

RECEIVED

Jan 28 2021

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for a Writ of Certiorari to Kershaw County
Court of Common Pleas

Clifton Newman, Circuit Court Judge
J. Derham Cole, PCR Judge

Appellate Case No. 2020-000806

George S. Branham, II,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MICHAEL D. DAVIDSON
Assistant Attorney General
SC Bar No. 104114

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

ISSUES RAISED ON PETITION FOR A WRIT OF CERTIORARI1

STATEMENT OF THE CASE2

STATEMENT OF THE FACTS3

STANDARD OF REVIEW5

ARGUMENT6

CONCLUSION25

**RESPONDENT'S COUNTERSTATEMENTS TO ISSUES RAISED ON PETITION FOR
A WRIT OF CERTIORARI**

- I. The PCR court properly found Counsel was not deficient for failing to object when the trial judge qualified the forensic interviewer as an expert witness in child abuse assessment and forensic interviewing because, at the time of Petitioner's trial, Counsel's decision not to object was reasonable.
- II. The PCR court properly found Petitioner failed to show any resulting prejudice for Counsel's failure to object to the forensic interviewers testimony that improperly bolstered and vouched for the credibility of Victim because there is no reasonable probability the outcome of his trial would have been different, but for this testimony, based on the significant, independent evidence establishing Petitioner's guilt.
- III. The PCR court properly found Petitioner failed to show how Counsel's failure to consult an expert witness was deficient because Counsel was able to vigorously cross-examine both of the State's experts and highlight the differences in their findings, and Petitioner failed to establish he suffered any resulting prejudice, as Petitioner failed to show how the outcome of the proceeding would not have been any different had Counsel retained an independent medical expert.
- IV. The PCR court properly found Petitioner failed to show any resulting prejudice for Counsel's failure to object to testimony by Rebecca Scheffer and Kathy Saunders because there is no reasonable probability the outcome of his trial would have been different, but for this testimony, based on the significant, independent evidence establishing Petitioner's guilt.
- V. Petitioner has completely failed to show how the solicitor's question asking Petitioner if witnesses were lying, had any reasonable effect on the outcome of Petitioner's trial and coupled with significant independent evidence of Petitioner's guilt, he has failed to show any prejudice.
- VI. The PCR court properly found Victim's mother's inadmissible hearsay did not prejudice Petitioner because there was significant, independent evidence establishing Petitioner's guilt and the testimony did not reasonably affect the outcome of trial.
- VII. The PCR court correctly found Petitioner could not show how Counsel's failure to object to Dr. Saunder's testimony was deficient because it was admissible under Rule 803(4), and correctly found Petitioner failed to show any prejudice from Counsel's alleged deficiency because any objection Counsel made to this admissible testimony would not have been sustained.
- VIII. The PCR court properly found Counsel's failure to object to the jury instruction was not deficient because the trial court's jury charge was an appropriate charge on the law at the time of Petitioner's trial.
- IX. The PCR court properly found Counsel's questioning of Victim's mother regarding prior allegations of sexual misconduct against Petitioner was not deficient because Counsel's overall trial strategy—that people were coaching Victim to lie about the alleged abuse—was objectively reasonable, based on Counsel's preparation and review of the case.

- X. The PCR court properly found Petitioner failed to show any prejudice resulted from Counsel's failure to object to the jury watching the video because Petitioner failed to present evidence showing that the trial court would have ruled in his favor.
- XI. The PCR court's dismissal of Petitioner's cumulative error argument was proper and this Court should not apply the cumulative error doctrine and order a new trial.
- XII. The procedures employed by the PCR court were proper and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented to the PCR court and comports with statutory and constitutional requirements.

STATEMENT OF THE CASE

In July 2011, Petitioner was indicted for first-degree criminal sexual conduct with a minor. Jason D. Kirincich, Esquire represented Petitioner on this charge. On August 22-25, 2011, Petitioner proceeded to a jury trial before the Honorable Clifton Newman, where he was convicted as indicted. Judge Newman sentenced Petitioner to fifty years imprisonment. Petitioner appealed.

Appellate Defender Breen Stevens perfected an appeal on Petitioner's behalf pursuant to *Anders v. California*, 386 U.S. 738 (1967). Petitioner subsequently filed a *pro se* brief. Our Court of Appeals issued an order dismissing Petitioner's appeal without argument on September 4, 2013, and granted counsel's request to withdraw. *State v. Branham*, Op. No. 2013-UP-346 (S.C. Ct. App. Filed September 4, 2013). Petitioner filed a petition for rehearing, which was denied on October 24, 2013. The remittitur was issued on December 5, 2013.

Petitioner commenced the underlying post-conviction relief (PCR) action on August 4, 2014. The State served its return on January 30, 2015. App. 27. Thereafter, Petitioner, through his counsel filed an amended application for post-conviction relief on January 22, 2016. In addition to allegations set forth in his amended application, Petitioner also proceeded on an additional claim of cumulative error.

An evidentiary hearing was convened on February 4, 2016, before the Honorable J. Derham Cole. Judge Cole took the matter under advisement. Judge Cole subsequently requested

proposed orders from both parties. On February 12, 2019, three years after the evidentiary hearing, Judge Cole signed an order denying Petitioner relief. Petitioner moved to reconsider pursuant to Rule 59(e), SCRCF, and after the State filed its return, the court summarily denied the motion.

STATEMENT OF THE FACTS

On December 8, 2009, Victim, Victim's mother, and Victim's siblings were living with Petitioner. App. 121, 123, 169. Petitioner had been at a neighbor's house drinking. Victim and Victim's siblings were all sleeping in their mother's bed together. When Petitioner returned home, at about two o'clock, he came into the bedroom and woke Victim's mother. They spoke for a while, and then Victim's mother returned to bed. App. 123–124. Later, Victim, who was seven at the time, woke up to use the bathroom. While she was in the hall, just outside of the bathroom, Petitioner approached her, told her to get on the ground, and got on top of her. Petitioner pulled down Victim's pants and then his own pants. Petitioner then attempted to penetrate Victim's vagina with his penis. App. 171–73.

Meanwhile, Victim's mother realized Victim was no longer in her bed, so she got up to look for her. When she walked into the kitchen, she could see Petitioner in the hallway, lying on top of Victim with his pants around his ankles. Victim's mother could see Victim's pants were also down. When Victim's mother confronted Petitioner, Petitioner jumped up, pulled his pants up, and told her he was trying to make Victim go to the bathroom. Petitioner explained he was checking to see if Victim had wiped herself well after using the bathroom. Victim's mother took Victim to the bathroom, and Victim proceeded to use the bathroom.. She then took Victim back into her bedroom, and Victim informed her Petitioner was trying to put his penis inside her vagina. Victim's mother then called 911. App. 124–31.

Victim's grandmother arrived in the early hours to take Victim to the hospital because Victim was complaining of vaginal pain. App. 133, 314. While there, Dr. Foy Connell examined Victim. App. 196. Dr. Connell opined, "[T]he introitus to the vagina, or where the opening of the vagina appeared to be dilated or – or widened posteriorly, which is indicative of abuse or trauma or anything like that that's been going on for a long time." Dr. Connell noted "no signs of physical injuries at the time of the examination, meaning "there were no signs of an acute laceration or acute bruising or acute anything at the time of the examination." Dr. Connell recommended the child follow up with Dr. Luberoff for an "extensive [medical] examination." App. 192-202.

On December 11, 2009, Debra Elliot did a forensic interview of Victim. She opined the child was competent. She testified about the "safeguards" used "to prevent any type of influence." Ms. Elliott testified there was nothing about the child's disclosure that would cause her "to believe it was the result of third-party influence," and in her "expert opinion" the child's disclosure was not "affected by suggestibility or coaching." Further she opined that the Victim's account was very detailed and therefore credible, from which she concluded that Victim had been chronically sexually abused by Petitioner. Dr. Kathy Saunders also examined Victim a couple of days after the abuse. App. 312. Upon examination of Victim, Dr. Saunders there was attenuation of the hymen, which was consistent with past penetration. App. 197, 203, 317-18. Although there were no signs of tearing, bruising, or bleeding, the opening of Victim's vagina appeared to be dilated, which Dr. Saunders noted was indicative of prolonged abuse. App. 197, 203, 210, 332. Because Victim's vagina was widened at the time of the exams, Dr. Saunders concluded penetration could have occurred between hours and days of the exam. and noted Victim's genitalia were also red and irritated. App. 209, 214, 317. Dr. Saunders found there was a small amount of clear discharge

present as well. App. 318, 320. Lastly, Dr. Saunders observed some avascularity along the posterior rim of Victim's vagina, which was also consistent with past penetration. App. 322.

STANDARD OF REVIEW

PCR Appeal

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts give great deference to a PCR court's credibility findings because appellate courts lack the opportunity to directly observe the witnesses. *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, appellate courts give no deference to the PCR court's conclusions of law and review those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome . . ." *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (emphasis added). "Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

ARGUMENT

I. The PCR court properly found Counsel was not deficient for failing to object when the trial judge qualified the forensic interviewer as an expert witness in child abuse assessment and forensic interviewing because, at the time of Petitioner’s trial, Counsel’s decision not to object was reasonable.

Petitioner argues trial counsel was constitutionally ineffective for failing to object to the forensic interviewer who interviewed Victim was tendered and testified as an expert witness in child abuse assessment and forensic interviewing the PCR court erred as a matter of law in denying relief on this ground because the court erroneously ignored the established precedent finding such performance ineffective. However, the PCR court found Counsel’s failure to object was not deficient because, at the time of Applicant’s trial in 2011, it was common practice to admit forensic interviewers as experts in the field of forensic interviewing and objections to the qualifications of such witnesses were generally unsuccessful.

“The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases.” *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). In making a fair assessment of attorney performance, a court must make every effort to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Counsel’s performance must be evaluated based on the reasonable professional practices at the time of Applicant’s trial.

In *State v. Douglas*, the South Carolina Court of Appeals held the trial court did not abuse its discretion in finding a forensic interviewer had ““acquired by study or practical experience such knowledge of the subject matter of [her] testimony as would enable [her] to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge”” when the interviewer had previously been qualified in family

court, circuit court, and federal court as an expert witness in interviewing child sexual assault victims, had received specialized training in the RATAAC method, and had been certified as a forensic interviewer using the RATAAC method. 367 S.C. 498, 519, 626 S.E.2d 59, 70 (Ct. App. 2006), *reversed on other grounds by State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009). In holding that it was unnecessary for the trial court to admit the forensic interviewer as an expert, the Supreme Court of South Carolina, in dicta, noted although it was unnecessary to admit the forensic interviewer in that case as an expert, there may be a case in which qualification of an expert in the field of forensic interviewing would be proper. *Douglas*, 380 S.C. at 503 n. 2, 671 S.E.2d at 609 n. 2.

In *Briggs*, our Supreme Court reversed the PCR court's finding that trial counsel was deficient for not objecting to a forensic interviewer being qualified as an expert. 421 S.C. at 331-32, 806 S.E.2d at 721. The Court in *Briggs* examined its opinion in *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009), and clarified, "We did not say it was error [to qualify a forensic interviewer as an expert], and specifically recognized 'there may be a case in which qualification of an expert in this field is proper.'" *Briggs*, 421 S.C. at 332, 806 S.E.2d at 721 (footnote omitted) (quoting *Douglas*, 380 S.C. at 503 n.2, 671 S.E.2d at 608 n.2). The *Briggs* Court concluded,

In light of this history of permitting forensic interviewers to testify as experts, we simply cannot say it was unreasonable for [trial counsel] to not object to the qualification of [the forensic interviewer] as an expert in child abuse assessment in the August 2010 trial.

421 S.C. at 333, 806 S.E.2d at 722.

Here, the PCR court found Counsel's decision not to object was reasonable, and therefore Petitioner failed to show how Counsel was deficient. At the time of Petitioner's trial, in 2011, it was common practice to admit forensic interviewers as experts in the field of forensic interviewing

and any objections to the qualifications of such witnesses were generally unsuccessful. Based on the history of permitting forensic interviewers to testify as experts, the PCR court's finding—that at the time of Petitioner's trial, Counsel's decision not to object to the qualification of the forensic interviewer was reasonable—was proper. *See Briggs, supra*. The PCR court did not err, and this Court should deny certiorari.

II. The PCR court properly found Petitioner failed to show any resulting prejudice for Counsel's failure to object to the forensic interviewers testimony that improperly bolstered and vouched for the credibility of Victim because there is no reasonable probability the outcome of his trial would have been different, but for this testimony, based on the significant, independent evidence establishing Petitioner's guilt.

Petitioner argues Counsel was ineffective for failing to object when the forensic interviewer testified "My conclusion was that [Victim] had been chronically sexually abused by [Petitioner]." and, "I felt that she was telling the truth.", because it bolstered and vouched for the credibility of the child's statements. Although the PCR court found Petitioner failed to establish Counsel was deficient because allowing forensic interviewers to testify at the time of Petitioner's trial was common practice and arguments that this testimony was bolstering were generally ineffective, Respondent concedes that it is abundantly clear from the case law in this area that Counsel's failure to object was deficient. *See State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *Smith v. State*, 386 S.C. 562, 689 S.E.2d 629 (2010); *Dawkins v. State*, 346 S.C. 151, 551 S.E.2d 260 (2001). However, despite Counsel's obvious deficiency in failing to object, the PCR court properly found Petitioner failed to meet his burden of proof because there is no reasonable probability the outcome of his trial would have been different but for this testimony, based on the significant, independent evidence establishing Petitioner's guilt.

Here, Victim testified regarding the alleged sexual abuse, and Victim's mother's admissible testimony properly corroborated the event. At Petitioner's trial, Victim's mother

testified on the night of the abuse she woke up to see Petitioner in the hallway lying on top of Victim with his pants down. She further testified Victim's pants were also down. App. 124. This alone is convincing enough for the jury to determine Petitioner's guilt. In addition to Victim's mother's testimony, Dr. Connell's testimony that there was a widening introitus indicative of abuse or trauma, Dr. Saunders testimony that there was attenuation of the hymen, which was consistent with past penetration. App. 197, 203, 317-18. It is important to note that Petitioner's own expert at the evidentiary hearing testified that it would have been her opinion that the victim was subject to sexual abuse. App. 800. The PCR court found Petitioner failed to establish any resulting prejudice because he failed to show a reasonable probability of a different outcome at trial based on the other significant, independent evidence establishing Petitioner's guilt.

The presence of significant, independent evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the trial. *Franklin v. Catoe*, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n.3 (2001), *cert denied*, 535 U.S. 1114 (2002); *see also Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is significant, independent evidence of guilt). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Smalls* at 188, 810 S.C. at 844 (internal citations omitted).

After properly weighing the impact of Elliott's testimony against the other admissible evidence at trial, the PCR court properly found Petitioner failed to establish any resulting prejudice because he failed to show a reasonable probability of a different outcome at trial based on the other

significant, independent evidence establishing Petitioner's guilt. This finding is supported by ample evidence of probative value and certiorari should be denied.

III. The PCR court properly found Petitioner failed to show how Counsel's failure to consult an expert witness was deficient because Counsel was able to vigorously cross-examine both of the State's experts and highlight the differences in their findings, and Petitioner failed to establish he suffered any resulting prejudice, as Petitioner failed to show how the outcome of the proceeding would not have been any different had Counsel retained an independent medical expert.

Petitioner argues Counsel was ineffective for failing to retain and consult with a forensic pediatrician for a second opinion regarding the medical and photograph evidence and that the PCR court erred as a matter of law. However, the PCR court found Petitioner failed to show that Counsel was not deficient for failing to consult an expert witness, as he was able to vigorously cross-examine both of the State's experts and highlight the differences in their findings. Also, the PCR court found Petitioner failed to establish he suffered any prejudice, as the result of the proceeding would not have been any different had Counsel retained an independent medical expert.

At the PCR hearing, Counsel testified he neither hired nor consulted a medical expert, but that he did meet with the State's expert, Dr. Saunders, prior to Petitioner's trial. He testified he reviewed the photographs with Dr. Saunders, and they also reviewed her testimony. App. 829. Counsel explained he knew that Dr. Connell's testimony differed from Dr. Saunders's testimony in that Dr. Connell did not find signs of physical injury whereas Dr. Saunders did find signs of physical injury. App. 197, 203, 210, 317, 324, 339. He testified it was his strategy to exploit these differences, and he was able to bring out the fact that there was no physical injury in front of the jury. App. 847. He further testified he did ask the trial court for funding for another expert, but the trial court denied his request, explaining that the defense could hire every expert the State hires but that the defense would just hire an expert that has a different opinion than the State's expert. App. 830. The PCR Court concluded that Counsel was not deficient for failing to consult an expert

witness, as he was able to vigorously cross-examine both of the State's experts and highlight the differences in their findings.

“[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007). This duty includes the duty to investigate the prosecution's medical evidence and present expert testimony refuting the State's expert. *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008). However, when counsel vigorously cross-examines the State's witnesses and attacked the accuracy of the evidence, his representation is not rendered deficient. *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing *Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991)).

The PCR court, relying on *Lorenzen*, found Counsel was able to elicit testimony from both Dr. Connell and Dr. Saunders that there was no physical injury, scarring, or bruising to Victim. App. 210, 322, 344. Counsel was also able to elicit testimony from both experts as to different causes of redness and swelling of Victim. App. 209, 331. The PCR court properly concluded that Counsel was not deficient for failing to consult an expert witness, as he was able to vigorously cross-examine both of the State's experts and highlight the differences in their findings.

Moreover, Petitioner failed to show he suffered any resulting prejudice from Counsel's alleged deficiency. In support of his allegation Counsel was ineffective for failing to retain and consult a medical expert, Petitioner presented the testimony of Dr. Rosa at his PCR hearing. Dr. Rosa testified she agreed with Dr. Saunders regarding the presence of redness and shape of Victim's hymen, but she disagreed with Dr. Saunders regarding the avascularity area or scar tissue on the posterior hymen. She testified the lack of acute trauma at the time Victim was examined

does not rule out past penetration. Ultimately, Dr. Rosa testified she believed Victim had been sexually assaulted and would have testified to that opinion had she been called as a witness at trial. App. 791–99. Although Dr. Rosa disagreed with some of Dr. Saunders’s description of the symptoms and appearance of Victim’s hymenal tissue, Dr. Rosa did agree with Dr. Saunders’s opinion that Victim had been sexually assaulted. The PCR court properly found Petitioner wholly failed to establish he suffered any prejudice, as the result of the proceeding would not have been any different had Counsel retained an independent medical expert. *See Strickland*, 466 U.S. at 696.

In conclusion, the PCR court correctly found Petitioner failed to show that Counsel was not deficient for failing to consult an expert witness, as he was able to vigorously cross-examine both of the State’s experts and highlight the differences in their findings. Further, the PCR court correctly found Petitioner also failed to establish he suffered any prejudice—as the result of the proceeding would not have been any different had Counsel retained an independent medical expert. Accordingly, certiorari should be denied.

IV. The PCR court properly found Petitioner failed to show any resulting prejudice for Counsel’s failure to object to testimony by Rebecca Scheffer and Kathy Saunders because there is no reasonable probability the outcome of his trial would have been different, but for this testimony, based on the significant, independent evidence establishing Petitioner’s guilt.

Petitioner argues the PCR court erred in finding Counsel was not ineffective for failing to object to Rebecca Scheffer and Kathy Saunders because it exceeded the scope of time and place limitation of Rule 801(d)(1)(D) and the limited exception for medical diagnosis and treatment of Rule 803(4). However, regardless of the alleged inadmissible hearsay testimony, Petitioner cannot show he suffered any resulting prejudice because there is no reasonable probability the outcome of his trial would have been different but for this testimony, based on the significant, independent evidence establishing Petitioner’s guilt.

At trial, Rebecca Scheffer, a Registered Nurse, was qualified “as an expert in sexual assault nurse examination.” She performed a sexual assault examination on the child on December 8, 2009. Scheffer read her report into the record, which included, “Mom caught Bubba trying to touch me in the hallway. Bubba has touched me with his nuts a lot of times. I bled on time – not last night. Mom saw him with his pants down and my pants down as usual.” Then she summarized the sexual assault exam she performed and testified about the evidence she collected. App. 260-76.

Later, Dr. Saunders testified about the medical history provided to her by Victim’s father, including allegations that Petitioner “went in the hallway,” “pulled the child’s pants down,” “pulled his pants down,” and was “having sex with the Victim.” She also had reviewed the forensic interview. App. 313-15. Dr. Saunders testified she used the victim’s medical history, along with her own observations, when diagnosing the victim. Based on the victim’s past medical history and her own observations, Dr. Saunders diagnosed the victim as displaying physical characteristics consistent with past penetration. App. 322.

The presence of significant, independent evidence of guilt negates any claim that counsel’s performance could have reasonably affected the result of the trial. *Franklin v. Catoe*, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n.3 (2001), *cert denied*, 535 U.S. 1114 (2002); *see also Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is significant, independent evidence of guilt). “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Smalls* at 188, 810 S.C. at 844 (internal citations omitted).

Although portions of Rebecca Sheffer's and Dr. Saunders' testimony did go beyond the time and place limitations of Rule 801(d)(1)(D), SCRE, the admissible physical evidence and corroborating evidence in this case—namely Victim's mother's testimony she actually saw Petitioner on top of the victim with his pants down—leaves little question as to whether the inadmissible hearsay testimony of Dr. Saunders and Rebecca Sheffer changed the outcome in the case. *See Franklin v. Catoe*, 346 S.C. 563. Therefore, the Petitioner cannot establish any resulting prejudice because there is no reasonable probability the outcome of his trial would have been different but for this testimony, based on the significant, independent evidence establishing Petitioner's guilt. Accordingly, certiorari should be denied.

V. Petitioner has completely failed to show how the solicitor's question asking Petitioner if witnesses were lying, had any reasonable effect on the outcome of Petitioner's trial and coupled with significant independent evidence of Petitioner's guilt, he has failed to show any prejudice.

Petitioner argues Counsel was ineffective for not objecting to the State allegedly pitting him against other witnesses by asking, "So all these people, [Victim's mother], [Victim], Investigator Lyons, they're all lying?" However, Petitioner cannot establish any resulting prejudice because there is no reasonable probability the outcome of his trial would have been different but for this testimony, based on the significant, independent evidence establishing Petitioner's guilt.

Petitioner alleges the solicitor was pitting witnesses; however, Petitioner and Counsel decided their strategy before trial would try to expose that the allegations were lies. This question highlights the exact message Petitioner wanted the jury to know. As such, Petitioner has completely failed to show how this questioning, coupled with significant independent evidence of Petitioner's guilt, had any reasonable effect on the outcome of Petitioner's trial; therefore, he has failed to show any prejudice. Accordingly, certiorari should be denied.

VI. The PCR court properly found Victim’s mother’s inadmissible hearsay did not prejudice Petitioner because there was significant, independent evidence establishing Petitioner’s guilt and the testimony did not reasonably affect the outcome of trial.

Petitioner argues Counsel was ineffective for his failure to object to Victim’s mother’s testimony of statements of the child hearsay statements by Victim’s mother, because the testimony exceeded the scope of Rule 801(d)(1)(D). Specifically, Petitioner takes issue with testimony by Victim’s mother that “[Petitioner] was trying to stick his private in [Victim’s] hole”, and her testimony of Victim’s urinary tract infections. App. 125; 136. However, Petitioner failed to establish any resulting prejudice from the alleged hearsay testimony of Victim’s mother because there was significant, independent evidence establishing Petitioner’s guilt and the testimony did not reasonably affect the outcome of trial.

Addressing the testimony of regarding what Victim told her after the sexual assault occurred, Victim’s mother testified “[Victim] told me [Petitioner] was trying to stick his private in her hold.” App. 125. Petitioner is correct that Counsel was deficient for failing to object to Mother’s above referenced testimony because it is inadmissible hearsay. Rule 802, SCRE (“Hearsay is a statement made by someone other than the person testifying offered for its truth.”); Rule 801, SCRE. (“Hearsay is generally inadmissible.”) However, Victim’s mother’s improper hearsay testimony—“he was trying to stick his private in her hole”—did not prejudice Petitioner. “Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice.” *State v. Garner*, 389 S.C. 61, 67, 697 S.E.2d 615, 618 (S.C. App. 2010). Such error is deemed harmless when it could not have reasonably affected the result of trial. *Id.*

Petitioner cannot show that the admission of this testimony had any resulting prejudice—that the testimony at issue reasonably affected the result of the trial—because Victim’s mother actually witnessed Petitioner lying on top of the victim with their pants down around their ankles.

Because Victim's testimony was properly corroborated by what Mother actually saw, no prejudice resulted from Mother's inadmissible hearsay testimony. Accordingly, the PCR did not err in finding Petitioner was not prejudiced by Victim's mother's testimony because the testimony of what Victim related to her about the incident was properly corroborated in significant ways and therefore its admission did not reasonably affect the outcome of trial.

Next, addressing Victim's mother's testimony regarding Victim's urinary tract infections, Victim's mother testified she took Victim "to the doctor a lot" because Victim kept getting urinary tract infections (UTIs), and the doctor would prescribe antibiotics for Victim. Victim's mother further testified she would ask the doctor "what was going on," and the doctor would "just say [Victim's vagina was] red and irritated and that [the doctor] didn't want to mess with it because [the doctor] didn't want to make it worse." App. 136.

Again, Petitioner is correct that Counsel was deficient for failing to object to Victim's mother's testimony regarding Victim's prior UTIs because it is inadmissible hearsay. However, Victim's mother's testimony regarding the victim's prior UTIs was not prejudicial because it was merely cumulative to Dr. Saunders's admissible testimony regarding the victim's history of UTIs. *See State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). Because Victim's mother's testimony regarding Victim's UTIs was cumulative to Dr. Saunders's testimony, the PCR court did not err finding Petitioner failed to show prejudice as there is no reasonable probability the outcome of trial would have been different but for this cumulative testimony. In conclusion, the PCR Court did not err in finding no prejudice resulted from Mother's inadmissible hearsay testimony, and certiorari should be denied.

VII. The PCR court correctly found Petitioner could not show how Counsel’s failure to object to Dr. Saunder’s testimony was deficient because it was admissible under Rule 803(4), and correctly found Petitioner failed to show any prejudice from Counsel’s alleged deficiency because any objection Counsel made to this admissible testimony would not have been sustained.

Petitioner argues the Court misapplied Rule 803(4), SCRE, in finding Dr. Saunders’ testimony admissible, which included hearsay information contained in prior medical records of the Victim, including medical history provided by Victim’s father, because the treatment providers did not testify at trial and the records were not introduced into evidence. However, the PCR court did not err. Rule 803(4), SCRE, provides an exception to the rule against hearsay for statements for purposes of medical diagnosis or treatment. Specifically, statements that fall into this hearsay exception are “Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or . . . general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” Rule 803(4), SCRE.

As noted above, Dr. Saunders testified she used Victim’s medical history, along with her own observations, when diagnosing Victim. Dr. Saunders stated that in her review of Victim’s medical records, there were instances where previous doctors thought Victim had UTIs. However, in reviewing those lab reports, Dr. Saunders discovered there was no infection present in Victim’s urine cultures. Saunders testified the medical history of previous vaginal bleeding, that was thought to be caused by UTIs but was not, was significant. Based on Victim’s past medical history and her own observations, Dr. Saunders diagnosed Victim as displaying physical characteristics consistent with past penetration. App. 322–23.

Dr. Saunders’s testimony that Victim’s past diagnoses of UTIs were unfounded, based on the lab results, was relevant to Dr. Saunders’s diagnosis of Victim as displaying characteristics of past penetration; therefore, this testimony was admissible under Rule 803(4), SCRE. Because the

testimony was admissible under Rule 803(4), Petitioner cannot show how Counsel's failure to object was deficient. Further, Petitioner cannot show any prejudice from Counsel's alleged deficiency because any objection Counsel made to this admissible testimony would not have been sustained. Accordingly, the PCR court did not err and certiorari should be denied.

VIII. The PCR court properly found Counsel's failure to object to the jury instruction was not deficient because the trial court's jury charge was an appropriate charge on the law at the time of Petitioner's trial.

Petitioner alleges Counsel was ineffective for failing to object when the trial court charged that "testimony of an alleged victim in a criminal sexual conduct case need not be corroborated" and that the State put "special emphasis" on this charge during its closing arguments. However, the PCR court found Counsel's failure to object was not deficient because the trial court's jury charge was an appropriate charge on the law at the time. At trial, the trial court charged the jury:

In passing upon credibility, you may take into consideration many things, such as the demeanor or manner of testifying, whether the witness had reason to be biased or prejudiced, whether a witness' testimony was contradicted on the one hand or supported and corroborated on the other hand. However, the testimony of an alleged victim in a criminal sexual conduct case need not be corroborated.

App. 456. Section 16-3-657 of the South Carolina Code explicitly provides that "the testimony of the victim need not be corroborated in [criminal sexual conduct] prosecutions." In 2016, however, the Supreme Court of South Carolina held a jury charge reflecting this statute was an impermissible charge on the facts. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). Consequently, *Stukes* "overrule[d] the precedent to the contrary." *Id.* at 498, 787 S.E.2d at 482.

Here, had Petitioner's trial occurred after *Stukes*, the trial court's charge would be error. However, "the relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies [his] original statements." *Thornes*, 310 S.C. at 310,

426 S.E.2d at 766. Moreover, trial counsel has never been required to anticipate or discover changes in the law that differ from the law at the time of trial. *Id.* at 309-10, 426 S.E.2d at 765. *Stukes* was decided in 2016, approximately five years after Petitioner's trial. Therefore, the PCR court correctly found that Counsel was not deficient because the trial court's jury charge was an appropriate charge on the law at the time. Accordingly, the PCR court did not err and certiorari should be denied.

IX. The PCR court properly found Counsel's questioning of Victim's mother regarding prior allegations of sexual misconduct against Petitioner was not deficient because Counsel's overall trial strategy—that people were coaching Victim to lie about the alleged abuse—was objectively reasonable, based on Counsel's preparation and review of the case.

Petitioner argues Counsel's questioning of Victim's mother regarding prior allegations of sexual misconduct against Petitioner was not a reasonable trial strategy as it introduced bad character evidence that was not even true. Petitioner argues that as a result of this line of questioning, the jurors heard misleading information that Petitioner had abused another child, which is improper character evidence. However, the PCR court found Counsel's overall trial strategy—that people were coaching Victim to lie about the alleged abuse—was objectively reasonable, based on Counsel's preparation and review of the case.

Strickland requires trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). The validity of counsel's strategy is

viewed under an ‘objective standard of reasonableness.’” *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). In making a fair assessment of attorney performance, a court must make every effort to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Accordingly, Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992).

Here, from the inception of the trial it is clear that Counsel’s trial strategy was to allege the Victim was coached because in his opening statement to the jury, he stated, “Children don’t always tell the truth. Children can be coached.” App. 117. Later, when cross-examining Victim’s mother, Counsel asked if Victim’s brother ever alleged Petitioner sexually abused him in the past. The solicitor objected, and the trial judge sustained the objection. Then, Counsel rephrased and asked Victim’s mother whether anyone in her family had made false allegations of sexual abuse against Petitioner. Again, the solicitor objected, and the trial judge sustained the objection. Later, outside the presence of the jury, Counsel informed the trial judge, “[T]here was a specific line of questioning that I wanted to go into that involved fabrication by another one of her children.” The trial judge stated, “It’s pretty easy to see why that’s an improper line of questioning if that’s what you were trying to do.” Then, Counsel questioned Victim’s mother *in camera*. Victim’s mother acknowledged the child’s sibling previously accused Petitioner of sexual abuse, but Victim’s uncle turned out to be the “perpetrator of that abuse.” Counsel asked if Victim’s sibling was coached to make that prior allegation against Petitioner, which Victim’s mother denied. The trial judge sustained the State’s objection to this line of questioning by the defense. App. 184–90.

The PCR court found Counsel's trial strategy to be "valid and prudent based on all testimony presented." OOD 12. As a result, the PCR court found Counsel was not deficient. Based on conversations with Petitioner, Counsel had reason to believe the family had falsely accused Petitioner of sexually assaulting Victim's sibling in the past; however, it was later determined that Petitioner was not the perpetrator. The PCR court found this line of question reasonable because Counsel's strategy was to show the victim was lying and had been coached. It was important for Counsel to ask this line of questions because it shows the victim's family made false accusations against Petitioner before, and it was essential to attack the family's credibility. Accordingly, the PCR court properly found Petitioner failed to establish any deficiency because Counsel's strategy was objectively reasonable and his performance went well beyond the standard of reasonableness according to professional norms. This finding is supported by ample evidence of probative value and should be upheld. Accordingly, certiorari should be denied.

X. The PCR court properly found Petitioner failed to show any prejudice resulted from Counsel's failure to object to the jury watching the video because Petitioner failed to present evidence showing that the trial court would have ruled in his favor.

Petitioner argues the videotape of Victim's forensic interview is essentially videotaped testimony without an opportunity for contemporaneous cross-examination. Petitioner does not argue the forensic interview was inadmissible, but he argues Counsel should have objected to the video being re-watched by the jury during deliberations. The PCR court found Petitioner failed to show any prejudice resulted from Counsel's failure to object to the jury watching the video again, because Counsel's objection would have been subject to the trial court's discretion.

"In assessing prejudice under *Strickland*, the question *is not* whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Harrington v. Richter*, 562 U.S. 86, 111

(2011) (emphasis added). “Instead, *Strickland* asks whether it is ‘reasonably likely’ the result would have been different.” *Id.* (quoting *Strickland*, 466 U.S. at 696). “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Id.* at 111-12 (quoting *Strickland*, 466 U.S. at 693, 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112.

At the PCR hearing, Petitioner failed to present evidence showing that the trial court would have ruled in his favor. As a result, the PCR court found Petitioner failed to show a substantial likelihood of a different result had Counsel objected. There is ample evidence of probative value to support this finding. Accordingly, certiorari should be denied.

XI. The PCR court’s dismissal of Petitioner’s cumulative error argument was proper and this Court should not apply the cumulative error doctrine and order a new trial.

Petitioner asserts the PCR Court should have granted relief based on a cumulative error analysis. However, the PCR Court properly rejected Petitioner’s assertions that he is entitled to relief based on cumulative prejudice. Accordingly, this Court should uphold the PCR Court’s holding and dismiss this issue with prejudice.

Recently, in *Smalls v. State*, our Supreme Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. 422 S.C. at 194, 810 S.E.2d at 864 (“As we have explained, the strength of the evidence must be considered along with the specific impact of counsel’s errors.”). “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by

the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Id.* at 188, 810 S.C. at 844 (internal citations omitted).

Here, the PCR court’s dismissal of Petitioner’s cumulative error argument was proper, pursuant to *Smalls*. The PCR court found that the State presented a significant, independent amount of evidence to support Petitioner’s guilt. Further, the PCR court found that the specific impact of counsel’s errors did not have an impact on the outcome of trial due to the overwhelming evidence of Petitioner’s guilt. Therefore, *Smalls* supports the PCR court’s conclusion that “cumulative error analysis would be inappropriate.” Accordingly, certiorari should be denied.

XII. The procedures employed by the PCR court were proper and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented to the PCR court and comports with statutory and constitutional requirements.

Petitioner argues that the procedure followed by the PCR court denied Petitioner his right to have his PCR claim adjudicated by a judicial officer. Petitioner takes issue with the process of asking the prevailing party to draft a proposed order for the Court’s review and consideration. However, the procedures employed by the PCR Court were proper and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented by the Court and comports with statutory and constitutional requirements.

It is crucial to note that Petitioner misrepresents the quoted portion of the South Carolina Supreme Court’s opinion in *Hall* by omitting the second half of the sentence: “Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, **we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.**” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (emphasis added). As discussed by our Supreme Court in *Hall* in

the emphasized portion above that Petitioner deliberately omitted, it is common and routine practice in not only post-conviction relief cases but the vast majority of cases heard by the circuit court in this state for the prevailing party to draft a proposed order for the Court's consideration. The process of submitting proposed orders is built into our rules, (*see* Rule 5(b)(3), SCRCP, which explicitly references "finds of fact and conclusion of law" as required under Section 17-27-80), and custom, *Hall*, 360 S.C. at 365, 601 S.E.2d at 341.

As recently as 2019, our Supreme Court has again recognized the practice of calling for proposed orders from litigants remains routine, though the "finalization of [the] order is often a collaborative effort." *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019). Our Supreme Court has never required or even suggested that a post-conviction relief judge must write his or her orders from scratch. If the post-conviction relief court—after careful consideration—adopts the language offered, that language becomes the Court's order. The judge is free to accept or reject a proposed phrasing or finding as the Court deems appropriate.

Here, both parties provided proposed orders to the PCR court, as requested. After reviewing the opposing orders, the PCR court elected to adopt the State's order denying relief. Once the PCR court signed the order and it was filed, the order was no longer that of an advocate, but that of the court. *See Fishburne, supra*. In conclusion, the procedures employed by the PCR court were proper and the final order issued reflects thoughtful and deliberate consideration and review of the record and evidence presented to the PCR court and comports with statutory and constitutional requirements. Therefore, the PCR court did not err, and this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should dismiss all issues raised by Petitioner on appeal and deny certiorari.


Respectfully submitted,

ALAN WILSON
Attorney General

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

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

January 28, 2020

BY: 

ATTORNEYS FOR RESPONDENT