

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Court of Common Pleas
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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

LANCE AUSTIN WILLIAMS,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

1. Whether the PCR court erred in presuming prejudice under United States v. Cronic where respondent's trial attorneys presented a defense and the surrounding circumstances failed to reach such a magnitude that no attorney could have provided effective assistance of counsel.

2. Whether the PCR court erred in concluding that respondent's trial attorneys provided ineffective assistance of counsel under Strickland v. Washington in their pre-trial preparation and decisions not to call an expert witness or object to photographs of the victim's injuries.

STATEMENT OF THE CASE

In July 2010, the Lexington County Grand Jury indicted Lance Williams (respondent) for criminal sexual conduct with a minor and unlawful neglect of a child. (App. 638-41). The case proceeded to trial on March 30, 2011. (App. 1). The Honorable R. Knox McMahon presided. (App. 1). Assistant Solicitor Suzanne Mayes represented the State, and attorneys James Snell and Wayne Floyd represented respondent. (App. 1).

After a two-day trial, the jury found respondent guilty as charged on both indictments. (App. 595, l. 4-13). The trial court sentenced respondent to twenty-five years for criminal sexual conduct with a minor and ten years for unlawful neglect of a child. (App. 636, l. 12-17). The court ordered the sentences to run concurrently. (App. 636, l. 17-18).

Respondent filed a timely appeal. Attorneys Richard Harpootlian, David Scott, and Graham Newman represented respondent on appeal. (App. 642). In a published decision, the Court of Appeals affirmed respondent's convictions. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). Respondent subsequently petitioned this Court for certiorari, which was denied on July 24, 2014. (App. 766).

Respondent then filed an application for post-conviction relief (PCR) alleging ineffective assistance of counsel. (App. 769). The Honorable Eugene C. Griffith presided over an evidentiary hearing on January 30-31, 2017. (App. 804, l. 9-13). After the hearing, the court granted respondent's motion to amend his application to conform his pleadings to the evidence. (App. 1187-88). The PCR court subsequently granted respondent's application and vacated the convictions. (App. 1223). The State filed a Rule 59(e) motion to alter or amend judgment, which was denied on August 18, 2017. (App. 1265).

The State timely appealed the PCR court's order. On August 5, 2019, this Court granted the State's petition for a writ of certiorari. The State submits this brief requesting the PCR court's order be reversed and respondent's convictions reinstated.

STATEMENT OF FACTS

Law Enforcement's Investigation

Respondent began dating Brittany B. in December 2009. (App. 149, l. 2). The two had known each other for years, and their relationship progressed quickly. (App. 148, l. 21; 485, l. 15-16). By April 2010, respondent was spending the night with Brittany three to four times a week. (App. 150, l. 10). They even discussed buying a home and moving in together. (App. 152, l. 21-22). Brittany had a fifteen month old daughter (victim) from a prior relationship, and respondent actively assisted with the daily tasks of raising the child. (App. 129, l. 4; 147, l. 16-21; 155, l. 4). For example, respondent helped bathe, dress, feed, and discipline the victim. (App. 155, l. 17-20; 156, l. 1-5). According to Brittany, respondent wanted to become the victim's stepfather. (App. 154, l. 11-12).

On April 15, 2010, Brittany had to help her father with a project at his home in Lexington. (App. 156, l. 23-24). Respondent had stayed over the night before and agreed to watch the victim while Brittany was away. (App. 156, l. 25; 157, l. 17). At the time, Brittany and her daughter were living in a trailer in Swansea with LeeAnn Harvey, a relative through marriage. (App. 151, l. 7; 183, l. 1-4). When Brittany left at 8:00 am, her daughter was still sleeping. (App. 157, l. 1-6). Respondent and LeeAnn subsequently got the victim dressed, fed, and ready for the day. (App. 187, l. 21-25; 188, l. 1-6). LeeAnn also changed the victim's diaper and noticed nothing out of the ordinary. (App. 188, l. 12-17). At around 11:30 am, LeeAnn went to run errands, leaving respondent and the victim alone in the trailer. (App. 189, l. 2-19). When LeeAnn left, the victim was fully dressed with her hair fixed in a bow. (App. 192, l. 8-17).

Around lunchtime, Brittany called respondent to check in. (App. 160, l. 1-8). Respondent told her that the victim was taking a nap but had fallen outside earlier. (App. 160, l. 9-10).

According to respondent, the victim bruised her forehead in the fall. (App. 160, l. 10). Brittany asked respondent to drop the child off with the paternal grandparents later that day. (App. 495, l. 10-14). The victim's father had custody that weekend, so the paternal grandparents were going to pick her up. (App. 170, l. 20-22).

LeeAnn returned to the trailer at around 1:00 pm to find the front door locked, which was strange. (App. 190, l. 22-25). LeeAnn never leaves her door locked because the trailer is situated behind her parents' house. (App. 190, l. 5-9). In order for a trespasser to come to her door, he would first have to go through her parents' front yard. (App. 190, l. 5-9). As LeeAnn knocked on her front door, she could hear the victim inside crying. (App. 191, l. 1-4). Respondent did not answer the door, so LeeAnn retrieved a key from her parents' house. (App. 191, l. 7-15). When she returned, LeeAnn saw the victim running down the hallway wearing only a diaper. (App. 191, l. 23; 192, l. 1-4). The victim's hair was also a mess. (App. 192, l. 9-20). Respondent explained that he had to give the victim a bath because she took a nap and got sweaty. (App. 192, l. 23).

At around 6:00 pm, respondent dropped the victim off with the paternal grandparents. (App. 131, l. 14-15; 507, l. 5-6). The grandparents were on their way to another grandchild's little league baseball game and brought the victim along. (App. 131, l. 11-16). Once there, the victim's aunt noticed that the child looked like a "zombie." (App. 132, l. 25). The victim usually acted like an "outgoing, energetic, happy, little girl." (App. 135, l. 17-18). Not so on that day. Instead, the victim resisted anyone touching her. (App. 135, l. 21-22). The aunt also noticed marks and bruises on the victim's cheek, ears, head, and arms. (App. 133, l. 6-13). In fact, the victim had visible fingerprints on her cheek, as if someone had slapped her in the face. (App. 134, l. 16). The aunt did not want to make a scene at the little league game, but called Brittany to tell her about the visible bruises. (App. 133, l. 21-24).

When the family returned home they found additional bruising and swelling on the child's genitalia. (App. 136, l. 6-9). After discovering these injuries, they took the child to the emergency room. (App. 137, l. 3-4). Brittany rushed to meet them on their way to the hospital. (App. 137, l. 5). While en route, she called respondent to tell him that something was wrong with her daughter. (App. 163, l. 12-13). Respondent stated that he "didn't do anything to her, she didn't get hurt under my care." (App. 163, l. 18-19).

The child would stay in the hospital for four days. (App. 138, l. 11). Upon arrival, the victim underwent a CT scan, revealing a large hematoma on the back of her head and petechial hemorrhages.¹ (App. 244, l. 19-20; 319, l. 15-17). A forensic nurse examined the victim that night, noting that the child's demeanor was agitated, tearful, and "hyper-vigilant." (App. 237, l. 5-10; 265, l. 21). Although the victim would drift off to sleep, she would wake back up at the slightest noise. (App. 237, l. 7-12). The nurse also observed bruises on the child's forehead, neck, ears, arms, and legs. (App. 241, l. 3-23; 244, l. 1-5; 247, l. 10-19). Additionally, the victim had a bloody lip and abrasions to her neck and thigh. (App. 241, l. 22; 242, l. 2; 244, l. 13-15; 248, l. 4-18).

The nurse removed the child's diaper and found bloody streaks. (App. 255, l. 24-25). An examination of the victim's genitalia revealed swelling, abrasions, and petechial hemorrhages to the labia. (App. 266, l. 11-23). The victim's clitoris was also swollen. (App. 266, l. 11-12). The nurse tried to examine the victim's hymen, but could not completely see it because the child would not cooperate. (App. 267, l. 11-25). The nurse explained that an examination of the hymen is

¹ Petechiae are small, ruptured capillaries that create pinpoint reddened areas on the skin. (App. 245, l. 2-7).

“very, very painful,” and the child would not sit still. (App. 268, l. 2-5). The nurse believed the child’s injuries to the genitalia were consistent with trauma. (App. 271, l. 5).

After the forensic nurse examination, the child was admitted to the pediatric intensive care unit. (App. 284, l. 20-21). Dr. Susan Luberoff, a pediatrician, examined the victim the following day. (App. 316, l. 24). She found the victim’s external injuries were consistent with physical abuse. (App. 333, l. 5-6). For example, Dr. Luberoff believed the hematoma to the scalp and bruising along the ears arose from a single blow to the head from “a fair amount of force.” (App. 326, l. 8-22). She explained that although a child can accidentally injure an ear, typically the injury “doesn’t go through the head and show up on the other side” like the victim’s injury. (App. 326, l. 16-17). Dr. Luberoff further identified three bruises on the victim’s elbow, which appeared to be a “grip mark” from forcefully grabbing the child’s arm. (App. 329, l. 1-7). The victim had similar bruising on her right leg that also appeared to be a grip mark. (App. 329, l. 12-17). Along the victim’s neck, Dr. Luberoff observed a series of bruises indicative of jerking the child by her clothing. (App. 330, l. 1-9). Additionally, the victim had bruising to the forehead, face, and jaw line. (App. 327, l. 12; 328, l. 13-17; 329, l. 23-25). The child’s upper lip was also split, indicative of a fresh injury. (App. 331, l. 14-15).

Dr. Luberoff explained that ordinarily she would expect to find small, scattered bruises on an active child’s shins or other prominent bony parts. (App. 333, l.10-14). The absence of any bruising there suggested that the child was neither excessively clumsy, nor suffered from a blood disorder that would make her susceptible to bruising from incidental contact. (App. 333, l. 14-20). According to Dr. Luberoff, the distribution, location, and pattern of the injuries “very strongly support the diagnosis of inflicted injury or physical abuse.” (App. 334, l. 1-9). Although Dr.

Luberoff could not precisely date the injuries, she believed they were inflicted within the previous day or two. (App. 334, l. 20-21).

Dr. Luberoff also conducted an examination of the victim's genitalia, first noting an arc of bruises across the external pubic bone. (App. 335, l. 10-12). Compared to photographs taken by the forensic nurse, the bruises appeared much more evident, indicating they were still "evolving" and "quite fresh." (App. 344, l. 19-20). The child's internal genitalia was injured as well. (App. 335, l. 12-25). She had tearing on both sides of her labia and bruising to the hymen, which Dr. Luberoff characterized as "penetrating injuries." (App. 335, l. 17-19; 343, l. 15-16). Dr. Luberoff explained that "the hymen is within the vaginal area... and the only way to get there is by penetrating into that area." (App. 342, l. 12-15). Although Dr. Luberoff could not precisely date the injuries to the genitalia, she believed they occurred within the past thirty-six hours. (App. 349, l. 9).

After Dr. Luberoff's physical examination, law enforcement developed a timeline to determine who was caring for the child when she sustained these injuries. (App. 383, l. 16-22). Through interviewing family members, a detective learned that respondent had been taking care of her immediately before the injuries were discovered. (App. 384, l. 23-24). As the detective left the hospital on April 16, 2010, he called respondent, who agreed to meet at the Sheriff's Department to "clear it up." (App. 385, l. 13).

Respondent arrived at the Sheriff's Department later that night. (App. 386, l. 5-6). When the detective said that the little girl was covered in bruises, respondent explained that he already notified Brittany that she had fallen. (App. 387, l. 22-23). The detective then showed respondent a photograph of the "grip mark" on the arm. (App. 388, l. 1-4). Respondent admitted that he picked the victim up by her arm, explaining that he lifts up his own daughter that way and

understands it is a bad practice. (App. 388, l. 4-6). The detective also showed respondent a photograph of bruising behind both of the victim's ears. (App. 388, l. 9-13). Respondent explained that he hit the child twice on one side of the head after she threw her toys. (App. 388, l. 15-17). Respondent later slapped the child twice on the other side of the head after she threw her bottle down. (App. 388, l. 17-21).

The detective finally showed pictures of the victim's bruising on the forehead and external genitalia. (App. 388, l. 21-25; 389, l. 1-2). Respondent stated that the victim bruised her forehead when she fell outside. (App. 389, l. 2-4). As for the external genitalia, respondent explained that the victim has eczema, and he must have pressed too hard on the area while applying cream. (App. 389, l. 6-8). Respondent further advised that he has nerve damage in his hand, which creates problems in applying the proper amount of force. (App. 389, l. 13-16). To demonstrate his injury, respondent squeezed the detective's hand and punched the desk in the interview room. (App. 389, l. 17-23). At that point, the detective advised respondent of his *Miranda* rights. (App. 389, l. 23-25)

Respondent subsequently provided a written statement, in which he confirmed that the bruising to the victim's ears arose from two slaps to each ear. (App. 395, l. 1-5). He also confirmed that the bruises to the arm occurred from lifting the child up by her elbow. (App. 395, l. 6-7). The victim's bruising along the neck occurred while playing outside because he "might have grabbed her shirt collar to catch her and bring her back." (App. 1112). As for the child's genitalia, respondent wrote that "the bruising around her privates is from the cream I applied for her dry skin, as I applied to [sic] much force do [sic] to lack of feeling in hand." (App. 1112).

After respondent provided a written narrative, the detective asked several follow-up questions. These too were in writing. The final question was, "what happened to [victim's] vagina

(bruises)?" (App. 1113). Respondent replied, "Was angry that the poop got in between her and used excessive force to clean (wipe) her. Poop got in between her lips, used excessive force to clean her." (App. 1113). At the conclusion of the interview, the detective placed respondent under arrest. (App. 399, l. 24-25).

Counsel's Pre-Trial Representation

After his arrest, respondent retained attorney James Snell (trial counsel) to represent him. (App. 817, l. 20). Trial counsel met with respondent approximately twenty times. (App. 820, l. 5). During these visits, respondent initially denied causing any of the victim's injuries. (App. 820, l. 11-14). As such, respondent opposed pursuing a defense that the victim's genital injuries arose from applying too much force during a medically necessary diaper change. (App. 877, l. 8-11). Instead, respondent's initial defenses were: (1) someone else caused the victim's injuries, and (2) the injuries were not serious enough to warrant the charges. (App. 873, l. 18-22).

As respondent awaited trial, counsel worked on the case for almost a year. (App. 818, l. 6). Trial counsel first reviewed and organized the discovery from the State. (App. 1028, l. 13-16). In addition to speaking to law enforcement officers, trial counsel hired an investigator to interview witnesses. (App. 832, l. 1-3; 834, l. 13-14; 846, l. 3-16). Trial counsel explained that he preferred to have an investigator contact witnesses, as opposed to doing it himself, so that he could impeach the witness at trial if necessary. (App. 841, l. 13-22).

In addition to hiring an investigator, trial counsel consulted with several experts in preparing respondent's defense. First, a registered nurse reviewed and discussed the significance of the medical records with counsel. (App. 855, l. 3-8). The nurse explained that the victim's injuries to the genitalia were not permanent and did not necessarily arise from penile penetration.

(App. 856, l. 13-6). Additionally, the nurse discussed whether the victim's injuries could have arisen while cleaning the child during a diaper change. (App. 857, l. 1-4).

Dr. Anne Abel, a pediatrician at MUSC Children's Hospital, provided an expert assessment as well. (App. 1120). Specifically, Dr. Abel considered whether the child suffered from lichen sclerosis, a skin condition affecting female genitalia. (App. 898, l. 15-23). Dr. Abel found no evidence of lichen sclerosis. Rather, the victim suffered from "acute genital trauma and acute general physical trauma." (App. 1120). Dr. Abel reduced her findings in a letter to trial counsel. (App. 1120).

At the request of respondent's family, trial counsel also conferred with Dr. Edward Friedlander, a pathologist at the Kansas City University College of Osteopathic Medicine. (App. 907, l. 1-5; 1109). Dr. Friedlander subsequently rendered an opinion in an undated letter to counsel. (App. 1109). He noted that respondent's situation was "classic" in that he found himself the caregiver to another man's child. (App. 1109). Dr. Friedlander believed respondent "becomes frustrated with the situation, and while changing a diaper loses control of himself and takes out his anger physically on the child." (App. 1109). Although Dr. Friedlander could not address any potential psychological injury, he did not believe the child's physical injuries were permanent. (App. 1109). Dr. Friedlander additionally believed there was no evidence to indicate respondent injured the child in an act of sexual gratification.² (App. 1109).

Dr. Friedlander additionally spoke with trial counsel over the phone. During the conversation, Dr. Friedlander "made it clear to [trial counsel] that we could not think of any way to defend the idea that this child was manhandled." (App. 956, l. 16-19). According to Dr.

² In concluding his letter, Dr. Friedlander noted "All this is true to a reasonable degree of medical certainty and on my word as a Christian gentleman." (App. 1110).

Friedlander, trial counsel was focused on whether the victim's injuries could have arisen without digital penetration of the vulva. (App. 956, l. 21-25; 957, l. 1-10). Dr. Friedlander stressed that they could not. (App. 957, l. 8). The two also discussed payment for potential testimony. (App. 959, l. 13-14). In quoting his fee, Dr. Friedlander stated that "your client was an asshole for the way he handled the kid and I'm going to charge a thousand dollars." (App. 960, l. 3-4).

Additionally, trial counsel had respondent undergo two psychological evaluations to assess any predisposition to pedophilia. (App. 903, l. 16-24). If the evaluations were favorable, counsel planned on presenting the findings to the solicitor during plea negotiations. (App. 903, l. 25). The first evaluation, by Dr. William Burke, was unfavorable to respondent. (App. 904, l. 3-23). As such, trial counsel did not send the solicitor a copy of the report. (App. 903, l. 25). The second evaluation, by Dr. Selman Watson, assessed respondent did not have an attraction to underage children. (App. 924, l. 2-4). Trial counsel gave the solicitor a copy of the report in an attempt to convince her that a plea offer would be appropriate. (App. 924, l. 6-11). The solicitor declined to enter plea negotiations.³ (App. 1089).

Instead, counsel received a trial notice on March 18, 2011. (App. 825, l. 23-25; 826, l. 1-3). One week later, the solicitor gave him a witness list. (App. 829, l. 4-18; 1053-54). As counsel was preparing for trial, respondent's mother asked whether another attorney could assist him at trial. (App. 847, l. 20-25; 848, l. 9-13; 1095). Apparently, she believed an older attorney would present better to a jury. (App. 867, l. 21-23). Counsel replied that he was ready for trial, but would not turn down any help. (App. 1095). Knowing that attorney Wayne Floyd (co-counsel) was a

³ In explaining her position, the solicitor noted several factors, including the extent of the victim's injuries and the recommendation of the victim's family. (App. 1089).

“fantastic trial lawyer” and “would do an excellent job,” counsel reached out to him. (App. 868, l. 25; 869, l. 4). Co-counsel was retained the week of the trial.⁴

Respondent’s Trial

Respondent’s case was called for trial on March 30, 2011. After jury selection, respondent’s trial attorneys made several pre-trial motions. First, co-counsel moved to suppress respondent’s verbal and written statements to law enforcement. (App. 84, l. 15-16). Second, trial counsel moved to quash the indictment on procedural grounds. (App. 91, l. 6-7). The trial court denied both motions. (App. 84-90; 93, l. 18).

Counsel also moved to prohibit the State’s expert witnesses from referring to the alleged crime as a “sexual assault.” (App. 95, l. 7-15). Specifically, trial counsel noted that the relevant statute defined sexual battery as any intrusion except for medically recognized purposes. (App. 94, l. 4-8). In other words, the battery did not have to be sexual in nature. (App. 95, l. 9-12). Counsel noted that the evidence would reveal that the victim’s injuries arose not from a sexual assault, but from a diaper change. (App. 97, l. 2-3). As such, he argued that referring to the crime as a sexual assault would confuse the jury, be unduly prejudicial, and exceed the bounds of proper expert testimony. (App. 94, l. 8-15; 97, l. 1-7). The trial court denied counsel’s motion. (App. 100, l. 6-8).

⁴ There is some discrepancy regarding exactly when co-counsel became involved in the case. Co-counsel testified that he began working on the case on the Monday of the trial term. (App. 990, l. 9-10). According to co-counsel, the solicitor called the case for trial on Wednesday. (App. 990, l. 12). Trial counsel’s case notes indicate that he contacted co-counsel the day before the trial began. (App. 1095).

The State called twelve witnesses in its case-in-chief. (App. 3, l. 3-16). Brittany and LeeAnn Harvey established that the victim had no physical injuries⁵ prior to being left with respondent. (App. 157, l. 18-25; 158 l. 1-5; 159, l. 1-14; 188, l. 25). The victim's aunt then established that she discovered the injuries after respondent dropped the child off with the grandparents. (App. 133, l. 6-13). LeeAnn Harvey's mother, Tommi Hutto, also testified that while the victim was under respondent's care, she did not see them playing outside in the yard. (App. 215, l. 8). Hutto explained that she operates a hair salon adjacent to Harvey's yard and would have seen them playing outside. (App. 213, l. 10-25). The State offered Hutto's testimony to discredit respondent's statement that the victim bumped her head while playing outside. Additionally, the State introduced respondent's verbal and written statements through the detective's testimony. (App. 387-399; 1112-1113).

Respondent's trial attorneys extracted concessions from each witness on cross-examination. The aunt conceded that the child's injuries did not initially appear serious. (App. 146, l. 3-7). In fact, the family did not leave the little league baseball game to seek medical attention. (App. 144, l. 25). The aunt also admitted that there were inconsistencies between her trial testimony and the statement she initially gave law enforcement. Specifically, the aunt never told law enforcement that the victim's bruises appeared in the shape of fingerprints. (App. 145, l. 11-12). Additionally, LeeAnn Harvey conceded that her trailer did not have central air conditioning. (App. 198, l. 12). Co-counsel elicited this testimony to explain respondent's statement that the victim got sweaty and needed a bath. Furthermore, Hutto conceded that she

⁵ As noted above, LeeAnn changed the victim's diaper before leaving her with respondent and saw nothing unusual. (App. 188, l. 11-17).

cannot see LeeAnn's front yard from the hair salon. (App. 219, l. 15-16). Thus, if the victim fell in the front yard, as respondent claimed, Hutto could not have seen it.

Co-counsel also extracted concessions from the detective. For example, the detective testified that respondent gave two explanations for the victim's genital injuries. Initially, respondent stated that "the bruising around the privates" arose from using too much force while applying skin cream. (App. 1112). Later, in response to a follow up question, respondent said that the bruising to the victim's vagina occurred while wiping her during a diaper change. (App. 407, l. 24). The apparent inconsistency implied respondent was fabricating an explanation for the injuries. But on cross-exam, the detective admitted that respondent was referring to photos of two separate injuries: the external bruising to the pubic area and the internal genital bruising.⁶ (App. 410, l. 9-13).

In addition to these lay witnesses, the State also presented evidence of the victim's medical treatment and examination. The forensic nurse described the victim's demeanor and physical injuries that night. (App. 237, l. 5-14; 241-60; 264-84). In support of her testimony, the State introduced the photographs she took during the examination, as well as anatomical diagrams used

⁶ The detective also conceded that respondent voluntarily agreed to appear for an interview. In fact, respondent could have gone to a wedding in Alabama. (App. 406, l. 3-4). Additionally, co-counsel asked whether respondent "vehemently denied" penetrating the victim. (App. 402, l. 11-12). After the detective's response, co-counsel confronted him with his report that noted respondent "reiterated that he would never penetrate a little girl like that." (App. 403, l. 5-11).

to document the location of the victim's injuries.⁷ Over co-counsel's objection, the nurse also testified that the victim's injuries were consistent with trauma.⁸ (App. 271, l. 5).

On cross-exam, the nurse conceded several points. First, she acknowledged that she took her photos after the victim had been in the hospital for several hours. (App. 292, l. 20-23). During that time, the victim was given morphine, which could affect the child's appearance in the photos. (App. 294, l. 10; 295, l. 1-5). Second, the nurse conceded that according to the intake history, the victim's family had changed the diaper before going to the hospital. (App. 296, l. 7). Third, the nurse admitted that she could not precisely determine when the victim's bruising and abrasions occurred. (App. 297, l. 1-9).

After the nurse testified, Dr. Luberoff took the stand. She testified that the victim's injuries to the head, ears, arms, and legs supported a diagnosis of physical abuse. (App. 333, l. 1-20). Dr. Luberoff also assessed that the arc-like pattern of bruises on the victim's pubic area arose from blunt force trauma. (App. 345, l. 1). Based on this pattern, Dr. Luberoff believed the child could have been bitten, hit a number of times in that area, or struck with an object shaped in that pattern.⁹ (App. 345, l. 2-10). As for the injuries to the internal genitalia, Dr. Luberoff characterized the

⁷ Co-counsel objected to the admission of the diagrams, but did not object to the introduction of several photographs of the victim's injuries. (App. 239, l. 15-23; 246, l. 2-7; 251, l.1-3; 276, l. 12).

⁸ The solicitor also asked the nurse whether other medical personnel observed vaginal bleeding, but co-counsel prevented this line of questioning. The trial court sustained co-counsel's hearsay objection. (App. 260, l. 22).

⁹ Dr. Luberoff testified that "a curved arrangement of a series of bruises raises the possibility, when we're looking at injuries in children, of bite mark. That's the type of pattern that we can see in a bite mark. **This doesn't have to be a bite mark. It can be another kind of blunt force trauma.** It can be where the child has been struck a number of times in that area or struck with an object, with a pattern; but it raises the concern for a bite mark." (App. 345, l. 2-10)(emphasis added).

bruised hymen as a “penetrating injury.” (App. 347, l. 13). According to Dr. Luberoff, digital penetration could cause this type of injury, but standard medical care, including a routine diaper change, would not. (App. 347, l. 18-23; 348, l. 2-7).

On cross-exam, Dr. Luberoff conceded that the victim’s medical records included a history of eczema, which required a prescription for skin cream. (App. 350, l. 9-14). In fact, according to those records the victim had a “rash all over.”¹⁰ (App. 377, l. 3). Dr. Luberoff also conceded that she could not precisely date the child’s bruises. (App. 356, l. 6). She admitted that some of the bruises could have occurred before respondent was alone with the child. (App. 356, l. 14-24).

Regarding the child’s genitalia, Dr. Luberoff confirmed that although the hymen is an “internal organ,” it is external to vagina. (App. 362, l. 17-21). She conceded that contact to the external genitalia and the labia can occur while wiping a child during a diaper change. (App. 377, l. 25). After a particularly messy diaper, a caregiver might need to separate the labia to properly wipe the child. (App. 378, l. 8-9). Dr. Luberoff conceded on cross-exam that this type of contact would be medically appropriate. (App. 379, l. 9-16).

After Dr. Luberoff testified, the State twice attempted to introduce photographs of diapers recovered from LeeAnn Harvey’s trailer. (App. 416, l. 22-23; 418, l. 22-25). A week before trial, a deputy took the photographs while they were in storage in the evidence room. (App. 417, l. 9; 445, l. 10). The trial court sustained co-counsel’s objections that the State failed to establish an adequate chain of custody prior to taking the photographs. (App. 416, l. 22-23; 419, l. 5-10).

¹⁰ Additionally, Dr. Luberoff conceded that diaper rash is not uncommon and can occur without any misconduct by the child’s caregiver. (App. 377, l. 11-16).

Ultimately, to establish the chain of custody the State recalled Brittany, called two additional evidence custodians, and recalled the deputy who took the photographs.¹¹ (App. 422-442).

Once the court admitted the photographs, the solicitor asked whether any feces was visible in the diapers. (App. 442, l. 15-18). Co-counsel objected because the question called for expert testimony for which the deputy was unqualified to give. (App. 442, l. 17-18). The trial court sustained the objection. (App. 442, l. 224-25). Nevertheless, the solicitor subsequently noted “some additional type of material” located in the diapers. (App. 443, l. 17-18). When the solicitor asked what it appeared to be, the trial court again sustained an objection. (App. 443, l. 22). Unable to elicit further testimony, the State rested. (App. 445, l. 24-25).

At the conclusion of the State’s case, counsel moved for a directed verdict on two grounds. First, he argued that the State presented no evidence indicating respondent had assumed the role of parent or guardian, as required by § 63-7-20. (App. 446-49). Second, counsel argued that there was insufficient evidence to support a criminal sexual conduct charge because the State did not establish any penetration. (App. 449-51). Specifically, he argued that a bruised hymen did not establish penetration because the hymen sits on the outside of the genital opening. (App. 450, l. 11-14). The trial court denied both motions.¹² (App. 455-59).

¹¹ Additionally, co-counsel pointed out that the evidence tag on the diapers was never photocopied and sent in discovery. He argued that the State should not be allowed to use the chain of custody tag because it had not been provided in discovery. (App. 424, l. 1-6). The trial court rejected this argument, noting that the State provided the officer’s report indicating the diapers had been seized and placed into evidence. (App. 434, l. 17-25). As such, the defense was on notice that the items were in evidence and had an opportunity to view them. (App. 425, l. 15-21).

¹² The trial court noted there was sufficient evidence for a jury to conclude respondent had assumed the role of parent. (App. 456, l. 1-25; 457, l. 1-21). The Court of Appeals affirmed. State v. Williams, 405 S.C. 263, 747 S.E. 2d 194 (Ct. App. 2013). With respect to the criminal sexual conduct charge, the court noted that vaginal penetration is not required. Instead, the State need only establish genital penetration. Based on the testimony of Dr. Luberoff and the detective, the

Counsel presented a case in defense. First, he offered the testimony of an investigator from the Department of Social Services (DSS). (App. 469-71). The DSS investigator testified that the agency opened a child abuse case, but determined that respondent was not acting *in loco parentis*. As such, the investigator closed her file. (App. 470, l. 23-25).

In addition to the DSS investigator, respondent took the stand in his own defense. (App. 482, l. 20). He testified that after LeeAnn Harvey left to run errands that morning, he and the victim went outside to play in the front yard. (App. 493, l. 6-18). While playing, the victim fell and bumped her head. (App. 493, l. 20-22). When Brittany called to check in at 12:00 or 12:30 pm, he explained that the victim had bumped her head in the fall. (App. 495, l. 4-6). During the call, Brittany asked respondent to drop the victim off with the grandparents later that evening. (App. 495, l. 10-14). Originally, Brittany was supposed to return and take over supervision of the child at 1:00 or 2:00 pm. (App. 491, l. 2).

Later that afternoon, the victim had a dirty diaper. (App. 499, l. 4-5). According to respondent, he was aggravated at being left alone to deal with the child and her dirty diaper. (App. 502, l. 6-12). Respondent lifted the child up, used a baby wipe to clean her back side, and then put her back down. (App. 499-501). Respondent then used a baby wipe to clean her front side. Respondent admitted that because he was aggravated, "I guess I was rougher than I should have been." (App. 502, l. 15-16). After he changed the diaper, he put Aveeno lotion on the victim's thighs. (App. 503, l. 11-12).

Respondent then took the victim to the living room to watch TV. (App. 503, l. 22-23). Respondent was still "aggravated that I was having to sit there with nowhere else to go besides in

trial court found sufficient evidence for a jury to conclude penetration of a genital opening occurred. (App. 458, l. 24-25; 459, l. 1-5).

this trailer and watch [the victim].” (App. 504, l. 3-5). When the child began throwing her toys around, respondent “popped her” on the right side of her head. (App. 504, l. 10-11). Respondent realized that he must have used excessive force because the child “was obviously shocked” and stopped what she was doing. (App. 504, l. 25; 505, l. 1). Nevertheless, respondent subsequently hit the child again after she threw down her sippy cup. (App. 505, l. 5-7). This time he “popped” the child on the left side of the head. (App. 505, l. 7). When asked how hard he struck her, respondent replied, “I didn’t think it was hard enough to do any damage, but I mean, hard.” (App. 505, l. 13-14). Respondent acknowledged “[i]t was very wrong.” (App. 505, l. 17).

At around 6:00 pm that evening, respondent dropped the victim off with the grandparents. (App. 506, l. 5-6). At the time, the child’s only visible injuries were on the forehead, which he assumed was from the fall. (App. 506, l. 10-11; 507, l. 10-12). Respondent showed the bruises to the grandparents, who were apparently unconcerned. (App. 507, l. 10-15). When the detective subsequently revealed the photographs of the victim’s injuries, respondent was shocked. (App. 513, l. 19). He was unaware “of what my actions did to her.” (App. 513, l. 21). After seeing the photograph of the grip marks on the victim’s arm, respondent admitted that he lifted the child up by her elbow. (App. 514, l. 7-8; 526, l. 16-19). He explained that he picks his own daughter up by the elbows because he has a bad back. (App. 514, l. 7-8; 526, l. 16-19). Respondent ended his testimony by admitting he was responsible for the victim’s bruises, but denying he committed criminal sexual conduct. (App. 516, l. 20-25; 517, l. 1-3).

After respondent testified, the defense rested. (App. 545, l. 23-24). At co-counsel’s request, the trial court charged assault and battery of a high and aggravated nature (ABHAN) under the common law as a lesser included offense of criminal sexual conduct (CSC). (App. 539, l. 20-23; 580, l. 23-25). In closing, co-counsel noted that if the jury had any doubt whether respondent

was guilty of CSC or ABHAN, the jury must go with the lesser included offense. (App. 551, l. 20-25; 552, l. 1). Co-counsel argued that doubt existed because Dr. Luberoff testified that it is appropriate for an adult to touch a child's genitalia while cleaning up after a diaper change. (App. 554, l. 14-18). According to co-counsel, "[t]hat's not a sexual act; that's an act of hygiene." (App. 554, l. 17-18). Co-counsel noted that there was no evidence the victim's injuries arose from a sexual act. (App. 555, l. 2-4). Instead, the bruising occurred from being too rough while wiping the child during the diaper change. (App. 555, l. 5-6). Although "[t]hat doesn't make it right. ... he's guilty of assault, but not sexual assault, assault and battery of a high and aggravated nature."¹³ (App. 558, l. 8-11).

The solicitor then gave her closing argument. (App. 560, l. 12). The defense objected three times during the solicitor's closing argument. (App. 563, l. 25; 564, l. 23-24; 566, l. 19-21). The State argued that respondent's story about the dirty diaper was unreasonable because no dirty diapers were ever found at the residence. (App. 567, l. 17-18). In fact, the photographs revealed blood in the diapers, not feces. (App. 567, l. 17-18). Furthermore, the solicitor argued that criminal sexual conduct "is not always about sexual gratification." (App. 565, l. 25; 566, l. 1). Instead, sometimes the crime can be committed to dominate or physically harm another individual. (App. 566, l. 6-9). The statute only requires penetration of the genital openings, however slight. (App. 565, l.18-20). Regardless of respondent's motivation, the solicitor argued that he acted against the victim in the worst way possible. (App. 566, l. 9-11).

¹³ With respect to the charge of unlawful conduct towards a child, co-counsel argued that the State failed to establish that respondent had the requisite duty to care for the child as required under the statute. (App. 550, 1-6). In making the argument, he noted that the DSS investigator did not feel that the statute applied to respondent. (App. 550, l. 5-6).

At the conclusion of closing arguments, the trial court instructed the jury on the law. (App. 570-88). After deliberating for less than two hours, the jury asked two questions. (App. 589, l. 16-17). First, the jury asked to review the transcript of Dr. Luberoff's testimony. (App. 589, l. 20-21). Second, it asked to receive a copy of the CSC statute, noting "[w]e specifically are interested in words related to penetration." (App. 590, l. 11-12). The trial court provided the jury with a copy of its jury charges relating to CSC and ABHAN. (App. 591, l. 16-25). Additionally, the court informed the jury that the transcript had not yet been created, but the jury could listen to the recording of Dr. Luberoff's testimony. (App. 591, l. 4-16).

Less than twenty minutes later, the jury advised that listening to Dr. Luberoff's testimony would be unnecessary. (App. 592, l. 15; 594, l. 3-7). It had reached a verdict. (App. 594, l. 6-7). Respondent was found guilty as charged on both counts. (App. 595, l. 6-12). The trial court denied all of counsel's post-trial motions.¹⁴ After hearing from both parties¹⁵ at sentencing, the court sentenced respondent to twenty-five years for criminal sexual conduct and ten years, concurrent, for unlawful conduct of a child. (App. 636, l. 10-18).

Post-Conviction Relief

Respondent's application for post-conviction relief alleges three grounds of ineffective assistance of counsel. (App. 1135). First, it alleges that that trial counsel failed to object to the introduction of photographs of the victim's injuries. (App. 1135). Second, trial counsel allegedly

¹⁴ Specifically, counsel argued that even when viewed in the light most favorable to the State, the evidence only revealed respondent was "conducting a lawful activity in an unlawful manner." (App. 605, l. 18-25). As such, he moved for a new trial. (App. 607, l. 10-11). Alternatively, he asked the court to exercise its authority under the Thirteenth Juror Doctrine and moved for both an arrest of judgment and a judgment notwithstanding the verdict. (App. 606, l. 1-10; 607, l. 1-2).

¹⁵ In addition to several of respondent's family members, Dr. Selman Watson appeared on respondent's behalf at sentencing. (App. 629-31).

failed to call expert witnesses who would have testified that the victim's injuries were consistent with respondent's statement to the police and arose from "medically recognized treatment." (App. 1135). Third, respondent alleges a lack of trial preparation, including a failure to interview witnesses and comprehend facts relevant to a legal defense. (App. 1135).

At the evidentiary hearing, respondent called three witnesses to support these claims: trial counsel, co-counsel, and Dr. Friedlander.¹⁶ (App. 805, l. 3-19). Trial counsel explained that he worked on the case for almost a year prior to trial. (App. 818, l. 4-6). Although he only spoke with law enforcement witnesses, trial counsel hired a private investigator to interview the other witnesses. (App. 832, l. 1-3; 834, l. 13-14; 846, l. 3-16). Admittedly, some witnesses were not interviewed prior to trial, but trial counsel did not elaborate why. (App. 835-41). Respondent did not ask whether the investigator attempted to interview these witnesses. (App. 835-41).

Trial counsel also discussed the strategy to argue that the child's injuries arose from medically recognized treatment. (App. 875, l. 8-21). Specifically, he argued that respondent grew frustrated while changing the diaper and was too rough. (App. 896, l. 4-10). Trial counsel acknowledged that sexual battery only requires an intrusion into the genital openings. (App. 875, l. 4-21). Although there was no evidence that respondent's motive was sexual in nature, counsel understood the law has no such requirement. (App. 875, l. 18)

Additionally, trial counsel explained his rationale for not offering Dr. Friedlander's testimony. Trial counsel was reluctant to consult with Dr. Friedlander because he solicits his medical consulting services on the internet. (App. 906, l. 11-13). According to trial counsel, the advertising resembles more of a sales-pitch to vulnerable family members than legitimate medical

¹⁶ Respondent also offered several exhibits, including trial-counsel's case notes, respondent's written statement to law enforcement, photographs admitted at trial, and Dr. Friedlander's letter to trial counsel. (App. 1053-1119).

evaluation. (App. 906, l. 13-19). In fact, trial counsel only learned about him after Dr. Friedlander told respondent's family to have "the lawyer" send him records to review.¹⁷ (App. 907, l. 3-5).

Trial counsel further explained that at the time he spoke with Dr. Friedlander, respondent did not want to pursue this defense. (App. 873, l. 8-22; 874, l. 5-7; 877, l. 15-17). Ultimately, respondent changed his mind closer to trial. (App. 878, l. 6-7). By that time, trial counsel had retained a nurse to explain that the positioning of a toddler during a diaper change "would certainly lead to physical contact with the genital area." (App. 879, l. 12-15). The nurse was also prepared to testify that the victim's injuries were not permanent and did not necessarily arise from penile penetration. (App. 856, l. 13-25). However, when Dr. Luberoff conceded these points on cross-exam, trial counsel assessed that the nurse's testimony would be unnecessary. (App. 879, l. 17-20; 897, l. 1. 5). Trial counsel additionally noted that "putting up a defense expert that's going to be subject to cross might have more of its own set of pitfalls." (App. 909, l. 9-11).

Later on at the hearing, Dr. Friedlander testified that the bruising on the victim's genitalia was consistent with finger impressions. (App. 953, l. 4-5). He explained that respondent likely held the victim down too hard and scratched her with his fingernails. (App. 953, l. 13-23). Additionally, Dr. Friedlander disagreed with the suggestion that the bruising to the victim's pubic area could be a bite mark. (App. 962, l. 10-12). Although Dr. Friedlander admitted that he does not really understand the law, he believed respondent had been overcharged. (App. 956, l. 21; 957, l. 10-12; 961, l. 15).

On cross-examination, Dr. Friedlander admitted that aside from occasionally serving as a ringside doctor at boxing matches, he has not examined a living human being since completing his

¹⁷ Trial counsel sent Dr. Friedlander an email to notify him that he was sending records to review. Upon receipt of the email, Dr. Friedlander responded, "Thanks. I did my 60th autopsy for the year today -- my 'street cred' is really high." (App. 1115; 983, l. 15-18).

residency in 1983. (App. 937, l. 1-25; 938, l. 1-3). Instead, he has focused on teaching and performing autopsies. (App. 932, l. 9-15). Regarding his assessment that the victim's injuries appeared consistent with fingernail scratches, Dr. Friedlander admitted that he never reviewed photos of respondent's fingers. (App. 973, l. 19). In fact, he had no idea how large respondent's fingers are. (App. 973, l. 22).

Similarly, Dr. Friedlander acknowledged that the victim's bruising in the pubic area was in an arc pattern. (App. 973, l. 4-15). Although the State pointed out that teeth are also aligned in an arc pattern, Dr. Friedlander dismissed the suggestion that the bruising could be a bite mark. (App. 974, l. 4-9). When asked whether he examined respondent's teeth, Dr. Friedlander replied, "well, he's got ordinary teeth, doesn't he?" (App. 974, l. 21).

Dr. Friedlander further conceded on cross-exam that when performing any medical care around a toddler's genitalia, one must do so "[w]ith the greatest care." (App. 976, l. 18). He explained that "you try not to touch the hymen unless you absolutely have to." (App. 977, l. 8-9). Dr. Friedlander also confirmed the victim's vulva was clearly penetrated. (App. 977, l. 19). Although the victim's hymen was bruised, it was not penetrated. (App. 977, l. 12).

After Dr. Friedlander's testimony, co-counsel took the stand. (App. 988, l. 6). Co-counsel has been practicing law for over forty years and has tried hundreds of criminal cases. (App. 989, l. 4; 990, l. 5). He addressed the decision not to object to the photographs of the victim's bruised genitalia. In framing the issue, respondent noted that co-counsel argued the nurse's anatomical diagrams were too prejudicial under Rule 403, but made no similar objection to the photographs. Co-counsel responded that:

almost all evidence produced by the State is prejudicial... The difference -- I didn't have any major trial strategy to not object. I did feel that the difference would be that was created by someone else. You know, kind of

their interpretation of the situation whereas these were actually photographs of the injuries.

(App. 1018, l. 10-14). After co-counsel's testimony, respondent rested. (App. 1047, l. 16-18).

PCR Court's Order

The PCR court granted respondent's application for relief. In its written order, it found that trial counsel's lack of preparation not only constituted ineffective assistance of counsel under Strickland v. Washington, but also was "a total failure to function as a meaningful State adversary" under United States v. Cronie. (App. 1210). The court noted three reasons to apply Cronie to trial counsel's handling of this case. First, the court found that that trial counsel failed to conduct a reasonable investigation. (App. 1210). Specifically, it found that trial counsel "was objectively unreasonable in failing to interview, or attempting to interview, any State witness other than the lead detective." (App. 1211). Second, the court found that trial counsel "labored under a misapprehension of law and fact as to what constituted a legal defense." (App. 1212). Third, the court found that trial counsel's "overall lack of preparation and legal understanding" was presumptively prejudicial. (App. 1215).

Additionally, the court presumed prejudice under Cronie from co-counsel's late involvement in the case. (App. 1216). The court noted that although co-counsel had only a day's preparation, he cross-examined eleven of the State's thirteen witnesses. (App. 1216). According to the court, in this situation "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." (App. 1216).

In addition to presuming prejudice under Cronie for the lack of trial preparation, the PCR court addressed respondent's remaining allegations. (App. 1218-23). It found ineffective assistance of counsel under Strickland for failing to call Dr. Friedlander as an expert witness.

(App. 1220). The court noted that his testimony would have given the jury a choice between Dr. Luberoff and another opinion that corroborated respondent's trial testimony. (App. 1219). The court further noted the jury's request to review a transcript of Dr. Luberoff's testimony and receive a copy of the criminal sexual conduct statute. (App. 1219). The court found the request "is persuasive evidence of a serious debate concerning the interplay between Dr. Luberoff's testimony concerning penetration and the law." (App. 1219-20). As such, the court concluded there was a reasonable likelihood the jury would have reached a different conclusion had Dr. Friedlander testified. (App. 1220).

Finally, the PCR court found ineffective assistance of counsel in not objecting to the admission of photographs of the victim's injured genitalia. (App. 1220). The court ruled that counsel should have raised an objection under Rule 403 that the probative value of the photos was substantially outweighed by their prejudicial effect. (App. 1222). According to the court, "the severity of any injury to the child's genitals was irrelevant to the criminal sexual conduct charge because all the State had to prove was penetration. Thus, what mattered was the existence of evidence of penetration ever so slight, not a graphic display of the injuries." (App. 1222). Although the court could not predict how a timely objection would have been handled, it "has grave concerns with [the photos'] probative value and whether the jury could set aside any animus that might have been engendered toward Applicant after reviewing the images and refocus its attention on the facts in dispute." (App. 1222-23).

This appeal follows.

STANDARD OF REVIEW

The standard of review in a PCR case depends on the specific issue before the Court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). The PCR court's findings of fact will be upheld if there is evidence in the record to support them. Id. However, questions of law are reviewed *de novo*. This Court does not give "any deference to a PCR court's conclusions of law." Id. at 181 n. 2, 810 S.E.2d at 839 n. 2.

ARGUMENT

I. **The PCR Court Erred in Presuming Prejudice Under *United States v. Cronic* Because This Was Not an Extreme Case in Which Trial Counsel “Entirely Failed” to Present a Defense, Nor Were the Surrounding Circumstances of Such Magnitude That No Attorney Could Provide Effective Assistance.**

Ordinarily, in order to establish ineffective assistance of counsel, an applicant must prove not only deficiency of counsel, but also prejudice. Strickland v. Washington, 466 U.S. 668 (1984). However, in United States v. Cronic, 466 U.S. 648 (1984) the Court identified three limited situations where prejudice can be presumed. The first situation occurs when an accused is completely denied counsel at a critical stage of the proceedings. Id. at 659. Second, “if counsel **entirely fails** to subject the prosecution’s case to meaningful adversarial testing” then “the adversary process itself presumptively unreliable.” Id. (emphasis added). Third, the Court recognized that there can be “[c]ircumstances of that magnitude ... when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” Id. at 659-60.

The PCR court presumed prejudice in this case, finding that Cronic’s second and third categories applied. The court erred in its legal conclusions. As the State will show, respondent’s trial attorneys neither entirely failed to present a defense, nor were the circumstances of such magnitude that no attorney could provide effective assistance.

A. Prejudice Should Not Be Presumed Because Respondent’s Trial Attorneys Did Not “Entirely Fail” to Present a Defense.

In order to presume prejudice under the second Cronic category for not challenging the prosecution’s case, “**the attorney’s failure must be complete.**” Bell v. Cone, 535 U.S. 685, 697 (2002)(emphasis added). The distinction between “complete failure” under Cronic and deficient

performance under Strickland “is not of degree but of kind.” Id. As the United States Court of Appeals for the Fifth Circuit has noted, “Cronic is reserved only for those **extreme cases** in which counsel fails to present any defense. We presume prejudice in such cases because it is as if the defendant had no representation at all.” Haynes v. Cain, 298 F.3d 375, 381 (5th Cir. 2002)(emphasis added). Stated differently, an “attorney’s incompetence must rise to the level of a complete denial of counsel; **‘bad lawyering, regardless of how bad’ is insufficient.**” Fulsi v. O’Brien, 621 F.3d 1, 7 (1st Cir. 2010)(quoting Scarpa v. Dubois, 38 F.3d 1, 13 (1st Cir. 1994)(emphasis added). Accord Lorenzen v. State, 376 S.C. 521, 657 S.E.2d 771 (2008)(reversing a PCR court’s ruling that prejudice could be presumed from the cumulative effect of counsel’s errors)(abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)); Nance v. Ozmint, 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006)(holding that the case represented “a very rare situation” where counsel failed to provide an adversarial challenge).

The PCR court erred in presuming prejudice because trial counsel’s performance was not a “complete failure” on par with having no representation at all. Instead, respondent had competent attorneys by his side throughout the proceedings. As noted above, trial counsel’s preparation included meeting with respondent twenty times, meticulously reviewing and organizing discovery, hiring an investigator to interview witnesses, and consulting with five experts. Prior to trial, counsel also moved to suppress his client’s incriminating statements, moved to quash the indictment on procedural grounds, and moved to prohibit the use of term “sexual assault.”

At trial, respondent’s attorneys articulated two defenses. First, they argued that respondent owed no legal duty to care for the child because he had not assumed the role of parent. Second, they argued that that the victim’s genital injuries arose during the course of medically recognized treatment. In support of these defenses, respondent’s attorneys thoroughly cross-examined each

of the State's witnesses, prevented lines of questioning by the State, and objected to the introduction of several pieces of evidence. Furthermore, respondent's attorneys offered two defense witnesses. In addition to respondent's testimony, trial counsel called the DSS investigator to testify that the agency did not find respondent was acting *in loco parentis*. Therefore, even if respondent's attorneys made isolated mistakes, their representation was not a "complete failure" as required under Cronic.

Because respondent cannot establish that his attorneys "completely failed" to present a defense, this case is analogous to United States v. Theodore, 468 F.3d 52 (1st Cir. 2006). In Theodore, the defendant originally retained an attorney who had been admitted to practice in the jurisdiction *pro hac vice*. When that attorney withdrew, the local sponsoring attorney remained on the case. The local attorney failed to interview any potential witnesses other than the defendant. Instead, he planned "to play it by ear and shoot from the hip." Id. at 55. As he later explained to the jury, he was almost seventy, had been retired for five years, and "was never supposed to try this case." Id. After a fifteen day trial, the jury found the defendant guilty.

The district court appointed a new attorney to handle post-trial motions, and a subsequent hearing established numerous errors by the trial attorney. For example, he asked open-ended questions on cross, struggled to lay evidentiary foundations, and had difficulty hearing opposing counsel. During his closing argument, the court sustained eight objections. Apparently, the attorney had never even tried a case in federal court before. Although he managed to subpoena a witness for trial, he failed to appear for a hearing to quash the subpoena. Predictably, the court quashed the subpoena. Noting the litany of errors from pre-trial preparation through every stage of the proceedings, the district court presumed prejudice under Cronic. As such, the court granted the defendant's motion for a new trial.

The Court of Appeals reversed, noting that although the attorney's representation "suffered serious shortcomings, it was not tantamount non-representation." *Id.* at 57. The court held that the attorney "cross-examined the government witnesses, suggested some defense themes, and introduced a few exhibits. **Such minimal performance is sufficient to remove this case from *Cronic's* ambit.**" *Id.* at 57. (emphasis added)(citations omitted). Accordingly, the court remanded for consideration of whether the attorney's errors created actual prejudice under *Strickland*. *Id.* at 58.

Fulsi v. O'Brien, 621 F.3d 1 (1st Cir. 2010) is also instructive in distinguishing between complete failure under *Cronic* and ineffective assistance under *Strickland*. In *Fulsi*, the defendant was charged with rape. He allegedly approached the victim while she was walking home from a bar, knocked her unconscious, and raped her in someone's backyard. The trial attorney pursued a dual strategy of faulty identification and alibi. For example, on cross-exam he highlighted that the victim failed to notice a birth mark on his client's face and gave an inaccurate description of his complexion. Additionally, he presented witnesses to bolster the identification issue and to establish an alibi. Nevertheless, the jury found his client guilty. The defendant subsequently alleged complete failure under *Cronic*. Specifically, he noted that the trial attorney became involved in the case only two days before trial and never interviewed the owners of the backyard where the rape occurred. *Id.* at 4.

The First Circuit Court of Appeals disagreed, noting that in order to presume prejudice under *Cronic*, "the attorney's incompetence must rise to the level of a complete denial of counsel; 'bad lawyering, regardless of how bad' is insufficient." *Id.* at 7. In its ruling, the court distinguished between "maladroit attorney performance," which requires a prejudice analysis under *Strickland*, and "non-performance," which does not. *Id.* (quoting *Scarpa v. Dubois*, 38 F.3d

1, 13 (1st Cir. 1994). Although the trial attorney in Fulsi “received the case only two days prior to trial and admitted he would be ‘shooting from the hip,’ he provided [his client] with some, albeit limited, representation thereby precluding a presumption of prejudice under *Cronic*.” Id. at 9. In other words, the defendant “may have retained a bad lawyer; he was not, however, denied counsel.” Id.

This case law reveals that the PCR court made several errors in presuming prejudice under Cronic. (1210). First, the court found that counsel “was objectively unreasonable in failing to interview, or attempting to interview, any State witnesses other than the lead detective.” (App 1211). In reaching this conclusion, the PCR court noted counsel’s duty to investigate potential witnesses, citing Tucker v. Ozmint, 350 F.3d 433, 444 (4th Cir. 2003). (App. 1211). This finding was both factually inaccurate and legally erroneous.

As noted above, counsel hired a private investigator to interview witnesses so that he could later impeach them, if necessary. (App. 841, l. 13-22; 846, l. 3-7). Therefore, even if he did not personally speak with each witness, many were interviewed as part of his investigation. Furthermore, the PCR court applied the incorrect legal standard in finding counsel’s pre-trial investigation was deficient under Cronic. The case relied upon by the PCR court, Tucker, assessed whether a pretrial investigation was sufficient under a traditional Strickland analysis. Tucker, 350 F.3d at 444-45. As noted above, the difference “between the rule of *Strickland* and that of *Cronic* ... is not of degree but of kind.” Cone, 535 U.S. at 697. Whereas Strickland applies to cases of *maladroit* attorney performance, Cronic applies to cases of attorney *non-performance*. Fulsi, 621 F.3d at 7. Simply put, because the PCR court applied a Strickland standard in assessing counsel’s pretrial investigation, it should have also assessed prejudice under Strickland. Presuming prejudice under Cronic was legal error.

Second, the PCR court found that counsel “labored under a misapprehension of law and fact as to what constituted a legal defense.” (App. 1212). The court found that counsel tried the case under the mistaken belief that sexual battery requires proof of vaginal penetration. As the court noted, sexual battery requires neither sexual gratification nor vaginal penetration. (App. 1212). Instead, sexual battery is defined as “any intrusion, however slight ... into the **genital openings** ... except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.” S.C. Code Ann. § 16-3-651(h)(emphasis added). Despite counsel accurately defining sexual battery at the PCR hearing, the court believed that he lacked that knowledge at trial. (App. 1214). In support of its ruling, the court noted that counsel highlighted the lack of vaginal penetration throughout the trial. (App. 1212). The PCR court also specifically pointed out counsel’s motion for a directed verdict as proof of a mistaken belief that vaginal penetration, as opposed to genital penetration, was required. (App. 1213).

There is no evidence to support the PCR court’s finding of fact. The record establishes that counsel understood the definition of sexual battery prior to trial. For example, during one of his pre-trial motions, he noted that “sexual battery is specifically defined to include ... intrusion except for medically recognized or diagnostic purposes.” (App. 94, l. 5-8). Later on, he informed the jury that “[a] sexual battery, as will be explained to you in the context of this trial ... [is] any intrusion, however slight, of any part of a person’s body or of any object into the **genital** or anal **openings** of another person’s body except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.” (App. 124, l. 22-25; 125, l. 1-4)(emphasis added). Counsel’s two statements from trial align with his testimony at the PCR hearing. As previously noted, the PCR court held that counsel’s testimony at the hearing reflected an accurate understanding of the law, which he lacked at trial. (App. 875, l. 5-14; 1214).

Furthermore, in highlighting the lack of vaginal penetration, counsel was not revealing a misunderstanding of the law. Nor was counsel arguing “a fact of no legal consequence to [respondent’s] defense” as the PCR Court held. (App. 1212). Rather, highlighting a lack of vaginal penetration was integral to respondent’s trial strategy. Respondent’s defense at trial was that the victim’s injuries arose from a rough diaper change. The deeper the penetration, the less likely it occurred incidental to a diaper change. Thus, a lack of vaginal penetration, or any other evidence of sexual gratification, tends to prove the defense theory. Counsel would have been foolish NOT to highlight these facts to the jury.¹⁸

Similarly, counsel’s motion for a directed verdict does not suggest a misunderstanding of the law or fact. When an attorney makes an argument on behalf of a client, it does not necessarily imply that the attorney actually believes the argument has merit. Instead, the attorney could simply be playing the best card he has available. Trial counsel’s best—and perhaps only—argument in support of a directed verdict was that sexual battery requires “vaginal penetration.”

In fact, South Carolina courts have never squarely rejected that position.¹⁹ In denying counsel’s motion, the trial court referred to cases from other jurisdictions because there was no

¹⁸ Indeed, as co-counsel testified at the PCR hearing, “if the jury feels that it’s a sexual act, they are not really going to give your client the benefit of the doubt, you know.” (App. 1025, l. 22-24).

¹⁹Both the trial and PCR courts cited State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002), in holding that sexual battery does not require “vaginal penetration.” In Morgan, the Court of Appeals considered a case involving cunnilingus without genital penetration. Specifically, the evidence at trial was that the defendant “licked” the victim’s vagina. Id. at 363, 574 S.E.2d at 205. The Court of Appeals noted that the definition of sexual battery specifically includes the act of cunnilingus, in addition to intrusions of the genital openings. As such, if the State could prove cunnilingus occurred, it would be unnecessary to also demonstrate the act involved an intrusion into the genital openings. Thus, Morgan does not squarely address the issue trial counsel presented in his directed verdict motion. If anything, the court in Morgan seems to equate vaginal penetration with genital penetration in a manner similar to trial counsel’s argument. In concluding that cunnilingus does not also require a separate act of genital penetration, the court states “[p]enetration of the vagina is **NOT** necessary or required.” (emphasis in original). Note that the

South Carolina case law directly on point. (App. 458, l. 13-19; 458, l. 5-24). Even the solicitor appeared to believe the statute required vaginal penetration. In her opening statement she informed the jury that criminal sexual conduct “can be any type of sexual conduct that involves penetration of the **vagina**.” (App. 119, l. 9-10)(emphasis added). The solicitor continued by noting “it’s unlawful to commit an act of sexual battery or intrusion into the **vaginal opening** of the child.” (App. 119, l. 14-16)(emphasis added).

Moreover, even if trial counsel misunderstood the law and fact, such a misunderstanding does not satisfy Cronic. As discussed above, Cronic applies only in cases where counsel “entirely fails” to subject a case to adversarial testing. Cronic, 466 U.S. at 659. In other words, counsel must fail to present any defense, not present a bad one. Bell, 535 U.S. at 697; Haynes, 298 F.3d at 381. A misunderstanding of the law and facts may cause a defense to fail. But it will not cause a failure to defend. By its very nature then, a “misapprehension of the law and fact” triggers deficient performance under Strickland, as opposed to non-performance under Cronic. Therefore, even if the PCR court had a factual basis to find trial counsel misunderstood the law and facts of the case, it should have assessed prejudice under Strickland, not presume it under Cronic.²⁰

The PCR court’s third reason for presuming prejudice also fails for the same reason. The court found trial counsel’s “overall lack of preparation and legal understanding is presumptively prejudicial” under Cronic. (App. 1215). Again, by its very nature, lack of preparation and legal understanding implies deficient performance under Strickland, not non-performance under Cronic.

court’s words were not “penetration of the genital openings is not necessary or required.” Thus, the court appears to equate “intrusion of the genital openings” with “vaginal penetration” as trial counsel argued.

²⁰ In passing, the PCR court also found prejudice under Strickland. (App. 1215). However, the court articulated no reasons for its legal conclusion. (App. 1215). For the reasons given in Section II, below, the PCR court erred in finding prejudice under Strickland.

In order to presume prejudice under Cronic, the attorney must “entirely fail” to present any defense, not present a bad one.

As an additional ground for presuming prejudice, the PCR court noted that counsel failed to object when the State moved to qualify both the nurse and Dr. Luberoff as experts. (App. 1216-17). The court held that counsel had grounds to either move for a continuance or move to suppress the expert testimony under Rule 5 of the South Carolina Rules of Criminal Procedure. (App. 1217). Under the court’s logic, the State violated Rule 5 when it gave counsel its witness list five days prior to trial. (App. 1217). The list included the forensic nurse as a potential witness, but did not classify her as an “expert.” (App. 859, l. 23-25; 1053-54). Additionally, the list identified Dr. Luberoff as an expert, but the PCR court assessed that the notification was late. (App. 1217).

The PCR court’s legal analysis is simply wrong. Rule 5 imposes no obligation upon the State to either provide a witness list or identify potential experts. Instead, it only requires the State to allow the defense to inspect and copy any reports of examinations and tests within its custody or control. Rule 5(a)(1)(D), SCRCrimP. The State satisfied its discovery obligations under the rule by providing the reports of both the nurse and Dr. Luberoff. (App. 860, l. 24; 914, l. 1-4). When the State additionally provided a witness list, it went beyond its Rule 5 obligations.

In fact, South Carolina courts have consistently rejected the PCR court’s interpretation of Rule 5. For example, in State v. Nicholson, 366 S.C. 568, 623 S.E.2d 100 (Ct. App. 2005), the State notified the defense prior to trial of its intent to call an individual as an expert witness. At trial, the defendant argued that the State’s notice was late. As such, he asked the court to suppress the expert testimony, or alternatively, continue the case. The Court of Appeals rejected this argument, holding that the State “is not required to provide its witness list to a criminal defendant,

and the disclosure in the present case of this witness to the defense before trial was nothing more than a professional courtesy”. Id. at 579, 623 S.E.2d at 105.

Similarly, in State v. Barrett, 416 S.C. 124, 785 S.E. 2d 387 (Ct. App. 2016), the Court of Appeals again considered whether the trial court should have continued a case because the State allegedly provided late notice of expert testimony. The week prior to trial, the solicitor advised that the forensic interviewer on the case would also provide expert testimony. The defense demanded a continuance in order to obtain its own expert. Citing Nicholson, the court noted the State is under no obligation to share its witness list. Id. at 134, 785 S.E.2d at 392. Additionally, because the area of expert testimony had previously been found admissible, the defense should have been prepared to address it without express notification from the State. Id. at 135, 785 S.E.2d at 392.

Under this precedent, trial counsel had no basis to object to either the nurse or Dr. Luberoff being qualified as experts. Had counsel objected pursuant to Rule 5, he would have been overruled. Counsel’s decision cannot even be construed as deficient performance under Strickland, much less non-performance or “complete failure” under Cronic. Thus, the PCR court erred in finding the admission of this testimony supported a presumption of prejudice under Cronic.

As shown above, the PCR court’s legal conclusion that counsel entirely failed to subject the case to meaningful adversarial testing is fundamentally flawed. At best, respondent alleges garden-variety instances of deficient performance. But such deficiencies are not enough to presume prejudice under Cronic. The attorney’s failure must be complete. Because respondent cannot show his attorneys entirely failed, the PCR court’s ruling should be reversed.

B. Prejudice Should Not Be Presumed Because the Circumstances Were Not of Such Magnitude That No Attorney Could Provide Effective Assistance.

In articulating the “magnitude” of the circumstances that would presumptively prevent a fully competent attorney from rendering effective assistance of counsel, the Cronic court discussed the historic case of the “Scottsboro Boys,” Powell v. Alabama, 287 U.S. 45 (1932). In Powell, several young African-American males were charged with raping two white women while riding a train through 1930’s Alabama. Id. at 49-50. Upon their arrest in Scottsboro, Alabama, the defendants found “the attitude of the community was one of great hostility.” Id. at 51. In order to deter lynch mobs, the sheriff called for assistance from the state militia. Id. At the arraignment, the trial court appointed “all the members of the local bar” to assist and “anticipated that the members would continue to help the defendants if no counsel appeared.” Id. at 49.

The case was called for trial twelve days after the crime allegedly occurred. Id. at 49, 53. On the day of trial, a lawyer from Tennessee appeared on behalf of persons “interested” in the case. Id. at 53. The lawyer hesitated in representing the defendants because he was unfamiliar the facts of the case and local procedure. Id. at 55. Nevertheless, he informed the judge, “If there is anything I can do to be of help to them, I will be glad to do it.” Id. The Court summarized the situation at the start of trial:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

Id. at 57-58. Unsurprisingly, the defendants were convicted and sentenced to death. Id. at 50.

Under circumstances of this magnitude, presuming prejudice is appropriate under Cronic. But the case at bar is not the case of the Scottsboro Boys. Respondent faced no hostile crowds, no

rush to judgment, and no lack of counsel. Instead, he enjoyed the assistance of counsel for over a year prior to trial. There simply is no historic injustice upon which to presume prejudice.

Although co-counsel was retained the week of trial, his participation does not mirror that of the attorney in Powell. At the time of trial, co-counsel had been practicing law for over forty years and tried hundreds of cases. (App. 989, l. 4; 990, l. 5). Thus, unlike the attorney in Powell, he was familiar with local practice and procedure. As the PCR court even acknowledged, co-counsel “is a very seasoned and capable lawyer.” (App. 1216). Additionally, co-counsel did not try the case alone. Even if he handled the bulk of respondent’s defense at trial, he could leverage the work trial counsel had already put into the case. In other words, co-counsel did not have to start from scratch.

More importantly, in Cronic the Court held that in assessing whether to presume prejudice, the relevant inquiry is the *magnitude* of the circumstances, not the *timing* of the lawyer’s involvement. Cronic 466 U.S. at 662. The Court specifically noted it has “refused ‘to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel.’” Id. at 661 (quoting Chambers v. Moroney, 399 U.S. 42, 54 (1970)). The Court reasoned that in certain situations, “since evidence and witnesses were easily accessible to defense counsel, the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial” on short notice. Id. at 661.

Such is the case here. Under these circumstances, it is not unreasonable for a “very seasoned and capable lawyer” to provide effective assistance as co-counsel. The record confirms that after practicing law for forty years and trying hundreds of cases, co-counsel did not need additional time to second chair this case. Furthermore, even if co-counsel tried the case alone, respondent still could not satisfy Cronic’s high bar. Presuming prejudice under Cronic requires

more than late involvement in the case. As such, the PCR court's conclusion of law is flawed and should be reversed.

II. The PCR Court Erred in Finding Respondent Established Ineffective Assistance of Counsel Under Strickland v. Washington.

In order to establish ineffective assistance of counsel, the applicant must prove two things: deficient performance and prejudice. Strickland, 466 U.S. at 687. Deficient performance means “that ‘counsel’s representation fell below an objective standard of reasonableness.’” Laffler v. Cooper, 566 U.S. 156, 163 (2012)(quoting Hill v. Lockhart, 474 U.S. 52, 57 (1985)). In assessing performance, counsel is “strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690. The prejudice requirement means the “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different.” Id. at 694.

A. Respondent Failed to Establish Ineffective Assistance of Counsel Arising From Counsel’s Allegedly Deficient Pre-trial Investigation and Understanding of the Law.

As discussed above, the PCR court presumed prejudice under Cronic for counsel’s allegedly deficient pre-trial investigation and “misapprehension of the law and facts.” (App. 1210-18). In passing, the PCR court also found these alleged deficiencies resulted in prejudice under Strickland. (App. 1215). The court noted that if counsel had interviewed additional witnesses, he potentially could have countered the medical testimony, impeached the State’s timeline that the victim’s injuries occurred under respondent’s watch, or challenged the chain of custody of the dirty diapers. (App. 1211). As for counsel’s misunderstanding of the law and facts, the court noted “This resulted in a reliance on inaccurate factual and legal claims to the exclusion of a potentially meritorious defense.” (App. 1215).

Even assuming counsel was deficient in his pre-trial investigation,²¹ the PCR court erred in finding prejudice. Specifically, respondent offered no evidence of prejudice arising from any failure to interview additional witnesses. Respondent presented no evidence that additional interviews would have changed the medical testimony at trial. Respondent presented no evidence that additional interviews would have changed the State's timeline of events. And respondent presented no evidence that additional interviews would have revealed a deficiency in the chain of custody. The PCR court could only speculate on whether additional interviews would have changed the trial's outcome because respondent presented no evidence at the hearing. (App. 1211).

As this Court has repeatedly held, speculation is insufficient to establish prejudice.²² For example, in Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998), a PCR applicant alleged ineffective assistance of counsel because his attorney failed to interview the victims on the case.

²¹ As argued in greater detail in Section I, above, the PCR court erred in its analysis of counsel's pre-trial investigation. As this Court is aware, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. As such, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Here, respondent failed to overcome this presumption. Although counsel admitted that neither he, nor his investigator, interviewed several witnesses, respondent never established why those witnesses were not interviewed. (App. 835-41). In fact, respondent never asked whether the investigator attempted to reach them. As this Court has noted, "it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to. When counsel makes such a reasonable decision, he will have fulfilled the duty he owes to his client." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60-64-65 (2011)(emphasis in original).

²² See e.g. Harris v. State, 377 S.C. 66, 76, 659 S.E.2d 140, 145 (2008)(rejecting a claim of prejudice as "merely speculative" because the applicant offered no evidence "as to how counsel's alleged lack of preparation prejudiced him.")(abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)); Jackson v. State, 329 S.C. 345, 349, 495 S.E.2d 768, 770 (1998)("Mere speculation and conjecture on the part of [the PCR applicant] is insufficient."); Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

At the evidentiary hearing, the applicant failed to present evidence demonstrating how interviewing the victims would have affected their testimony at trial. In fact, he even admitted that one victim would have reiterated the same accusation. As such, this Court rejected the claim, holding that “there is nothing in the record to indicate that interviewing the victims would have led to any different result.” *Id.* at 334, 496 S.E.2d at 417. Because the applicant failed to show that the victims would have changed their story had they been interviewed, he could not prove prejudice. *Id.* Such is the case here. Respondent has failed to articulate how additional pre-trial interviews would have changed anyone’s testimony. As such, the PCR court erred in finding prejudice.

Similarly, respondent offered no evidence to explain how counsel’s apparent misunderstanding of the law and facts resulted in prejudice. Even if counsel believed sexual battery required proof of vaginal penetration, that misunderstanding did not change the outcome of the case. No misunderstanding induced respondent to exercise his right to a jury trial. The solicitor never even extended a plea offer. (App. 1089). Nor did any misunderstanding affect counsel’s trial strategy. Regardless of when precisely the sexual battery occurred—upon penetration of the vulva or penetration of the vagina—the only possible defense at trial was to claim the injuries occurred during a diaper change. Respondent’s trial attorneys pursued this defense throughout trial. The jury simply did not buy it.

B. Respondent Failed to Establish Ineffective Assistance of Counsel Arising From Counsel’s Decision Not to Call Dr. Friedlander as an Expert Witness.

The PCR court also erred in finding ineffective assistance of counsel for not calling Dr. Friedlander as an expert witness because: (1) trial counsel had valid reasons not to call him as a witness, and (2) his testimony would not have changed the outcome at trial. As this Court has made clear, “[w]hen counsel articulates a **valid** reason for employing a certain strategy, such

conduct generally will not be deemed ineffective assistance of counsel.” Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)(emphasis in original). A reviewing court will assess the validity of counsel’s strategy under “an objective standard of reasonableness.” Id. (quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402).

Trial counsel articulated several valid reasons not to call Dr. Friedlander. First, counsel assessed Dr. Friedlander would have credibility issues. Specifically, counsel noted that Dr. Friedlander solicits his medical consulting business on the internet.²³ (App. 906, l. 11-13). Trial counsel believed such advertising resembled more of a sales pitch to vulnerable family members than legitimate medical evaluation. (App. 906, l. 13-19). In fact, trial counsel only became aware of this expert after Dr. Friedlander told respondent’s family to have “the lawyer” send him the materials on the case. (App. 907, l. 3-5).

Additional evidence submitted at the hearing corroborates trial counsel’s assessment that Dr. Friedlander was giving an awkward sales pitch. For example, when trial counsel emailed him records to evaluate, Dr. Friedlander responded, “Thanks. I did my 60th autopsy of the year today -- my street cred is really high.” (App. 1115; 983, l. 15-18). Additionally, after reviewing the records, Dr. Friedlander wrote trial counsel a letter outlining his assessment. The letter concludes, “All this is true to a reasonable degree of medical certainty and on my word as a Christian gentleman.” (App. 1110). It is unclear why Dr. Friedlander would include that sentence in his evaluation. Medical expertise should suffice.²⁴

²³ In addition to maintaining a website that advertises his services (www.pathguy.com), Dr. Friedlander has also used referral services. (App. 939, l.3; 979, l. 25; 980, l. 1-12).

²⁴ The evidentiary hearing also revealed additional credibility issues. For example, aside from occasionally serving as a ringside doctor at boxing matches, Dr. Friedlander last evaluated a living human being during his residency in 1983. (App. 942, l. 1-4). Additionally, Dr. Friedlander admitted that on one occasion a court refused to allow his testimony. (App. 940, l. 14-25).

Second, trial counsel also testified that “putting up a defense expert that’s going to be subject to cross might have more of its own set of pitfalls.” (App. 909, l. 9-12). As applied to Dr. Friedlander, trial counsel could reasonably expect that exposing him to cross-examination would involve serious risk. In addition to the credibility issues noted above, Dr. Friedlander made clear that he “could not think of any way to defend the idea that the child was *manhandled*.” (App. 956, l. 17-18)(emphasis added). Later, in quoting a fee to trial counsel, Dr. Friedlander stated “*your client was an asshole* for the way he handled the kid and I’m gonna charge a thousand dollars.” (App. 960, l. 3-4)(emphasis added). Although trying a case requires taking calculated risks, trial counsel acted reasonably in refraining from using an expert that referred to his client as an “asshole” who “manhandled” a little girl.

Furthermore, trial counsel explained at the evidentiary hearing that he had another expert lined up to testify instead of Dr. Friedlander. Trial counsel planned on calling the nurse he retained as a consultant on the case. The nurse was prepared to explain that the positioning of a toddler during a diaper change “would certainly lead to physical contact with the genital area.” (App. 879, l. 13-15). The nurse would also testify that the victim’s injuries were not permanent and did not necessarily arise from penile penetration. (App. 856, l. 13-25). However, when Dr. Luberoff conceded these points on cross-exam, trial counsel determined that the nurse’s testimony would be unnecessary. (App. 879, l. 17-20; 897, l. 1. 5).

In addition to these valid reasons supporting the decision not to call Dr. Friedlander, respondent cannot show any resulting prejudice. Even if Dr. Friedlander could corroborate the claim that the injuries arose from using excessive force during a diaper change, Dr. Friedlander

Apparently, the prosecutor in that case alleged that Dr. Friedlander’s website contained links to child pornography. (App. 941, l. 12-16). In that case, Dr. Friedlander “felt that the prosecutor was corrupt.” (App. 941, l. 11).

never established that level of force was medically recognized or necessary. Instead, Dr. Friedlander testified that any type of medical care around a child's genitalia must be performed "with the greatest care." (App. 976, l. 18).

Dr. Friedlander's own words confirm that respondent did not act "with the greatest care." In his letter to trial counsel, Dr. Friedlander assessed that respondent "becomes frustrated with the situation, and while changing a diaper loses control of himself and takes out his anger physically on the child." (App. 1109). This assessment provides no defense. If a pediatrician becomes frustrated and "takes out his anger physically" on a toddler—even during medically necessary care—that doctor would have no defense. Nor does respondent. Thus, had Dr. Friedlander testified at trial, he likely would have given the solicitor additional ammunition to expose the limitations of respondent's defense.²⁵

Furthermore, Dr. Friedlander's testimony surrounding the possible bite marks on the victim's pubic area would not have affected the outcome of the case. The nature and value of that evidence was essentially the same with or without his testimony. At trial, Dr. Luberoff never asserted the arc pattern of bruises was a bite mark. Rather, she testified the pattern of bruises was "a blunt force trauma kind of injury." (App. 345, l. 1). Although Dr. Luberoff noted the "curved arrangement" is "the type of pattern that we can see in a bite mark," she took great pain to advise

²⁵ Dr. Friedlander's testimony does not support a conclusion that respondent was only guilty of the lesser-included offense of ABHAN. In State v. Gilmore, 396 S.C. 72, 719 S.E.2d 688 (Ct. App. 2011), the Court of Appeals noted that ABHAN can be charged as a lesser-included only when there is evidence that the defendant committed ABHAN *instead of*, as opposed to in addition to, CSC. Id. at 77, 719 S.E.2d at 691 (emphasis in original). The court identified three types of cases in which a defendant can be found guilty of ABHAN instead of CSC. Each situation requires evidence that the sexual battery either did not occur or was consensual. Id. at 77-78, 719 S.E.2d at 691. Where the only evidence is that a non-consensual sexual battery occurred, then there is no factual basis to support an ABHAN conviction instead of CSC. Id. Here, because Dr. Friedlander was clear that a sexual battery occurred (App. 957, l. 8), his testimony would not support a conviction for ABHAN instead of CSC.

the jury of the limits of her assessment. (App. 345, l. 2-10). Specifically, she testified that “This doesn’t have to be a bite mark. It can be another kind of blunt force trauma. It can be where the child has been struck a number of times in that area or struck with an object, with a pattern; but it raises the concern for a bite mark.” (App. 345, l. 6-10).

Dr. Friedlander provided no basis to discredit this limited assessment. At the evidentiary hearing, Dr. Friedlander agreed that the bruises were in an arc pattern. (App. 973, l. 11). He further acknowledged that teeth are aligned in an arc pattern. (App. 974, l. 4-5). Although he maintained that “I’m not seeing that as a bite mark,” he provided no evidence to support the assertion. (App. 974, l. 9). In fact, he never evaluated impressions or photographs of respondent’s teeth. (App. 974, l. 10-23). In order to discredit Dr. Luberoff’s limited testimony, he needed to compare the pattern of the victim’s bruises with the pattern of respondent’s teeth. When the State pointed that out on cross-exam, he replied, “Well, he’s got ordinary teeth, doesn’t he?” (App. 974, l. 21). Thus, in the absence of Dr. Friedlander’s testimony, the evidence was that the bruising *could be* a bite mark. With Dr. Friedlander’s testimony, the evidence was still that the bruising *could be* a bite mark. As such, respondent again fails to establish any prejudice.

Respondent’s inability to establish prejudice mirrors the situation in Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006)(abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018)). In Simpson, the defendant alleged his trial attorney was ineffective in failing to obtain expert testimony to corroborate his version of events. At trial, the defendant testified that he and an accomplice planned on robbing a convenience store. After he went inside the store, he apparently “chickened out.” Id. at 594, 627 S.E.2d at 705. To signal he no longer wanted to rob the store, the defendant lifted up his shirt to expose a gun. The cashier saw the gun,

grabbed the defendant by the collar, and a struggle ensued. During the struggle, the defendant fired two shots. The cashier staggered away, and the defendant fired two more shots at him. Id.

After being found guilty, the defendant claimed that his trial attorney should have obtained expert testimony to corroborate his testimony. At the PCR hearing, he offered three expert witnesses, two of whom testified that the cashier was shot in the hand while gripping the barrel of the defendant's gun. Id. at 596, 627 S.E.2d at 706. The defendant alleged ineffective assistance of counsel because the expert testimony would have corroborated his version of events. Id.

This Court rejected that argument. Although the experts could corroborate that the defendant fired two shots during the struggle, the defendant admitted to firing two more shots after the struggle ended. The experts provided no defense to these two additional shots. As such, even with the expert testimony, there was no reasonable probability that the jury would have found the defendant not guilty. Id. at 597-98, 627 S.E.2d at 707.

The case at bar is similar because even if Dr. Friedlander could corroborate respondent's story, he could not establish a defense to respondent's actions. Just like the experts in Simpson who could not explain the two additional shots after the struggle, Dr. Friedlander cannot justify respondent's excessive force. Respondent's excessive use of force and medically recognized treatment are two different things. Not even Dr. Friedlander could establish respondent's actions constituted medically recognized treatment. Thus, had jury heard from him, there is no reasonable probability that their verdict would have changed.

The Simpson case additionally provides guidance on assessing trial counsel's alleged deficiency in not calling Dr. Friedlander as a witness. The defendant in Simpson also claimed that his trial attorney should have hired an expert to discredit the testimony of a young boy who was at the convenience store and witnessed the murders. Id. at 602, 627 S.E.2d at 709. At the PCR

hearing, a developmental psychologist testified that there were several indicators suggesting the boy would remember false details, such as his young age, low I.Q., and length of time between the murders and interview with law enforcement. Id. at 602-03, 627 S.E.2d at 709.

In response, the trial attorney testified that he was aware of the boy's credibility issues and planned on addressing them on cross-exam. Id. at 602, 627 S.E.2d at 709. In fact, the boy's inability to accurately recall details was exposed on both direct and cross-exam. Id. at 603, 627 S.E.2d at 709. Because the trial attorney effectively impeached the boy's credibility on cross-exam, there was no deficiency in not offering expert testimony to accomplish the same thing. Id. 603, 710.

The same logic applies here. After co-counsel extracted concessions from Dr. Luberoff on cross-exam, expert testimony became superfluous. As noted above, Dr. Luberoff conceded that after a messy diaper, a caregiver might need to separate the labia to properly wipe a child. (App. 378, l. 8-9). In doing so, incidental contact to the genitalia can occur. (App. 377, l. 25). According to Dr. Luberoff, such contact is considered medically appropriate. (App. 378, l. 16). In his closing argument, co-counsel highlighted Dr. Luberoff's testimony to argue that the injuries arose from using excessive force during a diaper change. (App. 554, l. 14-19)

Unfortunately for respondent, his explanation for causing the victim's injuries simply did not constitute a valid defense. An individual is entitled to his own opinion, but he is not entitled to his own facts. Given the facts of this case, there is no path to conclude respondent's conduct was medically recognized treatment. Dr. Friedlander's opinion cannot change that reality.

C. Respondent Failed to Establish Prejudice Arising From Co-Counsel's Decision Not to Object to the Admission of Photographs of the Victim's Injuries.

The PCR court also found counsel ineffective in failing to object to the admission of photographs of the victim's injured genitalia. (App. 1220-23). According to the court, co-counsel

should have objected on grounds that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. (App. 1222). See Rule 403, SCRE. The court also found prejudice under Strickland, noting:

This Court cannot know how either the Trial Court or Court of Appeals might have responded to a timely objection...Nevertheless, the Court has reviewed the images in question and has grave concerns with their probative value and whether the jury could set aside any animus that might have been engendered toward Applicant after reviewing the images and refocus its attention on the facts in dispute.

(App. 1222-23).

The PCR court erred in finding prejudice because there is no reasonable probability that the trial court would have sustained an objection. To establish prejudice for failing to object to the admission of evidence, the applicant must prove that there is a reasonable probability that the trial court would have sustained the objection, and that the outcome of the proceeding would have been different. Stone v. State, 419 S.C. 370, 391, 798 S.E.2d 561, 572 (2017).²⁶ In the context of allegedly prejudicial photographs, “[c]ourts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder.” State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014). Moreover, the standard under Rule 403 is not whether the evidence is prejudicial, but “whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value.” Id. at 536, 763 S.E.2d at 28 (emphasis in original).

In reaching its conclusion, the PCR court noted that the photographs were unnecessary given the testimony of the medical personnel. According to the court, “The severity of any injury to the child’s genitals was irrelevant to the criminal sexual conduct charge because all the State

²⁶ Alternatively, the applicant can establish prejudice by showing that the conviction would have been overturned on appeal. Stone, 419 S.C. at 391, 798 S.E.2d at 572.

had to prove was penetration. Thus, what mattered was the existence of evidence of penetration ever so slight, not a graphic display of the injuries.” (App. 1222).

The PCR court’s logic is flawed because the severity of the injuries was relevant in proving respondent’s intent. Respondent claimed the injuries arose while changing the child’s diaper. In assessing that claim, the severity of the child’s injuries is a key factor. Simply put, the more severe the injuries, the less likely that they occurred during a diaper change, or any type of medically recognized treatment. A visible depiction of these injuries allowed the jury to assess their severity, and thus the merits of respondent’s defense.

The PCR court also ignored unique circumstances in this case that enhanced the probative value of the photographs and mitigated their prejudicial effect. For example, at fifteen months old, the victim lacked the ability to testify. Thus, the photographs provided the explanation that the victim could not. Although several witnesses observed the victim’s injuries, the photographs assisted the jury by removing the bias and subjectivity arising from their perception. Additionally, the State offered the photos in the context of clinical testimony from medical providers, which took some of the sting out. In using sterile, medical terminology to explain the injuries depicted in the photos, the providers diffused any prejudicial effect and focused attention on the relevant issues in the case. (App. 343-46).

In this regard, the photographs in this case are analogous to the ones at issue in State v. Collins, 409 S.C. 524, 763 S.E.2d 22 (2014). In Collins, the State offered autopsy photos of a young boy who had been killed by a pack of dogs. There were no eyewitnesses to the attack. Instead, the boy’s mother found his dead body surrounded by a pack of dogs belonging to the defendant. The State “attempted to piece together a theory of what transpired” using the photographs and expert testimony from a forensic pathologist and dog behaviorist. Id. at 531, 763

S.E.2d at 26. The trial court admitted the photos, and the defendant was convicted of involuntary manslaughter. The Court of Appeals subsequently overturned the conviction, finding the probative value of the photos was substantially outweighed by their prejudicial nature. In its ruling, the Court of Appeals repeatedly characterized the photos as “disturbing” and “gruesome.” *Id.* at 534, 763 S.E.2d at 27.

This Court reversed, noting that the Court of Appeals allowed its revulsion for the nature of the evidence to permeate its legal analysis. *Id.* at 534-35, 763 S.E.2d at 28. Specifically, this Court noted that the State had the burden of proof, and with no eyewitnesses to the attack, the photos provided “concrete evidence as to what transpired on that fateful day.” *Id.* at 536, 763 S.E.2d at 28. As this Court explained, “[s]ince there was no one else present at the time of the event, the photos aided the jury in evaluating the testimony offered by both the State and the defendant, especially as to determining the dangerous propensities of the dogs and whether or not [the defendant’s] conduct was criminally reckless.” *Id.* at 536, 763 S.E.2d at 29.

The PCR court made the same mistake as the Court of Appeals in Collins. It allowed its revulsion for the nature of the evidence to cloud its assessment of whether the photographs were admissible. In doing so, the PCR court ignored their high probative value. Given both the victim’s inability to testify and respondent’s defense, these photos had enormous probative value. As such, there is no reasonable probability that the trial court would have sustained an objection to their admissibility. Had counsel objected, the trial court would have overruled him. The PCR court’s finding should therefore be reversed.

CONCLUSION

Respondent's convictions arose not from ineffective assistance of counsel, but from the mountain of evidence against him. The fifteen month old victim was covered in bruises from her head to her feet. She also had penetrating injuries to her genitalia, including a bruised hymen and torn labia. Respondent admitted to causing these injuries, not only to law enforcement during its investigation, but also to the jury at trial. The Constitution grants respondent the right to effective assistance of counsel, and that is what he received.

For the reasons argued above, the legal conclusions in the PCR court's order are fundamentally flawed. Accordingly, the State respectfully asks this Court to reverse that order and reinstate respondent's convictions.

Respectfully submitted,


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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

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

LANCE AUSTIN WILLIAMS, #345477, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.


PROOF OF SERVICE

I, Michael D. Ross, do hereby certify that on this date, I served the *Brief of Petitioner*, in the foregoing action on the Respondent by depositing two copies of the same to his attorneys, in the United States mail, first-class postage prepaid, and addressed as follows:

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