regarding rape trauma syndrome. The expert testified to characteristics commonly found in sexual assault victims. *Id.* at 505, 435 S.E.2d at 861. The Supreme Court overturned its holding in *Hudnall*, and specifically found: "both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."

The Court of Appeals had an opportunity to address similar behavior testimony in *State v. Weaverling*, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). In *Weaverling*, an expert testified regarding behavior and characteristics of a sexually abused victim. The Court stated: "Expert testimony concerning common behavioral characteristics of sexual assault victims and the range of responses to sexual assault encountered by experts is admissible." *Id.* at 474-475, 523 S.E.2d at 794 (citing *Frenzel v. State*, 849 P.2d 741 (Wyo.1993); *State v. Lujan*, 192 Ariz. 448, 967 P.2d 123 (1998) (opinion testimony describing behavioral characteristics outside jurors' common

experience is permitted as long as it meets other admissibility requirements)). The Court explained:

> Such testimony is relevant and helpful in explaining to the jury the typical behavior patterns of adolescent victims of sexual assault. *Frenzel*, *supra*. It assists the jury in understanding some of the aspects of the behavior of victims and provides insight into the sexually abused child's often strange demeanor. *Id. See also Lujan*, *supra* (when facts of case raise questions of credibility or accuracy that might not be explained by experiences common to jurors—like reactions of child victims of sexual abuse—expert testimony on general behavioral characteristics of such victims should be admitted).

Id. at 475, 523 S.E.2d at 794.

The testimony by Roseborough merely explained the common behaviors and characteristics of a trauma victim and in particular a sexual trauma victim. Such testimony is clearly proper under *Schumpert* and *Weaverling*. Her further testimony regarding behaviors **she witnessed** in the victim was also proper testimony as it was based on her **personal observations**. The Roseborough's concern that resulted from the behaviors is well within the gambit of *Schumpert* and is not impermissible. As a result, Roseborough's testimony was properly admitted.

In addressing Petitioner's argument that Roseborough's testimony constituted vouching or bolstering and was a violation of *Kromah*, the Court of Appeals held Roseborough's testimony did not violate the dictates of *Kromah* because it did not impermissibly vouch for or bolster the victim's testimony. This Court in *Kromah* explained: "Our courts have previously held that '[t]he assessment of witness credibility is within the exclusive province of the jury,' and that witnesses generally are 'not allowed to testify whether another witness is telling the truth.'" *Kromah*, 401 S.C. at 358, 737 S.E.2d at 500 (quoting *State v. McKerlev*. 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). The expert in Petitioner's case testified extensively to observed behaviors, testimony specifically allowed under *Kromah*. *Kromah*, 401 S.C. at 360, 737 S.E.2d at 500

(allowing witness to testify to "any personal observations regarding the child's behavior or demeanor"). At no time did Roseborough indicate the child was telling the truth regarding her victimization at the hand of Petitioner. Accordingly, the trial court properly admitted the testimony as it did not vouch for or impermissibly bolster the victim's testimony.

In conclusion, because Petitioner failed to show his underlying claim is meritorious and would have resulted in reversal had it been preserved for appeal, the PCR court properly found Petitioner failed to establish prejudice under *Strickland*. The PCR court also properly found that Petitioner failed to show Trial Counsel's failure to preserve the issues for appeal was constitutionally deficient because Trial Counsel articulated a valid trial strategy explaining why she did not act to preserve the issues. There is ample evidence of probative value to support these findings, which are not controlled by any error of law. Accordingly, these findings should be upheld and this Court should deny certiorari.

II. The PCR judge properly found Appellate Counsel was not constitutionally ineffective for failing to properly raise the issue of Trial Counsel's objection to the State's expert not being qualified to diagnose the alleged victim with post-traumatic stress disorder on appeal because Appellate Counsel used reasonable professional judgment in choosing the strongest, meritorious issues to raise on Petitioner's behalf, and even had the issue been raised, it would not have changed the outcome of Petitioner's appeal.

Petitioner argues that Appellate Counsel was constitutionally ineffective for failing to argue on appeal that the trial court should not have admitted testimony from the State's expert qualified to discuss PTSD and its symptoms. Petitioner asserts that had Appellate Counsel properly made this argument, the court of appeals would have found on the merits in his favor, and as a result, his conviction would have been overturned. However, the PCR properly denied relief because Appellate Counsel used reasonable professional judgment in choosing the meritorious issues to raise on Petitioner's behalf, and even had the issue been raised, it would not have changed the outcome of Petitioner's appeal.

A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). "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, 397 S.E.2d 523 (1990). The Court declined to adopt different rules for appellate and trial counsel in terms of strategy. *State v. Tisdale*, 357 S.C. 474, 594 S.E.2d 166 (2004). Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). Where the strategic decisions 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. *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985). The burden of proof is upon petitioner to show counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). The

petitioner must then prove that because of appellate counsel's deficient performance there is a reasonable probability that, but for appellate counsel's unprofessional errors, the result of the proceeding (*appeal not trial*) would have been different. *Id.*

Here, the PCR court found Appellate Counsel was not deficient, as she raised the issues preserved for appeal she believed to have the strongest meritorious grounds on Petitioner's behalf. (App. 960.) Appellate Counsel testified when she reviewed the transcript and the record, she looked for the best arguments that could possibly over turn the case. (App. 892). Appellate Counsel testified in her opinion, the two best issues were the bad acts evidence and the expert testimony evidence. (App. 892). Appellate Counsel testified with regard to the expert testimony issue, her argument revolved around the *Kromah* issue because it was "the biggest one that jumped out immediately." (App. 892). Based on this testimony, Appellate Counsel was not constitutionally deficient because she chose to brief the issues she reasonably found to be the strongest and most meritorious. *Jones v. Barnes*, 463 U.S. 745 (1983) ("Appellate counsel has a professional duty to choose among potential issues according to their merit."). The PCR court's findings are supported by probative evidence and not controlled by an error of law. Accordingly, these findings should be upheld and this Court should deny certiorari.

The PCR court also found Petitioner failed to establish any resulting prejudice from Appellate Counsel's alleged deficiency. Petitioner argues he was prejudiced because Appellate Counsel's alleged deficiency left the issue procedurally barred from appellate review. However, this argument is without merit because Petitioner cannot show that even had Appellate Counsel raised the issue, there was a reasonable probability that the result of the appeal would have changed. Petitioner contends the State's expert was not qualified to render an opinion regarding the victim's symptoms of and suffering of PTSD because she was a social worker and not a doctor.

This same argument was made and rejected in *State v. Henry*. 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997). Thus, on the merits, the State's expert's discussion of PTSD and its symptoms were appropriate in light of her qualifications.

In *Henry*, the Court of Appeals analyzed the appropriateness of a social worker rendering an opinion regarding PTSD without being a medical doctor. The Court found a medical background was not necessary as long as the expert demonstrated the requisite training and experience in the subject field. *Id.* at 277-278; 495 S.E.2d at 468–469. Specifically, the Court enounced:

> Henry does not challenge the substance of Badger's testimony. Rather, he argues the State failed to present evidence she was qualified to give the diagnosis of PTSD. Henry cites her lack of a medical degree. The challenge mounted by Henry blithely ignores the recognized principle of law that a witness is competent as an expert provided the witness has acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that she is better qualified than the jury to form an opinion on the particular subject of testimony. *See Botehlo v. Bycura*, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984). Luculently, in the case *sub judice*, Coles Badger possessed the requisite skill, training, experience, learning, and knowledge to render an opinion in regard to PTSD.

Henry, 329 S.C. at 277-278, 495 S.E.2d at 468-469.

The *Henry* Court referenced its prior opinion in *Honea v. Prior*, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988). While a civil case, the Court in *Honea* analyzed the propriety of a social worker offering testimony regarding a sexual assault victim's psychiatric diagnosis. The Court explained:

> To qualify as an expert, a person must have acquired by study or practical experience such special knowledge of the subject matter of his or her testimony as would enable the person to give guidance and assistance to the jury in solving a problem about which the jury's good judgment and average knowledge is inadequate. *Botehlo v. Bycura*, 282 S.C. 578, 320 S.E.2d 59 (Ct.App.1984); *Allen v. State*,

> 365 So.2d 456 (Fla.Dist.Ct.App.1978), dismissed 368 So.2d 1373 (1979). There is no exact requirement concerning how knowledge or skill must be acquired. *Hopkins v. Comer*, 240 N.C. 143, 81 S.E.2d 368 (1954). A witness may be competent to testify as an expert although the witness acquired his or her knowledge through practical experience and not by scientific study, training, or research. 31 Am.Jur.2d Expert and Opinion Evidence § 27 at 526 (1967). Even where the problem presented may be one that usually requires some scientific knowledge or training, a person with long experience may testify as an expert although he or she did not pursue a special study of the matter. *Id.* at 526-27.

Honea, 295 S.C. at 530-531, 369 S.E.2d at 849. The Court concluded:

> Considering each social worker's education, her post-graduate training, her clinical experience with victims of sexual assault, and her opportunities to observe Honea, we hold the trial judge committed no abuse of discretion in determining that each social worker was qualified as an expert to give opinion evidence regarding Honea's mental condition.

Id. at 531, 369 S.E.2d at 849. The Court reiterated its opinion in its ruling on the Petition for Rehearing:

> In our decision, we also have acknowledged that one other than a psychiatrist may give an expert opinion concerning a person's mental condition. *See Commonwealth v. Gallagher*, 353 Pa.Super. 426, 510 A.2d 735 (1986) (wherein the court upheld the trial court's admission of expert testimony on rape trauma syndrome from a witness who did not have a medical degree and listed cases supporting its conclusion that an expert witness need not hold a medical degree in order to testify that a complainant exhibits symptoms of rape trauma syndrome).

Honea, 295 S.C. at 537, 369 S.E.2d at 852.

At trial, Roseborough testified she was a psychotherapist and a licensed, independent social worker. Her practice specialized in working with adolescents, young children, and their families. She testified she had a Bachelor of Arts degree in psychology, and a master's degree in social work. She further testified to her extensive training beyond her master's degree to enable her to work specifically with children. (App. 444–445).

Roseborough testified she had over 800 hours of training regarding child sexual abuse and working with abused children. She testified she has worked with sexually abused children since 1984 when she started at a residential treatment facility. She then worked for the Department of Social Services (DSS) in their sexual abuse unit handling child sexual abuse investigations and became a supervisor in the unit. After obtaining her master's degree, she worked at Safe Homes Rape Crisis in Spartanburg and developed their child therapy program for children who had been sexually abused. She has co-developed training curriculum with the College of Social Work to train DSS caseworkers to identify, diagnose, and treat child sexual abuse. Since 1995, she has been in private practice also working with child victims of sexual abuse. (App. 446–447). Finally, Roseborough testified she has been qualified in family and general sessions court as an expert in child sexual abuse assessment and treatment in eight or nine counties, and she has testified at trial as an expert over two hundred times. (App. 447–448).

Considering the Roseborough's education, training, clinical experience, and years of treating and observing the victim in this case, even had this issue been raised on appeal, the Court of Appeals would likely have found that the trial court did not commit an abuse of discretion in allowing testimony regarding the child's behavior and the concern Roseborough had that the behaviors were symptomatic of PTSD.[3] Therefore, because the issue would not have been successful on appeal, Petitioner failed to meet his burden of proving but for Appellate Counsel's alleged deficiency there is a reasonable probability that the result of the proceeding would have been different.

[3] It is important to not no actual diagnosis of PTSD was rendered by the State's expert. She expressed concerns but referred the victim to a psychiatrist. (App. 477; 479–480).

Ultimately, the PCR court properly found that Petitioner failed to meet his requisite burden of establishing constitutional ineffectiveness of Appellate Counsel. These findings are supported by ample evidence of probative value and are not controlled by an error of law. Accordingly, these findings should be upheld and this Court should deny certiorari.

CONCLUSION

Because the PCR court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, the State requests the opportunity to fully brief the issues raised.

Respectfully submitted,

ALAN WILSON
Attorney General

MICHAEL D. DAVIDSON
Assistant Attorney General
S.C. Bar No. 104114

BY: 
ATTORNEYS FOR RESPONDENT

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

August 3, 2020