

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Honorable R. Scott Sprouse, Circuit Court Judge

ANDREW ANTONIO CLEMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPELLATE CASE NO. 2020-000941

APPENDIX

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1 A Correct.

2 MR. SMITH: Your Honor, at this time the State
3 would move to admit Exhibit 1 into evidence.

4 MS. ROSS: Judge, we object. Anything beyond, I
5 believe, on page 31, the judge states that -- well,
6 going back to page 30, line 24, the judge states,
7 "Counsel, didn't you tell me that the bond form and the
8 card go out, notify?" And Ms. Reeves says, "Yes, sir,
9 we double-checked on that."

10 So to any extent beyond that which is in the
11 record, again I would object to that coming in at this
12 time.

13 THE COURT: All right. You're referring me to
14 page 31?

15 MS. ROSS: Right. The bottom of page 30, line 24,
16 and then the top of -- it goes on at the top of
17 page 31.

18 THE COURT: Looks like she says, "The language on
19 the back of the bond card that we sent out reads that
20 also bond estreatment procedure will begin. You can be
21 tried in your absence, so it's clearly stated on the
22 back of the bond card that's sent to the defendant."

23 Is this different -- the testimony is that there's
24 been additional language that has been added to it
25 regarding attire, but has there -- is this card

1 substantially different than what she just testified
2 to?

3 MS. ROSS: Well, we'd argue that it's just further
4 testimony in the record. My understanding of the trial
5 in absence analysis is the analysis is purely on what
6 the judge at the time had in front of him and the
7 ruling that he made on the record.

8 THE COURT: This is not this card that was mailed
9 to him?

10 MS. ROSS: That's not the original.

11 THE COURT: I'll sustain the objection. It's in
12 the record. I'll sustain the objection.

13 MR. SMITH: Well, your Honor, can I be heard
14 further on that, that point?

15 THE COURT: Yes, sir.

16 MR. SMITH: It leads into another item of evidence
17 I intend to introduce into evidence. It actually shows
18 the front of the card that was mailed to Mr. Clemons,
19 and the issue with that is the back of the card showing
20 what the warning is, is not preserved with this.

21 And I intend to show that, although I don't have
22 the back of the card that was mailed to him, I can show
23 it was substantially similar to the card.

24 THE COURT: You can put in case-specific documents
25 that are referred to, but she's testified that it was

1 on the back of the bond card that was sent to the
2 defendant, so I'm going to sustain this objection. But
3 that's without prejudice to your ability to bring in
4 other exhibits provided proper foundation is laid for
5 them.

6 MR. SMITH: Okay. Thank you.

7 I have here four documents that I would like to be
8 marked collectively as one exhibit, Respondent's
9 Exhibit 2.

10 (WHEREUPON, Respondent's Exhibit Number 2 was
11 marked for identification.)

12 Q Ms. Reeves, I'm handing you four sheets of paper
13 that have printing on one side.

14 Have you seen those pages before?

15 A I have.

16 Q That's marked Respondent's Exhibit 2, right?

17 A Yes.

18 Q Can you describe to me what these documents are?

19 A Yes, sir. These are copies of the front of the
20 bond cards that I referred to earlier. These are sent
21 out to the defendants, to their attorney, as well as
22 their bonding company notifying them of their court
23 date.

24 These pages in particular were from this trial.
25 The first page, the first and second page are both to

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1 Andrew Clemons. They are to two different addresses
2 that we had on file for him, [REDACTED] at
3 Railroad Street in Anderson, and [REDACTED] Sears Street in
4 Anderson. Both read that his appearance date is
5 May 13th of 2013 at 8:30 a.m. He is supposed to come
6 to the fourth floor courtroom for trial May 13th, 2013,
7 through May 17, 2013.

8 Q Okay. And these were mailed out to Mr. Clemons?

9 MS. ROSS: You know, Judge, again I'd object to
10 supplementing the record. This is going back nine
11 years. The record that I have on page 30 and 31 that
12 we discussed further is all that I saw in the
13 transcript, in the record, addressing the address, the
14 specific addresses that these bond cards went out to.

15 Now there is testimony in that record that bond
16 cards would be sent out, but nothing about these
17 specific addresses and no finding based on that. So to
18 that extent, I would object, and also these are not the
19 original cards or copies of the original cards that
20 went out at that time.

21 THE COURT: Mr. Smith.

22 MR. SMITH: Your Honor, the point in introducing
23 these into evidence is to show that, even if
24 Mr. Thomason did not tell his client about this hearing
25 date, that he would have been informed about the date

1 and time. The case law on this point says that a
2 defendant can waive his right to be at trial, and to do
3 that, a bond card notifying him of the time, place, and
4 the fact that he could be tried in his absence is
5 enough to establish that he waived the right to appear.

6 And so the whole point of this allegation is to
7 show -- that applicant's raising is to show Mr. Clemons
8 had no knowledge of this hearing and that he did not
9 waive his right to be there. This evidence goes
10 directly to that.

11 Now, I admit these weren't admitted into evidence
12 at trial, but we're also discussing other evidence in
13 this PCR that wasn't admitted at trial. The point is
14 what effect would these items have had had they been
15 introduced at trial.

16 I think that these pieces of evidence can go to
17 show that Mr. Clemons waived his right to be present
18 for trial, which would defeat his claim of prejudice.

19 MS. ROSS: And that was a question for the trial
20 judge.

21 THE COURT: Well, it is discussed by the trial --
22 in the conversations with the trial judge. I'm going
23 to overrule the objection. So Number 2 would be
24 admitted over the objection of the applicant.

25 THE WITNESS: Mr. Smith, there was something that

1 I forgot to mention as well that I noticed from the
2 transcript.

3 Mr. Thomason also mentions himself to the Court
4 that -- he says that the defendant knew to be here and
5 knew that the trial would go on without him. I believe
6 that was around page 36.

7 BY MR. SMITH:

8 Q When you moved to admit the -- tell me about the
9 forensic interviews.

10 What video recordings did you move to admit at
11 trial?

12 A We moved to admit two forensic interviews, one of
13 the victim herself, and then one of her sister who had
14 witnessed an incident.

15 Q And both of those were minors, the victim and her
16 sister, right?

17 A Yes.

18 Q And the trial court had the opportunity to hear
19 the process the forensic examiner used when she
20 questioned them, right?

21 A Correct.

22 Q And Mr. Thomason had the opportunity to
23 cross-examine those two witnesses at trial, both the
24 victim and her sister?

25 A Yes.

1 Q Tell me about -- because I know at trial the DSS
2 investigator testified. Tell us again what happened in
3 the pretrial hearing regarding her testimony.

4 A Well, so as I remember, the reason -- the DSS
5 worker testified, and she, in her notes, the report had
6 been made, and I believe the child's mother testified
7 that the report had been made by a former friend of
8 hers to DSS.

9 And she had said, basically, you know, that the
10 victim's mother wasn't protecting her because this
11 sexual abuse had gone on and hadn't been reported to
12 law enforcement. The reporter had also thrown in a
13 couple other allegations about the family and about the
14 mother in particular.

15 When I called the DSS worker to the stand, it was
16 a terribly worded question that I was asking her. I
17 can tell you my intent was to ask her about those other
18 allegations, not the one involving the sexual abuse.
19 It was about the ones where -- that were completely
20 baseless but basically pointed out -- tried to point
21 out that the victim's mother was not a good mother.

22 So the way I was asking her, I realize I said,
23 "Were all of the allegations that initially came in,
24 did those prove or turn out to be valid?" Like I said,
25 it was terribly worded, but that's actually what I was

1 trying to get at.

2 And she says, "Well, which ones are you talking
3 about?" And so I, again, try to rephrase it, but it
4 doesn't come out any better. "When you received this
5 report or this referral from the intake, did you have
6 any concerns or anything that you later found out
7 through your investigation that were untrue?" And so
8 she says, "Not the allegations concerning the victim."

9 So, unfortunately, that was her answer to say,
10 yes, we found out those other things were not true,
11 but, you know, unfortunately, you know, that's the way
12 she answered the question. But that was the intent
13 behind the question.

14 Q Okay. By asking that question, were you trying to
15 convey to the jury that you knew some outside
16 information about the victim's credibility that the
17 jury did not?

18 A No.

19 MS. ROSS: I object to the relevance of that. The
20 record shows what the jury actually heard and didn't
21 hear, so the intent of the solicitor is not really an
22 issue.

23 THE COURT: I'll allow this question, but move on,
24 Mr. Smith.

25 MR. SMITH: All right.

1 THE WITNESS: Mr. Thomason would have had those
2 DSS records as well. He would have been looking at the
3 same allegations and report intake information that I
4 was.

5 BY MR. SMITH:

6 Q Okay. And when you questioned the investigator,
7 Sergeant Partain, I believe is how you pronounce her
8 name, you were questioning her about the process that
9 the police undertook in investigating the case.

10 In a case where sexual allegations are made, what
11 would be your purpose in questioning the lead
12 investigator about the process of the investigation?

13 A So Ms. Price actually questioned the retired
14 officer, Melissa Partain. But, obviously, in any trial
15 and in this one in particular, we wanted law
16 enforcement presence, and the investigation comes
17 together because of law enforcement.

18 The referrals are made for forensic interviews by
19 law enforcement. The medical exam is completed after
20 referral by law enforcement. And in sexual assault
21 cases, well, in this one in particular, the victim knew
22 who her assailant was. So while the lead investigator
23 would be limited, you know, in certain aspects of their
24 testimony, obviously, you know, we needed her to say
25 who she arrested and who she charged with this crime.

1 Q In your closing argument, you mentioned that the
2 investigator testified that Mr. Clemons did not show up
3 for his prescheduled interviews with the police.
4 What's your motivation in making that argument and
5 mentioning that?

6 A I believe at that time I had thought there was a
7 case on point. I wasn't trying to burden-shift or
8 remove his right to remain silent, but I was trying to
9 reiterate that he had been given his opportunity to
10 state his side of the story and he didn't. He didn't
11 capitalize on that. And so I thought at the time that
12 I was correct in reiterating that to the jury.

13 Q And in that time, when the investigator was
14 talking to Mr. Clemons on the phone, he had not been
15 charged with a crime at that point, right?

16 A Correct. When she was trying to speak with him,
17 he had not been arrested as of yet. And so I think she
18 had -- you know, once again she had been in contact
19 with him and then he failed to show.

20 So he had not -- he wasn't read his Miranda or
21 anything else at that point.

22 Q At trial Mr. Thomason did not object to the
23 qualification of Dr. Carter as an expert. How much
24 discussions -- how much had the two of you spoken about
25 Dr. Carter before she was offered as an expert witness?

1 Was he aware of her qualifications?

2 A Yes. I had provided Mr. Thomason with, I believe,
3 at least a letter stating that I was going to offer her
4 before trial. I had written him a letter stating that
5 I was going to offer her as an expert witness in the
6 trial of this case. We had discussed with the judge
7 the week prior to trial offering her as an expert.

8 There was a discussion with Judge McIntosh in
9 terms of would she be qualified as an expert. He was
10 not familiar -- the judge was not familiar with
11 Dr. Carter or her testimony. He had not had her as an
12 expert beforehand prior to this trial, and he was
13 actually very skeptical of her abilities to be able --
14 to testify as an expert, so we went through her
15 qualifications.

16 Q What was the purpose of having Dr. Carter watch
17 the videotape of the victim's forensic interview?

18 A So we did her -- and what I was just alluding to,
19 because of Judge McIntosh's reservations, that's why we
20 did the in-camera hearing first outside of the presence
21 of the jury, so the judge could hear her
22 qualifications, Mr. Thomason could hear her
23 qualifications on the record, and that would be outside
24 the presence of the jury.

25 In that -- during that in-camera hearing, the

1 doctor, obviously, talked about her findings and her
2 exam, but she also had said that she went into that
3 examination blind. She had not heard what the child
4 had said. And so I believe the rationale was that if
5 you have an injury and you present to a doctor, you
6 tell the doctor how you think the injury happened.

7 In this situation, the doctor had not asked the
8 child how the injury had occurred. And so the forensic
9 interview was really the information that would have
10 come from the victim or the patient herself to have
11 said to the doctor, this is how this injury occurred.
12 Otherwise, the doctor just had information from the
13 child's mother. And so we took a break during the
14 trial for the doctor to go out and watch the forensic
15 interview.

16 Q Did Mr. Thomason object when you -- I'm sorry,
17 when Ms. Price moved to admit the photographs of the
18 victim?

19 A Yes.

20 Q You mentioned earlier that that was something you
21 had discussed in a pretrial hearing as well. Can you
22 tell us more about that?

23 A Like I said, we had discussed on the record and
24 off the record because we wanted to get the judge's
25 approval that these pictures would be admissible. We

1 showed the judge as well as Mr. Thomason the two
2 pictures that we intended to present at trial. One
3 would have been a very close-up image -- both of them
4 were very close-up images of the victim's hymen as well
5 as, like I said, a girl who was similar in age to the
6 victim.

7 We remember -- Ms. Price and I remember this
8 pretty clearly because the judge was pretty skeptical
9 again about offering these pictures to a jury, and we
10 had a discussion that, you know, this would really aid
11 the fact finder, that these pictures, although half of
12 our population has hymens, we don't view them on a
13 daily basis. So we needed that expertise of a doctor
14 to come in and say, "This is what a normal hymen is
15 supposed to look like, and this is what our victim's
16 looked like." Mr. Thomason objected during those
17 pretrial hearings and off-the-record conversations, and
18 then he certainly does on the record.

19 Q Okay. And when those were admitted, Dr. Carter
20 used them to explain to the jury the medical difference
21 between the two photographs, right?

22 A Yes.

23 Q I'd like to ask you just a few more questions
24 referring to Mr. Thomason's closing argument.

25 Do you have a copy of the transcript with you?

1 A I do not have it in front of me.

2 Q Okay. I have one I'm happy to share with you.

3 If you look at page 267, Mr. Thomason's closing
4 argument, and I'm going to point you to about line 16.

5 Doesn't Mr. Thomason argue there that the State
6 has not proved CSC first?

7 A Yes, he does.

8 Q Then I'm going to ask you to turn to page 270.

9 Can you read line 3 and first half of line 4,
10 please.

11 A It reads, "And I think he should certainly be
12 found guilty on the criminal sexual conduct."

13 Q And there is a notation there from the court
14 reporter, right?

15 A Yes.

16 Q And "sic" meaning error in original?

17 A Yes.

18 Q Do you recall whether Mr. Thomason said "be found
19 guilty" or "not guilty" from your independent memory?

20 A I think he misspoke, as I remember. I think he
21 accidentally said "guilty" when obviously he meant "not
22 guilty." He had been saying "not guilty" prior to and,
23 obviously, his whole closing argument.

24 Q And this was specifically, as we just pointed out,
25 page 2 --

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1 A Yes.

2 Q So you did not have the impression that he was
3 arguing in closing that his own client was guilty?

4 A No.

5 MS. ROSS: I'm going to just briefly object. The
6 solicitor's impression is not dispositive.

7 THE COURT: Move on. I'm going to read the
8 transcript. It speaks for itself.

9 MR. SMITH: I have no more questions.

10 Thank you, Ms. Reeves.

11 THE COURT: All right. Anything further from this
12 witness?

13 MS. ROSS: Yes, your Honor.

14 CROSS-EXAMINATION

15 BY MS. ROSS:

16 Q Now, let's skip around, if I can keep one myself.

17 First, on page, I believe it was 285. I'm going
18 to hand you my transcript in just a second.

19 285, line 6, the judge gives a corroboration
20 charge; is that correct? Line 2. 285, line 2.

21 A Yes.

22 Q All right. And that was at your request or his
23 own, or do you recall?

24 A That was at my request that he charged that.

25 Q And did Mr. Thomason make any argument, trial

1 counsel make any argument against a corroboration
2 charge?

3 A As I remember, there was a discussion on the
4 record concerning that, but I had case law that I
5 handed up at that time to show that that was proper to
6 be charged. The law has since changed, but at that
7 moment in time, that was a proper charge.

8 Q Okay. Now, as far as trial counsel objection to
9 the photos, do you recall the basis of the objection to
10 the photos of the hymens, the victim's and a normal?

11 A I think he, Mr. Thomason -- I mean, it would be
12 speculation. I don't remember specifically. I think
13 there is a discussion in the record, I think, of what
14 he's objecting to. I'm not sure that he clearly states
15 his objection very well, but I think he's indicating
16 that it's more prejudicial than probative. I think he
17 thought that -- I think he had said at some point, you
18 know, it would just inflame the passions of the jury.

19 Q And, clearly, the transcript speaks for itself as
20 far as what he argued.

21 A Right.

22 Q Do you recall him making any specific argument
23 that the photo was irrelevant due to the fact that
24 there was a prior exam where the child was normal?

25 A Not in those terms necessarily, no.

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1 Q Okay. And just to state the timeline, the
2 allegations were that in 2010 an assault occurred, and
3 then the child came forward with those allegations in
4 January of 2011 and went to the doctor, and then in
5 April 2011 Dr. Carter examined the child. Does that
6 sound right to you?

7 A Vaguely. I don't exactly remember the dates.

8 Q Okay. And do you recall if, during that
9 intervening time -- or hadn't the applicant been out of
10 the home between January and April of 2011? He had
11 been out of the home for about a year by the time the
12 allegation came up?

13 A Yes.

14 Q Now, just going back to --

15 A Wait. You're asking had he been out of the home
16 for a year when the allegation was made?

17 Q About six months when the allegation was made.
18 Does that sound correct?

19 A My understanding was he was, as soon as this
20 allegation was made, he was asked to leave the home.

21 Q Okay. And that was prior to the January 2011
22 examination by Dr. Syed?

23 A No. After the allegation was made. That's when
24 she was taken to the doctor.

25 Q Okay. And after the allegation was made, that's

1 when he was sent out of the home?

2 A Yes.

3 Q Now, just referring you to page 31, lines 16, at
4 that point you do make an effort or state that you
5 would double-check with your assistant to see whether
6 those cards, exactly when they were sent out and what
7 addresses? And you make that offer, correct?

8 A Yes.

9 Q But that's not -- she's not called into court, and
10 that's not put on the record when she mailed them out?

11 A No. The judge offers for me to admit them, and I
12 didn't think it was necessary.

13 Q Okay.

14 A Who knew.

15 Q Now, you testified earlier that your recollection
16 was that Mr. Clemons was there for jury selection?

17 A Yes.

18 Q And I just refer you to page 11, line 22. At this
19 point, this is prior to jury selection, Mr. Thomason
20 stands up and introduces himself and his client is not
21 there at that time?

22 A Correct.

23 Q So you might have meant prior to jury selection
24 earlier that morning?

25 A I'm sorry. Did I misspeak? He had been there

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1 that morning. He was there for jury qualification. He
2 was not present for jury selection.

3 Q Okay. And just to refer you to the transcript,
4 page 36, line 16. At this point -- excuse me -- 36,
5 13, Mr. Thomason says, "Your Honor, to be honest with
6 you, I haven't -- I haven't called him. I will step
7 out if you wish. I mean, he knew this case was going
8 forward today. If he wasn't there, he knew good and
9 well. He talked yesterday and we talked this morning.
10 He talked to my office this morning. He claimed to be
11 five minutes away."

12 So doesn't that transcript suggest that he was not
13 in court that morning?

14 A The way that reads, I can see how that impression
15 was made, but Ms. Price and I have a very distinct
16 memory of the defendant being there and then leaving.
17 That's why I believe Mr. Thomason says, "We talked this
18 morning," and why the judge doesn't go into it any
19 further. He knew the case was going to go further --
20 go on today without him. He had just been here, now he
21 left. He knew this was going to go forward without him
22 here.

23 And that's why, I mean, we don't start jury
24 selection until 11:12 a.m. The jury had come in for
25 qualification at 8:30, 9:00 o'clock that morning. And

1 we had, obviously, already cleared up all of our
2 pretrial motions. He was given time. We were trying
3 to give Mr. Thomason time to find his client.

4 Q Okay.

5 MS. ROSS: Beg the Court's indulgence. I'm just
6 looking over my notes.

7 Q Isn't it true that the DSS notes that you provided
8 in discovery, the child's mother had told about the
9 initial examination with Dr. Syed, told the DSS
10 workers, and that was in the case file?

11 A Potentially, yes.

12 Q Does that sound familiar?

13 A Yes. And I would like to -- I remember
14 interviewing, speaking with Dr. Syed. I know she said
15 on the stand today that she had had sexual assault
16 training. When I spoke with her, she told me she had
17 no sexual assault training. That's in my notes. I
18 remember her. That's why I didn't call her as a
19 witness.

20 Q And she testified earlier today, and I thought she
21 said that he had no therapy training. That's why she
22 would automatically refer the forensic case on,
23 correct?

24 A Correct.

25 Q All right. And you were prosecuting the case, not

1 defending it, obviously?

2 A Obviously, yes.

3 MS. ROSS: No further questions.

4 THE COURT: Anything further from this witness?

5 MR. SMITH: No redirect, your Honor.

6 THE COURT: All right. Thank you.

7 Ms. Reeves, you may step down.

8 MR. SMITH: Your Honor, I would call Lauren Price
9 for a few questions.

10 THE COURT: We'll note for the record Ms. Price is
11 still under oath.

12 **LAUREN PRICE,**

13 **BEING PREVIOUSLY DULY SWORN, TESTIFIED AS FOLLOWS:**

14 **DIRECT EXAMINATION**

15 **BY MR. SMITH:**

16 Q Ms. Price, tell us a little bit about where you
17 work and how you were involved in Mr. Clemons' case.

18 A I work for the Tenth Circuit Solicitor's Office.

19 I had actually just started working for the Tenth

20 Circuit Solicitor's Office in 2013, March of 2013, and

21 was going to be assigned some sexual assault cases, and

22 so Ms. Reeves generously allowed me to second chair

23 with her in this trial to observe this trial and

24 participate in a limited role, as I had not done

25 criminal sexual conduct cases prior to moving to this

1 circuit.

2 Q Okay. Were you present for any pretrial hearings
3 in Mr. Clemons' case the week preceding the week of
4 May 13, 2013?

5 A Yes, I was.

6 Q Do you remember if Mr. Thomason was present for
7 those hearings?

8 A Mr. Thomason was present, yes.

9 Q How about Mr. Clemons?

10 A I remember Mr. Clemons being present as well, yes.

11 Q Do you remember any public discussion about the
12 fact that there would be more proceedings in the case
13 in the following week beginning on the 13th?

14 A I think it was discussed that we would get started
15 promptly on Monday, and that was the reason we had had
16 these pretrial motion hearings in the week prior.
17 That's not unusual. That's something that we do in
18 this circuit in front of multiple judges in order to
19 not inconvenience the jury.

20 Q Do you remember what judge presided over those
21 hearings?

22 A That was Judge Lawton McIntosh.

23 Q Was that in Anderson County?

24 A It was. It was the fourth floor of the courthouse
25 we're in today.

1 Q Do you remember, were you present for the
2 beginning of trial on May 13th?

3 A I was.

4 Q Was Mr. Clemons present?

5 A He was. He was present for jury qualifications
6 and exemptions. My recollection is that he -- we took
7 a break. That's also typical. That's something we
8 normally do after the jury has gone through
9 qualifications and exemptions in this circuit. We
10 usually take a restroom break, let them walk around for
11 a minute before the jury is selected.

12 In this instance, my recollection is that we took
13 a break, and Mr. Thomason, at the end of this break,
14 could not locate his client. I distinctly remember
15 having in-chambers discussions with Mr. Thomason,
16 Ms. Reeves, and Judge McIntosh. I don't remember if
17 the judge's clerk was present or not. But Mr. Thomason
18 said he would like for his client to be present for the
19 trial. He was given additional time to try to locate
20 his client.

21 We had another in-chambers discussion, to the best
22 of my recollection, maybe 20 minutes after that, and he
23 said he couldn't find his client, and at that time the
24 judge said, "Let's get started."

25 MR. SMITH: I think those are all the questions I

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1 have. Thank you.

2 THE WITNESS: Thank you.

3 THE COURT: Any cross?

4 MS. ROSS: Just briefly.

5 CROSS-EXAMINATION

6 BY MS. ROSS:

7 Q Do you recall if there were any -- if the defense
8 counsel had subpoenaed any witnesses for court that
9 day?

10 A I don't have anything to do with defense counsel's
11 case, so I have no idea.

12 Q You don't recall him mentioning any other
13 witnesses subpoenaed?

14 MR. SMITH: Objection.

15 THE WITNESS: I wasn't privy to his case file, so
16 I wouldn't know.

17 MS. ROSS: Okay.

18 THE COURT: Anything further from this witness?

19 MS. ROSS: No, your Honor.

20 MR. SMITH: No, your Honor.

21 THE COURT: All right.

22 Thank you, Ms. Price. You can step down.

23 MR. SMITH: Your Honor, I would call the victim's
24 mother, Ms. Telfia Johnson.

25 TELFIA JOHNSON,

1 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

2 DIRECT EXAMINATION

3 BY MR. SMITH:

4 Q Ms. Johnson, would you tell us your name and your
5 relationship to the victim in the case.

6 A Telfia Johnson, and I'm her mother.

7 Q Do you recall taking her to see Dr. Syed at some
8 point?

9 A Yes.

10 MS. ROSS: Judge, I'd object to this testimony.
11 This is a PCR. We have alleged ineffective assistance
12 of counsel. I don't see what relevance --

13 THE COURT: Mr. Smith, what's the relevance of
14 this testimony?

15 MR. SMITH: Your Honor, I questioned Dr. Syed
16 about the kind of examination she conducted. I think
17 that goes to both is she qualified as an expert and how
18 valuable her testimony would have been at trial. And I
19 wanted to ask Ms. Johnson a few questions about how
20 Dr. Syed conducted that examination, just to rebut some
21 testimony from her about what she did.

22 MS. ROSS: Judge, she's certainly not an expert,
23 the mother, and this would be hearsay. And he could
24 have asked the witness when she was on the stand
25 earlier those questions if it goes to some kind of

1 statements.

2 MR. SMITH: Your Honor, I don't intend to ask her
3 what the doctor said. I just intend to ask her what
4 the doctor did and how long she was in the room.

5 THE COURT: All right. I will let you ask her the
6 length of the visit to the doctor's office, but we need
7 to -- she can't testify about procedures that the
8 doctor -- the doctor has already testified to that, so
9 just -- I will allow you to ask that question about the
10 length of time that the child was in the examination.

11 BY MR. SMITH:

12 Q Ms. Johnson, how long had Dr. Syed examined your
13 daughter?

14 A The actual examination, she might have looked at
15 her for maybe, like, 10 or 15 seconds. Because she,
16 when my child was laying on the bed, Dr. Syed just kind
17 of looked back. She wasn't even palpating or doing
18 anything like that. She was just looking back --

19 MS. ROSS: I'd object again to what the doctor was
20 perceiving during -- she did an examination, wrote up
21 her notes.

22 THE COURT: Let her finish her answer.

23 MR. SMITH: That was the extent of my question in
24 light of your Honor's ruling.

25 THE COURT: Okay.

1 MR. SMITH: Thank you. No more questions.

2 THE COURT: Any cross?

3 MS. ROSS: Yes.

4 CROSS-EXAMINATION

5 BY MS. ROSS:

6 Q Now, you had a caseworker at DSS, correct?

7 A Correct.

8 Q And you went and talked to that caseworker about
9 taking your daughter to Dr. Syed; is that correct?

10 A No, that's not correct. I did not get the
11 caseworker for DSS until after I went to Dr. Syed's
12 office.

13 MR. SMITH: Objection.

14 THE COURT: State your objection.

15 MR. SMITH: The question goes outside the scope of
16 direct examination.

17 THE COURT: It's cross-examination. I will allow
18 a relevant question, but we need to tie this into it.

19 THE WITNESS: Yes, I did not -- would you like for
20 me to rephrase what I'm saying?

21 MS. ROSS: No. Let me rephrase my question.

22 Q So I'm looking at some doctor's notes, and I'll
23 just let you look at them and see what they say.

24 And, I'm sorry. I said doctor's notes. This is
25 DSS counselor notes.

1 Does that sound familiar, that you talked to them?

2 A Yes. I talked to them after I took my daughter
3 to -- I took my daughter to Dr. Syed's office based on
4 what her sister told me. And then after that, only
5 reason the DSS was contacted, someone called DSS on me
6 when they were upset with me. So they called DSS and
7 reported all this. So whenever I talked to them, I let
8 them know that I did go to Dr. Syed's office, and that
9 Dr. Syed stated to me that she could not rule either
10 way, but that she could give us, **MINOR** some
11 referral for some counseling due to just in case she
12 was exposed to something.

13 Q Okay. So that's what Dr. Syed told you at the
14 time, that she couldn't rule it in or out?

15 A Either way.

16 MR. SMITH: Objection. Again, your Honor, counsel
17 objected on direct to any discussion about what
18 Dr. Syed had asked. And because of that, I asked a
19 single question, and this has gone well beyond that.

20 THE COURT: Sustained.

21 MS. ROSS: Okay. In response, I'd just say I'm
22 asking this witness what she reported to DSS, the words
23 out of her mouth.

24 THE COURT: Well, this witness testified in the
25 hearing, so what she said is going to be in the

1 transcript, so let's move on.

2 MS. ROSS: Okay.

3 Q Now, at that time when you talked to the worker,
4 did you ever tell the caseworker anything like, "I
5 didn't think the examination was a long enough for that
6 doctor to find anything out"?

7 A No, but I did tell her -- no, but I did tell her
8 that she didn't do, like, a full examination. I did
9 explain to her that she kind of just looked at **MINOR**
10 while she was lying on the bed. She didn't palpate
11 anything, she didn't use any light, she didn't do
12 anything so I was not sure if that the -- if she was
13 examined completely.

14 Q And the notes of this discussion with the
15 caseworker that I just showed you, they didn't say
16 that. They didn't say that part of you saying that, do
17 they?

18 A Well, that's not -- what she said, I can't contest
19 to what she told you in that note. I only can tell you
20 what I said to her at that time.

21 Q Okay. And so you didn't mention it in your
22 testimony at trial either?

23 A If she asked me, I would -- whatever she asked me,
24 that's what I answered to. Whatever his lawyer asked
25 me, that's what I answered to. I didn't -- it wasn't

1 free-flowing from the stand. I just answered questions
2 that was asked to me.

3 Q And just as far as when you took your daughter to
4 see Dr. Syed, was Mr. Clemons living in your home at
5 that point?

6 A No. When I found out about these allegations, he
7 was locked up on other charges, so I did not find out
8 until, like, two or three months that he was out -- I
9 found out -- I think he got locked up that August, and
10 this whole thing came about, I want to say, around

11 December or January that my other daughter thought that
12 she was getting my other daughter in trouble by telling
13 me that she had been in the room naked with her father.

14 Q And just to be -- it's in the transcript, she just
15 said without her pants.

16 A Well, yeah, it was multiple -- well, depending on
17 which time we're talking about.

18 Q And then, just to clarify, then at that point
19 Mr. Clemons, you didn't have your daughter around
20 Mr. Clemons after?

21 A Not after I found that out, no, I did not.

22 MS. ROSS: No further questions.

23 THE COURT: Anything further from this witness?

24 MR. SMITH: No, your Honor. Thank you.

25 THE COURT: Thank you, ma'am. Step down.

1 MR. SMITH: Your Honor, I just have one more
2 witness, Mr. Bob Dudek, appellate counsel, appearing by
3 phone.

4 THE COURT: Like we did yesterday in the other
5 hearing, let's make sure that we have a microphone so
6 that everyone can hear. That's my main concern for
7 this type of testimony. So take a minute, get set up.

8 (WHEREUPON, a recess was taken from 1:00 p.m. to
9 1:05 p.m.)

10 MR. SMITH: We are going to call Robert Dudek.

11 ROBERT DUDEK,
12 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS BY PHONE:
13 DIRECT EXAMINATION

14 BY MR. SMITH:

15 Q Mr. Dudek, will you tell me your name and your
16 position.

17 A My name is Robert Dudek. Dudek is D-u-d-e-k. I'm
18 the chief appellate defender at the Office of Appellate
19 Defense Commission of Indigent Defense.

20 Q Did you represent Mr. Andrew Clemons on his appeal
21 for CSC first?

22 A I did.

23 Q What issue did you raise on appeal?

24 A The issue I raised on appeal was whether the court
25 erred by allowing Dr. Sally Carter to testify as to the

1 alleged victim's injuries were consistent with
2 penetration where the alleged victim testified no
3 penetration occurred during a lewd act since this
4 opinion testimony was speculative and any probative
5 value it had was outweighed by its unduly prejudicial
6 effect under Rule 403, comma, South Carolina Rules of
7 Evidence.

8 Q Mr. Dudek, I'm going to ask you a question in
9 general. How do you decide what issues to raise in an
10 appeal?

11 A Well, I read the transcripts. I take notes on the
12 testimony of each witness, and then I note all the
13 objections or motions that are made by the defense
14 during the trial and the ruling on those, and then I
15 essentially go back from those objections or motions,
16 decide which issue or issues I think are meritorious
17 enough ultimately to convince the court to grant my
18 client a new trial.

19 Q How do you decide what issue to raise when there
20 are potentially multiple issues?

21 A Well, again, you know, merits brief rather than
22 Anders brief, I have to convince myself that I think
23 the issues are -- issues are winning issues, otherwise
24 there's no sense to raise those issues if I'm not
25 convinced myself that the issue or issues have a chance

1 to win in the appellate court.

2 Q Okay. Turning now specifically to Mr. Clemons'
3 case, when you were preparing your brief, did you
4 believe at the time there was an issue of bolstering in
5 Dr. Carter's testimony?

6 A Well, the way -- the reason I raised the issue
7 with Dr. Carter as I did was that the objection to the
8 doctor's testimony was on the grounds that it was more
9 prejudicial than probative because the alleged victim
10 stated she was not penetrated by Mr. Clemons, and also
11 the defense added to his 403 objection that the
12 testimony was also speculative. And you can find that
13 on page 166 and 167 of the trial transcript.

14 So, I mean, I can't -- you know, Mr. Taylor, I
15 have to -- I have to raise on appeal the objection that
16 was raised in a trial court. I cannot change the
17 objection on appeal or it will be procedurally barred.

18 Q If you had believed there was a meritorious issue
19 there with bolstering, would you have raised it?

20 A Yes. I mean, if I thought something had a chance
21 to be a winning issue, I would have raised it. I think
22 here the real problem I think we have with a bolstering
23 argument would be that our complaint was that the
24 alleged victim's testimony or claim was there was no
25 penetration. And so our complaint against Dr. Carter

1 at trial was her expert opinion that there was
2 penetration went against what the alleged victim was
3 claiming. It didn't bolster it, it actually went
4 against it.

5 Does that make sense? It's kind of 180 degrees of
6 bolstering.

7 Q Right. At the time, did you believe that it was a
8 better argument that the witness' and the doctor's
9 testimony was contradictory? Did you believe that that
10 was a better argument than arguing that the doctor
11 bolstered the victim's testimony?

12 A Right. Again, I did not believe that the doctor's
13 testimony bolstered the child because it didn't. It
14 went 180 degrees different than what the child claimed.

15 Now, the other thing about it was the atmospheric
16 to the argument was that without penetration, without
17 any evidence of penetration, which they weren't getting
18 from the alleged victim, then they could not convict
19 him of criminal sexual conduct with a minor in the
20 first degree. They needed the penetration for that.

21 So I thought, you know, that was an additional
22 good atmospheric which helped out our argument that the
23 expert giving that opinion was the only reason that CSC
24 with a minor in the first ever got to the jury.

25 Q Okay. Well, thank you, Mr. Dudek. I'm going to

1 let Ms. Ross ask you some questions now.

2 A Yes, sir.

3 THE COURT: All right, Ms. Ross.

4 CROSS-EXAMINATION

5 BY MS. ROSS:

6 Q All right. Mr. Dudek, this is Susannah Ross on
7 behalf of Mr. Clemons.

8 How are you doing?

9 A I'm doing well, Ms. Ross. Thank you.

10 Q I guess I could say if it wasn't bolstering the
11 child's testimony, wouldn't it have been vouching for
12 the child or in some way to -- bolstering or vouching
13 to say that some of the things -- sorry. Let me get my
14 thoughts straight -- some of the things that Dr. Carter
15 said? And I'd refer you to page 205.

16 Do you have a transcript?

17 A Yes, I do. I have it right here.

18 Q 205, line 7.

19 A Okay.

20 Q She states, "I was actually more concerned after
21 hearing the forensic interview and more convinced."
22 And then there's the objection, but it doesn't state
23 bolstering or vouching, correct?

24 A Well, I think in what you just pointed out, if
25 asked, that would be more of a bolstering argument

1 than, you know, the ones that were earlier objected to,
2 166 and 167.

3 Again, though, Ms. Ross, you can see the trial
4 counsel's objection that I'm reading here on 205, 13 --
5 lines 9 through 14 are -- I don't know that it's
6 worthy -- well, that's talking about taking the jury
7 out. Then he says, The allegations were that there was
8 no penetration, basically, and, you know, respectfully,
9 that's not a vouching or bolstering objection.

10 A Okay. Now, I just refer you to another instance
11 where there's no objection made at all, and that was
12 page 210, lines 10 through 22.

13 A Give me just a second to read that real quickly,
14 please.

15 Okay.

16 Yeah, I'm not really bothered by that also,
17 Ms. Ross. In my understanding and memory, flipping
18 back over to my notes were this was a bit unusual in
19 that Dr. Carter, as I recall, was asked to view the
20 forensic interview. It just seems to me like if this
21 is testimony of the forensic interviewer, it would be
22 improper because, again, she is saying, I think this is
23 impermissible vouching by saying that, you know, I
24 viewed this videotape and, you know, as often these
25 things are, it's somewhat vague but are informing the

1 jury that, I think this child is telling the truth. So
2 I think that's problematic, yes.

3 Q And had the trial attorney objected at that time,
4 would you have briefed that argument?

5 A I think I would have. Yes, I think if this had
6 been objected to, then that would be definitely an
7 issue worth raising because it would be a person who
8 was qualified as an expert, you know, albeit without
9 objection or by stipulation, and then allowing the
10 expert to say -- this is on page 210, 10 to 21, it
11 seems to be vouching for the child's testimony.

12 Yes. To answer your question, I think I would
13 have raised that.

14 Q And that's certainly been a developing issue over
15 the past few years; would you agree?

16 A Yes. I mean, we have gone from, starting out,
17 State vs. Douglas. That was my case. Croma was my
18 case. You know, now we have got to the point where all
19 forensic interviewers can do is introduce the forensic
20 interview and really nothing else. So I think it would
21 have been improper for a forensic interviewer to
22 testify in this manner, so I don't know why it would be
23 proper for Dr. Carter to watch the forensic interview
24 and then give an opinion like this.

25 Q Thank you, Mr. Dudek. I've got no further

1 questions.

2 A Yes, ma'am.

3 THE COURT: Anything further from this witness?

4 MR. SMITH: Just one more question.

5 REDIRECT EXAMINATION

6 BY MR. SMITH:

7 Q Mr. Dudek, just to summarize again, your testimony
8 was you thought that -- the argument you raised that
9 the doctor should not have been testifying at all in
10 light of the child's testimony that there was no
11 penetration.

12 MS. ROSS: I object it's beyond the scope of my
13 cross.

14 THE WITNESS: Your voice trailed off at the end.

15 THE COURT: I'll allow it.

16 BY MR. SMITH:

17 Q I'll try again.

18 It sounded like earlier you said that it was your
19 position that the argument you raised which was that
20 the doctor should not have been allowed to testify in
21 light of the child's testimony at trial that there was
22 no penetration, it was your opinion at the time that
23 that was a stronger issue than a vouching issue?

24 A Yes, because I could not -- again, I could not --
25 the objection at trial was that the doctor's testimony

1 was more prejudicial than probative because the alleged
2 victim stated she was not penetrated, and also that the
3 doctor's opinion was speculative, so we have more
4 prejudicial than probative, which I argued under
5 Rule 403.

6 And the reason given was because the alleged
7 victim stated she was not penetrated and also that that
8 was speculative. So, again, in my opinion, I could not
9 have argued vouching or bolstering from that testimony.
10 For one thing, that wasn't the objection at trial, and
11 number two, it was not vouching or bolstering because
12 it was 180 degrees of what the child said because the
13 child never said there was penetration. So, yes,
14 that's the reason I argued it the way that I did.

15 Now, on the issue Ms. Ross just raised for me,
16 obviously, there was no objection at trial so there was
17 no way that I could raise that on appeal.

18 Does that make sense?

19 MR. SMITH: It does.

20 I have no more questions.

21 MS. ROSS: None, your Honor.

22 THE COURT: All right.

23 MR. SMITH: Does the Court have any questions for
24 Mr. Dudek?

25 THE COURT: No.

1 MR. SMITH: Okay. Thank you, Mr. Dudek.

2 THE COURT: Thank you, Mr. Dudek.

3 THE WITNESS: Thank you. Thank you very much.

4 MR. SMITH: Your Honor, that's the State's case.

5 And I would just ask, again like we discussed in
6 chambers, that we be allowed to submit proposed orders
7 on both sides.

8 THE COURT: If either -- if you'd like to make a
9 brief summation. And I'll grant that request. I'd
10 like each attorney to submit me a proposed order,
11 request supporting case law. But if there's anything
12 else for the record here today, I'll be happy to hear
13 from, first of all, let me hear from the State. And
14 Ms. Ross has the burden of proof. I'll hear from her
15 last.

16 MR. SMITH: Well, your Honor, I guess, just for
17 the record, I made some objections and motions today,
18 and I just renew all those for the record because we
19 have some legal issues that need to be clear on the
20 record, but I will lay out my argument more clearly in
21 the proposed order. There are a lot of legal issues in
22 this case.

23 But I guess the summary of my case would be that,
24 here, that Mr. Clemons has raised some issues about
25 objections and that, when you review the record, in

1 several of those instances he actually did object on
2 the record to the issue about trial in absentia.

3 I think there's enough evidence on the record to
4 show that Mr. Clemons had been notified of his right to
5 be at trial at the time.

6 With respect to these medical records, again, I
7 don't think that Dr. Syed would have been qualified to
8 testify as an expert witness as to sexual abuse
9 diagnosis at trial. And then I think that she's failed
10 to establish -- that Mr. Clemons has failed to
11 establish prejudice in this case.

12 There are some other issues like the corroboration
13 jury instruction. I think under the law at the time
14 that that was completely appropriate as a jury
15 instruction.

16 As far as the victim's videotaped interview, that
17 that was properly admitted. State law provides a
18 statute that the victim's interview videotape can come
19 into evidence as long as the alleged perpetrator can
20 cross-examine that witness at trial. And with respect
21 to both of the children in this case, they did testify
22 at trial. And some other issues. Those are the big
23 ones, I think.

24 I think, as to the appellate issue, I think
25 Mr. Dudek has given a good reason for not arguing the

1 vouching issue. My understanding of his testimony was
2 he thought that the fact that the doctor's testimony
3 seemed to contradict the testimony of the victim at
4 trial was the far more serious thing and merited a lot
5 of attention because, if that were the case, her
6 testimony wouldn't have been admissible at all. But he
7 articulated a reason he raised one issue over the
8 other.

9 For the rest, I'll say as to the due process
10 issues, I don't think that those are properly raised as
11 standalone issues. I think Al Shabazz and cases in
12 that vein give us reason to think that most of the
13 cases that come into PCR court have to be based on the
14 Sixth Amendment. These due process claims, I think
15 most of them are dismissed in PCR court with a notable
16 exception being the -- I believe it was the Oscar
17 Fortune case, which recently came out about a
18 solicitor's statement in closing that defense attorneys
19 are paid to tell lies or hide the truth. I think that
20 that represented an exception to the rule.

21 So I think that these claims mostly should be
22 understood as claims that trial counsel was ineffective
23 for failing to raise objections and the like, instead
24 of issues on their own because they could have been
25 raised on appeal. And for the rest I'll rely upon a

1 proposed order.

2 THE COURT: Thank you, Mr. Smith.

3 All right, Ms. Ross.

4 MS. ROSS: Thank you, your Honor. May it please
5 the Court.

6 I have the amended application, which I'm going to
7 rely largely upon. However, I said "bolstering," and I
8 should have said probably "bolstering and vouching"
9 throughout that amended application. I would just ask
10 that my argument be allowed to be considered both. I
11 think it's sometimes difficult to --

12 THE COURT: I understood what you -- you did use
13 the word "vouching" in some of your questions. I
14 understood.

15 MS. ROSS: As far as -- I've got a few cases to
16 hand up as far as the corroboration charge. This is
17 one while -- you know, the moving law is based on the
18 same original law that we don't want to prejudice the
19 jury. So I would argue that that concept was still --
20 was current law at the time, and I'd just refer you to
21 the analysis on State v. Sue (phonetic). Hand that up
22 to you.

23 I've also got Briggs v. South Carolina, which is
24 fairly well known, and Chappell v. South Carolina,
25 which just came out recently and was my case at trial,

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1 so it's embarrassing, and Mr. Smith had it. But this
2 kind of goes to the idea that while it might not have
3 been the law at the time before, an insightful defense
4 attorney should have still objected and preserved that
5 issue. So I'll be happy to leave everything else for
6 the brief.

7 THE COURT: Thank you.

8 Well, I'm going to read everything. There is a
9 lot of material here for me to consider. I would like
10 each attorney to submit me a proposed order, and I'll
11 read through all those cases.

12 I want to thank you, Counsel, for your
13 well-prepared arguments, and the matter will be under
14 advisement.

15 MR. SMITH: Your Honor, is your Honor giving a
16 deadline on that?

17 THE COURT: Could you get it to me within ten
18 days; is that enough time?

19 MR. SMITH: Can I ask for 30?

20 THE COURT: We'll do 30. That's fine.

21 MR. SMITH: I appreciate it.

22 (WHEREUPON, proceedings adjourned at 1:26 p.m.)

23 ***END OF REQUESTED TRANSCRIPT OF RECORD***

24

25

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Certificate of Reporter

I, Diane L. Marcengill, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina at the time of the proceedings, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of a portion of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Anderson County, South Carolina, on the 19th day of February 2020.

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I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 20, 2020



Diane L. Marcengill, RPR, CRR, CRC
Circuit Court Reporter

Piedmont Children's Clinic

Date: JAN 28 2011 Name: [REDACTED]

Age: 8yr

S: Per mom - check up to make sure she hasn't been touched in her vaginal area. 8yr up since aunt Tylo sister told mother that child was out from parents' bedroom & parents don't know.

Immu: UTD
Allergies: NKDA
Meds: Ø

36.5kg 133cm 75y

Mother confronted child and told her that:

WT: <u>80 1/4</u>	HT: <u>4'4 1/4"</u>	HC:	TEMP: <u>95.6</u>
RR: /min	PR: /min	BP: /minHg <u>109/81</u>	

Mother's boyfriend touch and rub her buttocks, c. his private.

PHYSICAL EXAM:

	N	ABN		N	ABN
1. GEN. APPEARANCE - well nourished, hydrated, alert	<input type="checkbox"/>	<input type="checkbox"/>	12. HEART - rate, rhythm, S1, S2, murmur, F. pulse	<input type="checkbox"/>	<input type="checkbox"/>
2. SKIN - color, rash, hair; nails	<input type="checkbox"/>	<input type="checkbox"/>	13. ABDOMEN - soft, HSM, mass, H. orifices	<input type="checkbox"/>	<input type="checkbox"/>
3. HEAD - shape; AF, sutures, size	<input type="checkbox"/>	<input type="checkbox"/>	14. GENITALS - (F) external, (M) penis, meatus, testes	<input type="checkbox"/>	<input type="checkbox"/>
4. EYES - conj, cornea, pupils, squint, RR, fundi	<input type="checkbox"/>	<input type="checkbox"/>	15. SPINE - curvature (scoliosis), sacral area	<input type="checkbox"/>	<input type="checkbox"/>
5. EARS - pinnae, canals, TM appearance, mobility	<input type="checkbox"/>	<input type="checkbox"/>	16. EXTREMITIES - ROM, tenderness, edema, hips	<input type="checkbox"/>	<input type="checkbox"/>
6. NOSE - nares, turbinates, sinuses	<input type="checkbox"/>	<input type="checkbox"/>	17. NEUROLOGICAL - CN (3, 4, 6, 7, 12) gait, tone cerebellar; motor (strength, tone)	<input type="checkbox"/>	<input type="checkbox"/>
7. MOUTH - tongue, teeth, mucosa, tonsils, pharynx	<input type="checkbox"/>	<input type="checkbox"/>	18. NEURO - (complete) above plus other CN, sensory, reflexes, superficial & DTRS, clonus	<input type="checkbox"/>	<input type="checkbox"/>
8. NECK - thyroid, ROM	<input type="checkbox"/>	<input type="checkbox"/>	19. STAGE OF PUBERTY - (Tanner 1 2 3 4 5)	<input type="checkbox"/>	<input type="checkbox"/>
9. NODES - cervical, axillary, inguinal, other	<input type="checkbox"/>	<input type="checkbox"/>			
10. CHEST - symmetry, expansion, breast	<input type="checkbox"/>	<input type="checkbox"/>			
11. LUNGS - retractions, AE, rales, rhonchi	<input type="checkbox"/>	<input type="checkbox"/>			

ABNORMAL FINDINGS: arcuate hymen, smooth border, no bleeding
no discharge, no pruritus, no marks,
rectal area intact. Alleged incident

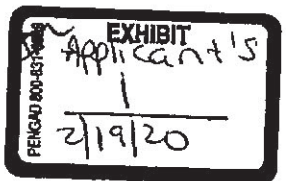
happened about 1 year ago

ASSESSMENT: Bylo wcc
Alleged sexual abuse

physical exam can't rule out or rule in possibility of sexual abuse

- PLAN:
1. for suit test
 2. _____
 3. ref to psychologist
 4. Anti-rap by evidence

5. Follow-up



20 FEB 20 11:50 AM
PEDIATRIC CLINIC



NOT PUT IN

TENTH CIRCUIT PUBLIC DEFENDER OFFICE

ANDERSON AND OCONEE COUNTIES

Anderson County Office
301 Camson Road
Anderson, SC 29625
Tel. 864.260.4048
Fax 864.260.4134

HERVERY B. O. YOUNG
Circuit Public Defender

Oconee County Office
415 S. Pine Street
Walhalla, SC 29691
Tel. 864.638.3133
Fax 864.638.3120

Re: State v. Andrew Antonio Clemons
Indictment #: 2011-GS-04-01977; 2013-GS-04-00569

You have been charged with criminal sexual conduct with a minor in the first degree by Indictment Number 2011-GS-04-01977 in violation of South Carolina Code Section 16-03-655. The elements of the offense the State is required to prove before you can be found guilty are:

- (1) Actor engages in sexual battery
- (2) With a victim who is less than eleven years of age

South Carolina Code Section 16-3-651 defines sexual battery as sexual intercourse, cunnilingus, fellatio, anal intercourse, or 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.

You have also been charged with lewd act upon a child by Indictment Number 2013-GS-04-00569 in violation of South Carolina Code Section 16-15-140. The elements of the offense the State is required to prove before you can be found guilty are:

- (1) A person over the age of 14
- (2) Willfully and lewdly commits or attempts a lewd or lascivious act
- (3) Upon or with the body, or its parts
- (4) Of a child under the age of 16 years
- (5) With the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or the child

I have been advised of the elements of the charges against me by my attorney G. Scott Thomason.

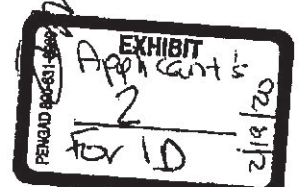
Defendant

Date

Witness

Date

10 FEB 20 PM 1:56:09
Anderson, SC 29625, SC, US



OFFICE OF PUBLIC DEFENDER

301 Camson Road
Anderson, SC 29625
864-260-4048 Telephone
864-260-4134 Facsimile

NOT PUT IN

PLEA OFFER REJECTION FORM

I, Andrew Clemons (defendant), have been charged with the following offenses:

- (1) **Criminal Sexual Conduct with Minor – Victim Under 11 Years of Age – First Degree**, which carries a mandatory minimum of 25 years imprisonment, no part which may be suspended nor probation or parole granted, and up to life imprisonment.
- (2) **Lewd Act – Committing or Attempting Lewd Act Upon Child**, which carries a possible sentence of up to 15 years imprisonment and a fine in the discretion of the court.

I understand that I face a maximum possible sentence of life imprisonment plus 15 years on all of these charges.

If convicted of either charge at trial I will be subject to *mandatory* lifetime sex offender registration and *mandatory* lifetime GPS monitoring.

I have been advised by my attorney, G. Scott Thomason, that the Solicitor will make the following recommendation, charge reduction and/or dismissal of charge(s) if I plead guilty:

Recommend a Sentence of: 20 years suspended to 8 years of incarceration AND 5 years of probation with lifetime sex offender registration

Reduce the Following Charges: Criminal Sexual Conduct with Minor – First Degree to Criminal Sexual Conduct with Minor – Second Degree

Dismiss the Following Charges: Lewd Act – Committing or Attempting Lewd Act Upon Child

My attorney and I have discussed the evidence that the Solicitor would offer against me in the trial or trials of these charges. I understand that I face the maximum sentence listed above if convicted of these charges at trial.

I do not want the offer made by the Solicitor. I want a jury trial on the charges listed herein. I reject this offer against the recommendation and advice of my attorney, G. Scott Thomason.

Defendant

Date

Witness

Date

20 FEB 20 PM 1:58:15
Anderson, SC 29600, CP/17

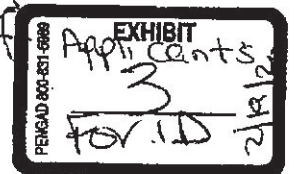


EXHIBIT
RESP.
1
2/19/20



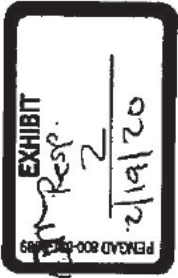
You are **REQUIRED** to be in court on the date and time shown on the **FRONT** of this card. Failure to appear and remain until discharged will result in a bench warrant being issued for your arrest. Also bond estreatment proceedings will begin and **you could be tried in your absence**. If you have not retained an attorney and feel you need one, you must hire one OR contact the Public Defender **PRIOR TO COURT**. If you believe you qualify for the Public Defender you must complete the application with the Clerk of Court, pay your fee and contact the Public Defender's Office. **Do not wait until your court date to contact an attorney.**

Be prepared to have your case disposed of on your appearance date.

David R. Wagner
Solicitor, Tenth Judicial Circuit

YOU MUST REMAIN IN COURT UNLESS EXCUSED BY THE SOLICITOR'S OFFICE

(No shorts, tank tops, offensive t-shirts or other inappropriate clothing, including pajama pants. Cellphones or other electronic devices are NOT allowed in Court. Please leave them in your car.)



05-13-2013 08:30 AM
05-13-2013 08:30 AM

ANDERSON SOLICITOR'S OFFICE
P O Box 8002
Anderson, SC 29622

Appearance Date: 5/13/2013 8:30 AM
4th Floor Courtroom FOR TRIAL 05-13-2013 THRU 05-17-2013
Prosecutor: KWR
Ref: Andrew Antonio Clemons

Andrew Clemons
[Redacted] [Redacted] Railroad Street
Anderson, SC 29625

ANDERSON SOLICITOR'S OFFICE
P O Box 8002
Anderson, SC 29622

Appearance Date: **5/13/2013 8:30 AM**
4th Floor Courtroom **FOR TRIAL 05-13-2013 THRU 05-17-2013**
Prosecutor: KWR
Ref: Andrew Antonio Clemons

Andrew Clemons
■ Sears St.
Anderson, SC 29625

ANDERSON SOLICITOR'S OFFICE
P O Box 8002
Anderson, SC 29622

Appearance Date: 5/13/2013 8:30 AM
4th Floor Courtroom **FOR TRIAL 05-13-2013 THRU 05-17-2013**
Prosecutor: KWR
Ref: Andrew Antonio Clemons

Galloway Bail Bonding
PO Box 5883
Anderson, SC 29623

ANDERSON SOLICITOR'S OFFICE
P O Box 8002
Anderson, SC 29622

Appearance Date: 5/13/2013 8:30 AM
4th Floor Courtroom FOR TRIAL 05-13-2013 THRU 05-17-2013
Prosecutor: KWR
Ref: Andrew Antonio Clemons

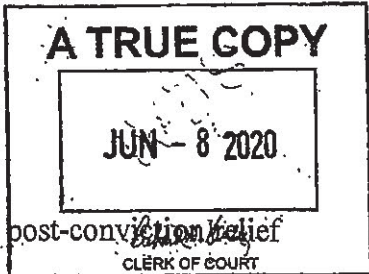
Scott Thomason
Assistant Public Defender
301 Camson Road
Anderson, SC 29625

STATE OF SOUTH CAROLINA)
 COUNTY OF ANDERSON)
 Andrew Antonio Clemons, #266944,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2017-CP-04-279

ORDER OF DISMISSAL



This matter comes before this Court by way of an application for post-conviction relief filed on February 10, 2017, by Andrew Antonio Clemons (Applicant). The State (Respondent) filed its return on May 15, 2017, in which it moved for the summary dismissal of one of Applicant's claims, moved for a more definite statement, and requested that the PCR court convene an evidentiary hearing in order to resolve some claims raised in the application. On June 1, 2017, Applicant filed an amended application incorporating the claims raised in the application and pleading new claims. On February 13, 2020, Applicant filed a second amended application, incorporating and adding supporting details to the previous applications. On Wednesday, February 19, 2020, an evidentiary hearing in this matter was convened before the undersigned. Susannah C. Ross, Esquire, represented Applicant, who was physically present. Assistant Attorney General Taylor Z. Smith, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant testified on his own behalf and called as witnesses Elizbieta Weronika Syed, M.D., and Assistant Solicitors Kristin W. Reeves and Lauren Davis Price, both of the Tenth Circuit Solicitor's Office. Respondent also called Reeves and Price as witnesses, as well as Chief Appellate Defender Robert M. Dudek (appellate counsel) of the South Carolina Commission on Indigent Defense. Following a thorough review of the

record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application for post-conviction relief.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. During its December of 2011 term, the Anderson County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2011-GS-04-1977). During its April of 2013 term, the Grand Jury indicted Applicant for committing a lewd act upon a child (2013-GS-04-569). Applicant was represented by G. Scott Thomason, Esquire (trial counsel), and Assistant Solicitors Reeves and Price prosecuted the case.¹ On May 13, 2013, through May 15, 2013, Applicant proceeded to a jury trial with the Honorable R. Lawton McIntosh (trial court) presiding, during which Applicant was tried in his absence. At the conclusion of trial, the jury convicted Applicant as indicted. The trial court sentenced Applicant but sealed the sentence as Applicant was not present for sentencing. On September 12, 2013, the parties appeared again before the trial court for sentencing. The trial court sentenced Applicant to imprisonment for twenty-five years for first-degree criminal sexual conduct with a minor and fifteen years for committing a lewd act upon a minor, with both sentences running concurrently, and with credit for time served.

Trial counsel filed a timely notice of appeal. Appellate counsel perfected the appeal on Applicant's behalf. Assistant Attorney General Christina Catoe Bigelow of the South Carolina Attorney General's Office represented Respondent. Appellate counsel argued on appeal that the trial court erred by allowing the State's expert witness to testify that the minor victim's injuries

¹ Trial counsel was not a witness at the PCR hearing, having passed away in 2017.

were consistent with penetration because the victim testified that no penetration had occurred, making the expert's testimony speculative and inadmissible under Rule 403, SCRE. The South Carolina Court of Appeals affirmed in an unpublished opinion. State v. Clemons, Op. No. 2015-UP-557 (S.C. Ct. App. filed December 16, 2016) (per curiam), cert. denied, State v. Clemons, S.C. Sup. Ct. Order dated December 1, 2016. The remittitur was issued on December 6, 2016.

CURRENT PROCEEDING

On February 10, 2017, Applicant filed an application for post-conviction relief,² in which he alleged that he was being held in custody unlawfully based on the following grounds:

1. Applicant received the ineffective assistance of trial counsel:
 - a. "Counsel was inadequate for denying [Applicant] effective assistance guarantee under the sixth amendment";
 - b. "Counsel was inadequate for failing to object or raise the issue of abuse of discretion when judge denied motion for an continuance to allow [Applicant] to appear in court";
 - c. "Counsel was inadequate in allowing the indictment to be amended without the grand jury or jury, because the language in the indictment must be specific";
 - d. "Counsel was inadequate and performance was deficient because counsel helped the State bolster their case against his client during his opening and closing arguments";
 - e. "Counsel was inadequate for allowing the [Applicant's] fifth amendment right to remain silent, right to be protected against double jeopardy, and the rights to the confrontational clause to be violated and this was unduly prejudicial";
 - f. "Counsel was inadequate and failed to impeach the testimonies of the State's witnesses because of their inconsistencies based upon the Rules of Evidence Rule#608 Truthfulness vs. untruth";
 - g. "Counsel as inadequate for making statement pertaining to the facts of this case to the jury about witness statements, irrelevant evidence or exhibits that were presented when the [Applicant] was unable or present to defend himself against the allegations";
 - h. "Counsel was inadequate for failing to subject the State to an adversarial testing or failed to present a defense";
 - i. "Counsel was inadequate for failing to consult with his client, failed to properly investigate, failed to give sound advice";

² This initial filing was filed by Applicant as a pro se litigant; the two amended applications were filed by Applicant's PCR counsel.

- j. "Counsel was inadequate for making the statement to the jury that his client certainly should be found guilty on the charge of criminal sexual conduct in the 1st degree with a minor without any actual proof of DNA physical evidence or biological material, and this was unduly prejudicial"; and
 - k. "Counsel was inadequate for his failure to seek DNA testing or expert testimony on behalf of the [Applicant] to rebut their expert testimony"; and
2. Applicant received the ineffective assistance of appellate counsel:
- a. "Appellate counsel was inadequate for failing to raise the issue that trial counsel was ineffective for failing to properly investigate, present an defense, or seek DNA testing";
 - b. "Appellate counsel was also inadequate for depriving the [Applicant] of the right to receive effective assistance under the sixth amendment of the United States";
 - c. "Appellate counsel was inadequate and deficient with his performance for sending me a letter that it is his decision what issue or issues to present to the Court of Appeals";
 - d. "Appellate counsel was inadequate for failing to raise obvious and significant issues that were much stronger than what was raise during an critical stage of [Applicant's] appeal";
 - e. "Appellate counsel was inadequate for depriving the [Applicant] of his due process rights, and his equal protection of the law under the fourteenth amendment of the United States. Which states no State shall deprive any person of life, liberty, or property without proper due process of law";
 - f. "Appellate counsel was inadequate for failing to consult with the [Applicant], failed to communicate the interest of his constitutional rights, and this was unduly prejudicial";
 - g. "Appellate counsel was inadequate for having an conflict of interest between his former counsel or the interest of his own representation of the [Applicant]";
 - h. "Appellate counsel was inadequate for filing a frivolous issue on direct appeal. The issue clearly had no merit and had no reasonable argument on the [Applicant's] offenses. Clearly having no basis in law"; and
 - i. "Appellate counsel was inadequate for being an friend of the Court as opposed to being an adversary. Counsel helped the State bolster their case against his client"; and
3. Applicant is actually innocent.

On June 1, 2017, Applicant filed an amended application, incorporating the claims raised in the application and asserting additionally that Applicant was entitled to post-conviction relief because:

1. Applicant received the ineffective assistance of counsel because trial counsel:
 - a. Failed to investigate;
 - b. Keep Applicant informed of plea negotiations;
 - c. Failed to make adequate objections and arguments to preserve the record for direct appeal;
 - d. Failed to make reasonable arguments in Applicant's defense; and
 - e. Failed to inform Applicant of the full nature of the allegations against him; and
2. Applicant's due process rights were violated because:
 - a. The State bolstered and vouched for its witness;
 - b. The trial court gave an improper corroboration instruction;
 - c. Applicant was afforded the ineffective assistance of counsel; and
 - d. The trial in Applicant's absence amounted to a total breakdown in the adversarial process.

On February 13, 2020, Applicant filed an amended application, incorporating the claims raised in the amended application and application and clarifying that Applicant was entitled to post-conviction relief because:

1. Applicant received the ineffective assistance of counsel because trial counsel:
 - a. Failed to properly move for a continuance or object to a trial in Applicant's absence;
 - b. Failed to effectively object to the admission of the recording from the forensic interview of the minor victim;
 - c. Failed to object to the State's question of a DSS investigator as to whether the allegations against Applicant were valid;
 - d. Failed to object to testimony from the DSS investigator that, after an extensive investigation and staffing, the witness indicated Applicant for sex abuse;
 - e. Failed to object to testimony from the law enforcement detective that she identified Applicant as a suspect;
 - f. Failed to object to the investigator's testimony that Applicant did not show up for interviews with law enforcement, which the State argued in closing corroborated Applicant's guilt;
 - g. Stipulated to the expertise in child sexual assault cases of the State's witness;
 - h. Failing to object or making the wrong objection to the admission of the photographs of hymens, the State's expert's testifying as to the ultimate issue, and the State's expert's vouching and bolstering by testifying that "one plus one is two";
 - i. Told the jury to find Applicant guilty;
 - j. Failed to make reasonable arguments, such as:

RSS

- i. “[W]hy didn’t State produce evidence of pornographic DVDs through reference to them by mother or during search of home”;
- ii. “[I]n house where sister thought child with no pants was suspicious how could penetration injury and blood go unnoticed”; and
- iii. “[W]hy first pediatrician Dr. Syad did not think there was any penetration because and noted hymen intact and crescent moon shaped or that maybe the examination caused injury”;
- k. Failed to take exception or move for a mistrial when the trial court gave the jury an improper corroboration charge;
- l. Failed to present medical records showing that the minor victim’s hymen was intact when she was subject to a medical examination on January 28, 2011 in light of the testimony from the State’s expert that the hymen was absent on April 4, 2011, and the indictments’ specifying that the sexual battery occurred between December 1, 2009, and August 31, 2010; and
- 2. Applicant received the ineffective assistance of counsel because appellate counsel:
 - a. Failed to argue on appeal that the testimony of the State’s expert witness constituted bolstering; and
- 3. Applicant’s due process rights were violated when:
 - a. The State vouched for and bolstered its witness;
 - b. The trial court gave the jury an improper corroboration instruction;
 - c. Applicant was afforded the ineffective assistance of counsel; and
 - d. The trial in Applicant’s absence constituted a total breakdown in the adversarial process.

At the start of the evidentiary hearing before the undersigned on February 19, 2020, Respondent requested that Applicant specify for the record the grounds upon which he would move forward. Applicant specified that he would be moving forward only upon the grounds specifically articulated in the second amended application for post-conviction relief filed on February 13, 2020. This Court finds that all allegations other than these have been waived by Applicant and they will not be addressed in this order.

Testimony at PCR Hearing

Applicant called Dr. Syed as a witness at the PCR hearing. She testified she is a physician practicing in the field of pediatrics. She testified she reviewed the minor victim’s medical

records in advance of the hearing. She testified she conducted a medical examination on the victim. She testified she wrote in her notes from the examination that the victim's genitalia appeared normal but noted that the examination was conducted one year after the sexual battery took place, according to information given to her by the victim's mother. She testified she would not have taken any swabs of the victim's genitalia or done anything similar since the assault happened so far before she conducted her examination. She testified the victim's hymen was present, and that an intact hymen can be present in variations. She testified the victim's hymen did not necessarily indicate that penetration of the victim's vagina had occurred, and testified the smooth border of the victim's hymen had indicated that the victim had not suffered any sexual trauma at the time. She testified a physical examination cannot rule out the existence of sexual abuse on a patient. She testified the victim's hymen was "intact", and that there was some space in the hymen but that it was too small for full penetration to have occurred. She testified she told the victim's mother after the conclusion of the examination that the mother should send the child to a special clinic or psychologist for sexual abuse counselling. She testified she did not specifically ask about the abuse. Based upon her testimony, Applicant's Exhibit One was admitted into evidence. This Exhibit is the witness's notes from her examination of the minor victim.

On cross-examination, she testified she participated in a sexual abuse clinic while in medical school in 1995, and that this training lasted for approximately two or three months. She testified she does not have any certification in the area of sexual trauma or sex abuse but that she did not need any such certification as such areas are within the normal part of medical practice. She testified she has dealt with at least fifty cases of sex abuse with female patients during her career, constituting about five or six cases per year. She testified she had never been qualified in

court as an expert in the field of sexual abuse or sexual trauma. She testified she had never been qualified in court as a medical expert. She testified as to the procedures she used in conducting her examination of the minor victim, testifying that she used a flashlight to look for bruises, lacerations, and the like, and that she spent minutes examining the victim's hymen. She testified her conclusion was that she could not rule out that sexual abuse had occurred and that no physical evidence, such as bruises or marks, were visible during her examination because it was conducted so long after the incident supposedly happened.

On redirect, she testified a smooth border on a hymen is a normal variation of a hymen.

Applicant testified on his own behalf. He testified he did not come to court for his trial because he was scared and because trial counsel "did not defend him", and wanted Applicant to plead guilty and accept a plea offer of five years. He testified trial counsel did not advise him that he could be tried in his absence or what would happen if Applicant did not appear at trial.

Applicant testified he wanted Dr. Syed to testify on his behalf at trial, but that no witnesses testified for the defense. He testified trial counsel did not let him know what was happening in his case, and that Applicant was therefore unable to produce witnesses and evidence that would have aided his defense.

He testified trial counsel moved for a continuance but that the trial court denied the motion.

He testified that trial counsel allowed the indictment to be amended, which "let a whole new charge come in" that he had no notice of and which caused him to "sound bad." He testified the indictment stemmed from an allegation that he had engaged in oral sex with the victim. He testified he thinks the State added the allegation in because the solicitors did not have proof that

he committed criminal sexual conduct with a minor, and that he thinks trial counsel should have objected to the amendment.

Referring to the trial transcript, Applicant testified to objections and arguments made.

On cross-examination, Applicant testified he was not in court for his trial because he stayed at home due to his feeling like trial counsel was not trying to help Applicant or defend him. He affirmed that he did not attend trial because he was scared at what the outcome would be. He testified he did not receive a bond card informing Applicant of his trial date.

Applicant called Reeves as a witness. She testified she provided discovery to trial counsel, which included Dr. Syed's notes from her examination of the victim and the DSS records. She affirmed that a plea offer form in Applicant's possession looks like something the State would have offered during Applicant's case.

Respondent also called Reeves as a witness. She testified trial counsel was a well-known visitor to the county jail because he was always visiting and communicating with Applicant. She testified she spoke with trial counsel about Applicant's case on multiple occasions.

She testified two hearings were held in the case the week before trial, and that Judge McIntosh presiding over those hearings as well as Applicant's trial. She testified those hearings would have occurred on May 7, 2013, and May 9, 2013, in Anderson County. As to the subject of those hearings, she testified the State wanted to introduce into evidence at trial recordings of the forensic interviews of the minor victim and the victim's sister. She testified other issues were dealt with at the hearings, including redactions, and the testimony and qualifications of the State's expert witness. She testified she wanted to introduce into evidence photographs that the expert witness, a physician, had taken of the victim's hymen and to compare them to photographs of a "normal" hymen. She testified the parties addressed the issue of whether

Applicant had been showing pornography to the victim and whether that could be the subject of testimony at trial; she testified trial counsel objected to that. She testified the parties discussed State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013), which she believed limited the State's ability to offer a forensic interviewer as a witness at trial. She testified trial counsel objected to the indictment for committing a lewd act upon a child because he did not think it was proper to proceed to trial on both indictments; the trial court decided that the State could proceed to trial on both because lewd act was not a lesser-included offense of first-degree criminal sexual conduct. She testified trial counsel objected throughout the hearings regarding the evidence the State intended to introduce at trial. She testified Applicant was present for both of the pre-trial hearings. She testified that the parties discussed throughout the hearings that the trial would begin the following week, and that the parties conducted the pre-trial hearings the week before trial so that they could get straight to trial the following week. She testified the transcript from Applicant's trial on May 13, 2013, reflects that the parties began jury selection immediately upon the start of proceedings.

She testified that, on the morning of May 13, 2013, Applicant was physically present at trial when the parties were going through jury qualification. She testified there was a break in proceedings immediately before the parties picked the jury and that Applicant went missing from the courthouse at that time. She testified she, trial counsel, and the trial court went into chambers to discuss going forward in Applicant's absence. She testified trial counsel requested that the proceedings be continued so that he could attempt to find Applicant. She testified the trial court denied that request, and stated he was finding Applicant was waiving his right to be present for trial by not returning to the courtroom. She testified the discussion about Applicant's absence occurred partly on the record and partly off. She testified the Thirteenth Circuit Solicitor's Office

mails out bond cards to all defendants unless the defendants are in jail. She testified the bond cards notify defendants of the date and time of their hearings and that they can be tried in their absence if they fail to appear for trial. She also testified that trial counsel informed the trial court at the time of Applicant's absence that Applicant was aware that he was supposed to be in court for trial.

She testified she moved to admit into evidence at trial video recordings of the forensic interview of the minor victim and the victim's sister, who was also a minor. She affirmed that trial counsel had the opportunity to cross-examine the children at trial.

When asked about her questioning of the DSS investigator at trial, she testified that a DSS report had been made by someone. The reporter alleged that the victim's mother knew of the sexual abuse but had failed to report it herself. She testified she intended to question the DSS investigator about the other allegations—that the victim's mother was not a good mother—at trial. She testified she was not attempting to imply to the jury that she had outside information of Applicant's guilt of which the jury was not aware. She testified trial counsel would have had those DSS records through discovery. She testified, by asking the DSS investigator about the process of the investigation, that referrals to DSS come from law enforcement. She wanted the investigator to testify regarding who she arrested and charged in the case.

She testified she referred during her closing argument to the law enforcement investigator's testimony that Applicant did not show up to interviews with the investigator. She testified she thought that there was a case stating that this argument was proper because Applicant had been given an opportunity to share his side of the story to police but chose not do so. She testified that Applicant had not yet been arrested at the time of the relevant phone conversations and missed appointments between Applicant and the investigator.

She testified she provided trial counsel with a letter stating that the State would offer Dr. Carter as an expert witness at trial, and she testified the parties had discussed the issue with the trial court the week before trial began. She testified the parties discussed whether the witness could be qualified as an expert, that the trial court was not familiar with Dr. Carter and was skeptical of whether it would have been proper to qualify her as an expert, leading Reeves to go through the factors showing that Dr. Carter was a proper person to testify as an expert. She testified they had an in camera hearing regarding Dr. Carter's qualifications at trial due to the trial court's skepticism about the witness's qualifications. She testified that, during the hearing, Dr. Carter testified about being a blind witness and not knowing what statements the minor victim had made.

She testified the parties discussed the photographs of the victim in a pretrial hearing on and off the record. She showed the photographs of the victim's hymen and of a "normal" hymen to the trial court and trial counsel. She testified the trial court was skeptical of offering the photographs to the jury, and the parties argued about whether the photographs would aid the jury in its fact-finding. She testified trial counsel objected to the admission of the photographs in a pre-trial hearing and during trial. She testified Dr. Carter used the photographs to explain the medical difference between a normal and abnormal hymen.

She testified regarding trial counsel's statement during his closing argument that the jury should find Applicant guilty. She testified trial counsel also stated during his argument that the State had not proven that Applicant was guilty of first-degree criminal sexual conduct with a minor. She noted that the court reporter included a notation in the transcript indicating that the error was in trial counsel's argument, and not stemming from the court reporter.

Applicant cross-examined Reeves at the hearing. She testified she handed up case law at trial to show that the corroboration charge given at the State's request was proper at the time of Applicant's trial.

She testified she did not remember specifically what objection trial counsel made to the photographs of hymens but believes it was based on speculation, Rule 403, SCRE, and that they would inflame the passions of the jury. She testified she did not remember whether trial counsel objected on the basis that there had been an examination of the minor victim conducted before the photographs were taken.

She testified Applicant had been out of the victim's home between January and April of 2011 after having been asked to leave by the victim's mother following the victim's disclosure of abuse.

She agreed that when trial counsel stood up to introduce himself prior to jury selection, as reflected in the transcript, Applicant was not present at that time. She testified she had a distinct memory of Applicant's being at trial on May 13, 2013, and then leaving during the proceedings. She testified that this explains why the trial court did not question trial counsel further about Applicant's absence.

She testified she interviewed Dr. Syed before trial, and that Dr. Syed told her that she had had no training concerning sexual assault victims, which is why Reeves did not call Dr. Syed as a witness at trial.

Respondent called Price as a witness at the PCR hearing. She testified she had only recently begun to work at the Thirteenth Circuit Solicitor's Office when Applicant's case was coming up for trial. She testified Applicant had been present for jury qualifications and exemptions at trial, that everyone took a break before jury selection began, and that trial counsel

was unable to locate Applicant at the end of the break. She testified the parties discussed Applicant's absence in chambers, that trial counsel was given time to find Applicant, and that trial counsel told the State and the trial court approximately twenty minutes later that he could not find Applicant.

Telfia Johnson, the victim's mother, testified at the PCR hearing. She testified she was present in the room when Dr. Syed conducted an examination of the victim following the victim's disclosure of abuse. She testified Dr. Syed looked at the victim's hymen for approximately ten or fifteen seconds only. Applicant questioned Johnson on cross-examination at the PCR hearing. She testified she talked to DSS after she took the victim to Dr. Syed's office after the victim's sister told her what had happened between Applicant and the victim. She testified Dr. Syed told her that she could not rule the occurrence of sexual abuse in or out based upon her examination of the victim. She testified she told the DSS caseworker that Dr. Syed did not conduct a thorough examination of the victim, and she admitted that the DSS records do not reflect that she did this and that she did not testify to this at trial. She testified Applicant was not living in her home when she took the victim to be examined by Dr. Syed because he was in prison at the time. She testified she did not allow the victim to be around Applicant once the victim disclosed the sexual abuse.

Respondent called appellate counsel as a witness at the PCR hearing. He testified he raised the issue during Applicant's direct appeal of whether the trial court erred in allowing Dr. Carter to testify regarding Applicant's alleged penetration of the victim when the victim testified at trial that no penetration had occurred. He argued Dr. Carter's testimony should have been kept out pursuant to Rule 403, SCRE.

He testified as to his process in selecting issues for briefing. He testified he reads through transcripts and notes all objections, motions, and rulings during trial. Then, he goes back through them to decide which issues are meritorious and which are not. He testified he must be convinced that issues are "winning issues" for him to file a merits brief.

He testified he raised the issue regarding Dr. Carter because trial counsel objected to the testimony on the ground of Rule 403. He did not believe that the bolstering issue was preserved, so he did not raise it. He testified the problem with the bolstering argument is that the victim's testimony was that there had been no penetration, which contradicted the victim's testimony rather than bolstering it. He thought the better argument was that Dr. Carter contradicted the victim's testimony rather than supposed it. In his opinion, without any evidence of penetration, the jury should not have convicted Applicant of first-degree criminal sexual conduct with a minor.

Applicant cross-examined appellate counsel. He agreed that Dr. Carter's testimony that she was more concerned after watching the recording of the forensic interview of the victim would have constituted bolstering more than the testimony he addressed in his brief and that trial counsel did not object on the ground of bolstering. He testified that, if a bolstering objection had been preserved on the ground of vouching, he probably would have raised that issue on appeal because Dr. Carter was an expert witness who was vouching for the victim's testimony.

Respondent questioned appellate counsel again on redirect. He testified the issue he raised on appeal was the strongest issue available and that he could not have raised a vouching or bolstering issue because trial counsel did not object on that basis. He agreed the testimony about penetration was not vouching or bolstering because it contradicted the victim's testimony. He testified no objection to Dr. Carter's testimony on page 210 of the transcript was preserved.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to scrutinize their credibility. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that

“there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. Therefore, the function of the post-conviction relief court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Trial counsel was constitutionally ineffective for failing to properly move for a continuance or object to a trial in Applicant’s absence.

Applicant argues trial counsel was constitutionally ineffective for failing to move for a continuance and object to a trial in Applicant’s absence when Applicant was not present for trial.

This Court finds Applicant has failed to show trial counsel’s performance was deficient for supposedly failing to move for a continuance when Applicant was not present for trial. Trial

counsel did move for a continuance. Tran. 30. Indeed, Applicant admitted this explicitly at the PCR hearing. The testimony from Reeves and Price at the PCR hearing indicated trial counsel requested a continuance when the parties were in the trial court's chambers. The trial court denied trial counsel's motion, finding he had not established good cause for the motion. Tran. 30. This Court finds Applicant was present for pre-trial hearings conducted the week before his trial began in earnest on May 13, 2013, and that Applicant was present in the courtroom for trial initially on May 13, 2013. Although the transcript from proceedings on May 13, 2013, appears to be silent as to whether Applicant made any appearance for trial that morning, the testimony from Reeves and Price places Applicant there and shows that Applicant left the courtroom and did not return after a break before jury selection. Reeves and Price also testified at the PCR hearing that they and the trial court and trial counsel discussed openly in the pre-trial hearings held the week before May 13, 2013, that trial would begin in earnest on that date. Applicant's assertions that he was not present are not credible on this point, whereas the testimony from both Reeves and Price is credible. Trial courts are afforded deference in rulings upon motions for a continuance. See Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006) (instructing that reversals of a trial court's denial of a motion for a continuance are about as rare as the proverbial hens' teeth) (quoting State v. Lytchfield, 230 S.C. 405, 95 S.E.2d 857 (1957)). The testimony from Reeves and Price also establishes that trial counsel informed the trial court that his attempts to reach Applicant to get him to return to trial were unsuccessful. It is therefore not surprising that the trial court denied trial counsel's motion for a continuance.

This Court finds trial counsel's performance was not deficient due to his failure to object to a trial in Applicant's absence. In City of Aiken v. Koontz, the South Carolina Court of Appeals explained that a defendant can waive his right to be present at trial if he received notice

of his right to be present and was warned that the trial would proceed in his absence. Id., 368 S.C. 542, 547, 629 S.E.2d 686, 689 (S.C. Ct. App. 2006) (citations omitted). “In some circumstances, a defendant may be presumed to waive or forfeit the right to be present by misbehaving in the courtroom or by voluntarily remaining away from trial.” State v. Patterson, 367 S.C. 219, 230, 625 S.E.2d 239, 244-45 (2006) (finding the trial court did not err in refusing to allow Patterson to waive his presence when his only reason for desiring to be absent was his belief that he had the right to waive his presence). Notice to a defendant of the term of court for which a trial is set constitutes sufficient notice to enable him to effectively waive his right to be present. Koontz, at 547, 629 S.E.2d at 689 (citations omitted). In this case, the trial court stated that Applicant “knew that this case was going forward today if he wasn’t [in court].” Tran. 36. Trial counsel informed the trial court that he talked to Applicant on May 12, 2013, and again on May 13, 2013, that Applicant had talked with someone at trial counsel’s office on the morning of May 13, 2013, that Applicant claimed he was five minutes away, and that trial counsel felt he had satisfied his obligation “to chase [Applicant] down” Tran. 30, 36. Trial counsel informed the trial court that all indications he had received indicated that Applicant would be present for court and that trial counsel did not have an explanation for Applicant’s absence. Tran. 30. The State informed the trial court that the Thirteenth Circuit Solicitor’s Office mailed a bond card to Applicant, warning him that he would be tried in his absence if he did not appear for court. Tran. 31. The parties did not enter the bond card into evidence, but the State put on the record the contents thereof. Tran. 31. Additionally, Reeves testified at the PCR hearing that the card and bond sheet mailed to Applicant included notice that the trial would begin on May 13, 2013. Applicant claimed at the PCR hearing that he did not receive a bond card in the mail.

Applicant's assertion that he did not know that he could be tried in his absence if he did not attend his trial on May 13, 2013, notwithstanding, this Court finds Applicant received notice of his right to be present from trial counsel and the State, and was warned that trial would be held in his absence if he failed to appear. This Court incorporates its previous findings as to Applicant's initial presence and later absence at trial on May 13, 2013, and his presence at hearings held the week before. This Court also finds Applicant's assertion that he lacked notice is not credible and that the testimony of Reeves and Price that Applicant was afforded notice is credible in light of Applicant's testimony at the PCR hearing that he did not attend trial because he was scared because he expected to be convicted due to his belief that trial counsel was unprepared and unwilling to defend him in court.

This Court finds the information available to trial counsel on May 13, 2013, indicated that Applicant knew of his right to be present for trial and that the trial would continue in his absence if he was not present. Therefore, trial counsel would have had no basis on which to object to the trial in Applicant's absence. The credible testimony of Reeves and Price that Applicant was initially present on May 13, 2013, but left during a break in the proceedings, and the testimony of Applicant that he was not present for trial because he feared its outcome reinforces this finding.

This Court finds Applicant has failed to demonstrate he suffered prejudice from trial counsel's failure to object to a trial in Applicant's absence. Applicant has not demonstrated that he did not voluntarily waive his right to be present for trial, that he would have supplied trial counsel with any helpful information during the course of trial, that he would have testified had he been present for his trial, nor has he established that there is a reasonable probability the outcome of trial would have been different had trial counsel objected to the trial in Applicant's

absence. During his closing argument, trial counsel noted that Applicant likely would not have testified even if he had been present for trial. Tran. 261. Additionally, trial counsel spoke to the jury about Applicant's absence throughout trial in mitigation and the trial court instructed the jury that it could not consider in its deliberations the fact that Applicant was not present. Tran. 272. And the trial court admonished the jury at the beginning of trial that it could not hold Applicant's absence from trial against him. Tran. 39.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to move for a continuance at Applicant's trial because trial counsel did so move and Applicant has failed to show any deficiency in trial counsel's performance with respect to a continuance. This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object to a trial in Applicant's absence because Applicant has failed to show any deficiency in his attorney's performance and any resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to effectively object to the admission of the recording from the forensic interview of the minor victim.

Applicant argues trial counsel was constitutionally ineffective for failing to object to the admission of a recording of the forensic interview of the minor victim. An out-of-court statement of a child is admissible in a proceeding in a court of general sessions if:

- (1) [T]he statement was given in response to questioning conducted during an investigative interview of the child;
- (2) [A]n audio and visual recording of the statement is preserved . . . ;
- (3) [T]he child testifies at the proceeding and is subject to cross-examination on the elements of the offense and the making of the out-of-court statement; and
- (4) [T]he court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness."

S.C. Code Ann. § 17-23-175(A).

The State offered into evidence the recordings of the forensic interviews of the minor victim and her minor sister. Tran. 173. The forensic interviewer who conducted the interviews of the two children testified at trial regarding the process she used when questioning the two. Tran. 168-73. The minor victim testified at trial and was questioned by trial counsel on cross-examination. Tran. 73-95. The victim's minor sister also testified and was cross-examined by trial counsel. Tran. 96-103. Trial counsel objected to the admission of these recordings on the grounds that they were cumulative to the testimony of the witnesses at trial, they violated the best evidence rule, and that they vouched for and bolstered the victim's credibility. Tran. 173-76. The State argued the recordings were admissible according to Section 17-23-175(A), and trial court overruled trial counsel's objections. Tran. 173-74, 176.

This Court finds Applicant has failed to show any deficiency in trial counsel's performance related to his objecting to the admission of the recordings. Contrary to Applicant's assertions, trial counsel did object on multiple grounds to the admission of the two recordings. According to Section 17-23-175(A), the recordings were admissible because all of the prerequisites for admission were met at trial. There simply was no reasonable basis upon which Applicant could make any further objection, and Applicant has not put forth a basis upon which the admission of the recordings likely could have been prevented by trial counsel. Trial counsel's performance fell within the range of professional competence required of defense attorneys.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective with regard to making proper objections to the admission of the recordings of the forensic interviews of the minor victim and her minor sister because Applicant has failed to show any deficiency in his attorney's performance. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object to the State's questioning of a witness who was a DSS investigator as to whether the allegations against Applicant were valid.

The State called Megan Overton as a witness at trial. Tran. 112. The witness had been a child protective service investigator with the South Carolina Department of Social Services in February of 2011. Tran. 112-13. The witness received a DSS referral regarding the minor victim on February 18, 2011. Tran. 113. The witness conducted an investigation that culminated in her referring the matter to law enforcement. Tran. 114. As part of her investigation, she visited the victim's home and spoke with the parties involved, including the victim and the victim's mother. Tran. 114-15. She testified Applicant did not have any contact with the victim's family while she was conducting her investigation. Tran. 116. During the State's questioning of the witness on direct examination, the following exchange occurred:

Q: And were -- all of the allegations that initially came in, did those prove or turn out to be valid?

A: Well, which ones are you talking, like ---

Q: When you received this report or this referral from the intake, did you have any concerns or anything that you later found through your investigation that were untrue?

A: Not the allegations concerning [the victim].

Tran. 116.

Trial counsel did not object on any ground during the above-quoted exchange. Applicant argues trial counsel was constitutionally ineffective for failing to do so.

This Court finds Applicant has failed to show any deficiency in trial counsel's performance due to his not objecting to this above-quoted exchange. In State v. Weaver, the South Carolina Court of Appeals found no error in the admission of a law enforcement witness's testimony that he did not perform a gunshot residue test on anyone at a crime scene because "[a]ll the evidence led to [the defendant]." Id., 361 S.C. 73, 85-86, 602 S.E.2d 786, 792-93 (S.C. Ct. App. 2004), aff'd, State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The Court of

Appeals noted there were multiple reasons there was no error in the admission of the testimony, including that the witness did not repeat statements made to him by others at the crime scene but testified regarding conclusions he made based upon what his investigation had revealed, the witness's testimony was responsive to cross-examination from Weaver about the witness's failure to perform gunshot residue tests on everyone at the crime scene, the witness's testimony did not refer to any specific statements identifying Weaver as the perpetrator, the witness's testimony was cumulative to other testimony admitted at trial, and an eyewitness identified Applicant at trial as the shooter. *Id.* (citations omitted). In *State v. Thompson*, the South Carolina Court of Appeals found testimony from law enforcement witnesses that, after receiving a tip from a bystander, they discovered Thompson and other evidence after Thompson's father consented to a search of the house was admissible because the testimony explained and outlined the officers' investigation and their reasons for going to Thompson's home. *Id.*, 352 S.C. 552, 556-559, 575 S.E.2d 77, 79-82 (S.C. Ct. App. 2003) (citations omitted). In this case, the witness's testimony served as an explanation for the witness's not abandoning the investigation because she did not find that the allegations made in the DSS case, not the criminal case, were unfounded. The witness did not comment upon Applicant's guilt in the criminal case, but instead provided an explanation of her investigation without providing hearsay.

This Court finds Applicant has failed to show any prejudice due to trial counsel's not objecting to the exchange between the State and Overton. The case did not hinge on the victim's credibility because Dr. Carter provided physical evidence. Dr. Carter testified the victim's hymen was abnormal because there was an absence of hymeneal tissue. Tran. 203. She concluded that the results of her examination were consistent with a penetrating injury. Tran. 204. Additionally, the victim's sister saw the victim coming out of the bedroom followed by

Applicant. The jury also viewed the forensic interview of the minor victim and her sister, as well as heard testimony from both at trial. In light of this other evidence, Applicant has failed to show there is a reasonable likelihood the outcome of his trial would have been different had trial counsel objected to the DSS investigator's statement that she did not find that the allegations concerning Applicant in the DSS case were untrue.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object to the State's questions of Overton as to whether the allegations against Applicant were valid because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object to testimony from the DSS investigator that, after an extensive investigation and staffing, the witness indicated Applicant for sex abuse.

Applicant argues trial counsel was constitutionally ineffective for failing to object when the following exchange occurred, without objection, between the State and Overton immediately after the exchange quoted in the previous section:

- Q: And at the end of your investigation period, what, if anything, did you do?
 A: At the end of the investigation, we staffed – I staffed my case with a supervisor. And through that we came to the decision that we were going to indicate [Applicant] for sex abuse.

Tran. 116.

This Court finds Applicant has failed to show any deficiency in trial counsel's performance due to his not objecting to this above-quoted exchange. In State v. Weaver, the South Carolina Court of Appeals found no error in the admission of a law enforcement witness's testimony that he did not perform a gunshot residue test on anyone at a crime scene because "[a]ll the evidence led to [the defendant]." Id., 361 S.C. 73, 85-86, 602 S.E.2d 786, 792-93 (S.C.

Ct. App. 2004), aff'd, State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The Court of Appeals noted there were multiple reasons there was no error in the admission of the testimony, including that the witness did not repeat statements made to him by others at the crime scene but testified regarding conclusions he made based upon what his investigation had revealed, the witness's testimony was responsive to cross-examination from Weaver about the witness's failure to perform gunshot residue tests on everyone at the crime scene, the witness's testimony did not refer to any specific statements identifying Weaver as the perpetrator, the witness's testimony was cumulative to other testimony admitted at trial, and an eyewitness identified Applicant at trial as the shooter. Id. (citations omitted). In State v. Thompson, the South Carolina Court of Appeals found testimony from law enforcement witnesses that, after receiving a tip from a bystander, they discovered Thompson and other evidence after Thompson's father consented to a search of the house was admissible because the testimony explained and outlined the officers' investigation and their reasons for going to Thompson's home. Id., 352 S.C. 552, 556-559, 575 S.E.2d 77, 79-82 (S.C. Ct. App. 2003) (citations omitted). In this case, the witness's testimony served as an explanation for the witness's referring the matter to law enforcement at the conclusion of her DSS investigation. The witness did not comment upon Applicant's guilt, but instead provided an explanation of her investigation without providing hearsay.

This Court finds Applicant has failed to show any prejudice resulting from trial counsel's not objecting to the exchange between the State and Overton. At the start of the trial, the trial court informed the jury that the indictments did not constitute evidence of Applicant's guilt and that they did not raise any presumption that Applicant was guilty; rather, the court explained that the indictments were "simply the mechanisms by which the State of South Carolina [brought] the

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Defendant before a jury such as yourselves for a trial and a determination of guilt or innocence.” Tran. 223. The trial court also instructed the jury properly regarding the presumption of Applicant’s innocence, the State’s burden of proving Applicant’s guilt beyond a reasonable doubt, and the jury’s role as the sole finder of fact. The witness’s testimony about her indicating Applicant for sexual abuse after the conclusion of her investigation was similar to the nature of the allegations found in the indictments, serving as information about the process by which Applicant was investigated, indicted, and brought into court for trial.

Furthermore, the case did not hinge on the victim’s credibility because Dr. Carter provided physical evidence. Dr. Carter testified the victim’s hymen was abnormal because there was an absence of hymeneal tissue. Tran. 203. She concluded that the results of her examination were consistent with a penetrating injury. Tran. 204. Additionally, the victim’s sister saw the victim coming out of the bedroom followed by Applicant. The jury also viewed the forensic interview of the minor victim and her sister, as well as heard testimony from both at trial. In light of this other evidence, Applicant has failed to show there is a reasonable likelihood the outcome of his trial would have been different had trial counsel objected to the DSS investigator’s statement that she did not find that the allegations concerning Applicant in the DSS case were untrue.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object when the DSS investigator testified she “indicate[d] Applicant for sex abuse” after concluding her investigation because Applicant has failed to show any deficiency in his attorney’s performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object to the law enforcement detective's testimony that Applicant did not show up for interviews, which the State argued in closing corroborated Applicant's guilt.

Applicant argues trial counsel was constitutionally ineffective for failing to object to the testimony of the law enforcement investigator's testimony that Applicant did not show up for interviews because the State argued in closing that Applicant's failure to keep the appointments corroborated Applicant's guilt. Melissa Partain testified at trial that she was a detective who investigated child and elder abuse crimes for the Anderson Police Department during the investigation into Applicant. Tran. 117-18. She testified she did not interview the victim, but the victim disclosed during a forensic interview that she had been sexually abused. Tran. 118-20. She testified she determined, through her investigation, that the abuse likely occurred in Anderson County in 2009 and 2010. Tran. 120. She was aware that a forensic interview of the minor victim's minor sister was conducted to ascertain whether the sister had been sexually abused as well and whether she had witnesses any abuse against the victim. Tran. 120. She testified she was aware that a medical examination of the victim was performed by Dr. Sallie Carter. Tran. 120-21. As part of the detective's investigation, she interviewed the victim's mother. Tran. 121. Based upon her investigation, she identified Applicant as a suspect. Tran. 121. She testified she tried to speak to Applicant by going to Applicant's father's home, attempting to locate Applicant through Applicant's family members, and calling Applicant on the phone. Tran. 121. She testified she talked with Applicant "and tried to set up interview times, which the dates we set up or the times we set up. [Applicant] never showed up." Tran. 121.

During its closing argument, the State argued the victim was remembering details about Applicant's abusing her to the best of her ability, and that the victim's testimony was corroborated by other evidence, including: the victim's mother's confirming that Applicant and the victim were both living in her home during the time frame in which the victim claimed the

abuse occurred; the victim's sister's testifying she saw, upon entering the home, the victim running out of Applicant's bedroom wearing no pants with Applicant trailing behind; the victim's denying that the incident described by her sister had happened when the sister told the girls' mother about the incident; the victim's mother's testimony that the victim's denials of the incident did not make sense; and the victim's mother's testimony about the family's structure, the layout of the home, and the arrangement of the people in the home matched the testimony of the victim and the victim's sister about those facts. Tran. 246-48. The State noted the detective had tried to speak with Applicant, who failed to keep his appointments. Tran. 250. The State then argued that "all of those details corroborated what [the victim] told in her original telling of what happened to her." Tran. 250.

"It is impermissible for the prosecution to comment, directly or indirectly, upon the defendant's failure to testify. However, improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant. The defendant bears the burden of demonstrating the improper comment deprived him of a fair trial." Johnson v. State, 325 S.C. 182, 187, 480 S.E.2d 733, 735 (1997) (finding that the solicitor's comments were a comment on the evidence presented to the jury and on the defendant's failure to testify) (citations omitted). The South Carolina Supreme Court also held in Johnson that, even assuming that the solicitor's comment had been improper, the trial court's instruction to the jury that it was not to use the defendant's failure to testify at trial against him was sufficiently curative. Id. at 188, 480 S.E.2d at 735-36.

The South Carolina Court of Appeals considered whether comments made by the State during closing argument denied a defendant the right to a fair trial in State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (S.C. Ct. App. 2001). Id., overruled on other grounds by State v. Gentry,

363 S.C. 93, 610 S.E.2d 494 (2005). In Hamilton, the State argued the defendant took the stand and admitted his guilt after going through a jury trial when he could have pleaded guilty at the start of the week and also said, “[L]adies and gentlemen, you put me here as a representative of your system of justice, a representative of your community, and I wouldn’t bring in to you a borderline case.” Id., at 359-60, 543 S.E.2d at 594-95. The Court of Appeals found the comments “highly inappropriate and constitutionally impermissible.” Id. at 362, 543 S.E.2d at 596. It evaluated the comments by giving the test that the State’s closing:

Must be carefully tailored so it does not appeal to the personal biases of the jurors. Further, the argument may not be calculated to arouse the jurors’ passions or prejudices and its content should stay within the record and its reasonable inferences. Moreover, the State cannot, through evidence or argument, comment upon a defendant’s exercise of a constitutional right.

Id. (citations omitted).

The Court of Appeals went on to find that, though the comments were not permissible, they did not so infect the trial with unfairness that Hamilton’s due process rights were violated. Id. at 365, 543 S.E.2d at 596. The South Carolina Supreme Court recently affirmed that this is the proper test for judging whether a defendant’s due process rights were violated by comments made by the State during closing argument. Fortune v. State, 428 S.C. 545, 837 S.E.2d 37, 44 (2019) (citations omitted) (finding the State’s closing argument was improper when the State commented, among other things, that the solicitor’s job is to tell the truth but the job of defense attorneys is to “manipulate the truth” and “do whatever they have to – without regard for the truth – to get a not guilty verdict.”).

This Court finds Applicant has failed to show trial counsel’s performance was deficient due to his failure to object when the detective testified that Applicant did not keep his appointments with her. Reeves testified at the PCR hearing that the detective’s calls with and attempts to interview Applicant occurred before he had been arrested or indicted. As such, the

witness's testimony should not be understood as a comment upon Applicant's right to remain silent, but rather as a comment on his unwillingness to meet with her during her investigation. Similarly, the State's reference in its closing argument to Applicant's failure to keep the appointments should not be understood as a comment on Applicant's right to remain silent. Instead, the focus of the comments, when viewed in context of the State's argument overall, shows that the State was focusing on the facts corroborating the victim's story.

This Court finds Applicant has failed to show he suffered any prejudice from trial counsel's failure to object to the detective's testimony or the State's referencing it during closing argument. Trial counsel spoke to the jury about Applicant's absence throughout trial in mitigation and the trial court instructed the jury that it could not consider in its deliberations the fact that Applicant was not present. Tran. 272. And the trial court admonished the jury at the beginning of trial that it could not hold Applicant's absence from trial against him. Tran. 39. In light of these facts and the other evidence of Applicant's guilt admitted at trial, Applicant has not shown there is a reasonable likelihood the outcome of trial would have been different had trial counsel objected to the comments. Neither has Applicant shown that the testimony from the witness and the argument from the State in closing so infected the trial with unfairness that a new trial is required.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object when the detective testified Applicant did not keep his appointments with her because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object to testimony from the law enforcement detective that she identified Applicant as a suspect.

Applicant argues trial counsel was constitutionally ineffective for failing to object when the following exchange occurred, without objection, between the State and the detective Melissa Partain:

Q: Okay. Through all of the investigation that you were involved in, were you able to identify a suspect in this case?

A: We did. After extensive investigation, follow-up and interviews, we finally came up with [Applicant]”

Tran. 121.

This Court finds Applicant has failed to show any deficiency in trial counsel’s performance due to his not objecting to this above-quoted exchange. In State v. Weaver, the South Carolina Court of Appeals found no error in the admission of a law enforcement witness’s testimony that he did not perform a gunshot residue test on anyone at a crime scene because “[a]ll the evidence led to [the defendant].” Id., 361 S.C. 73, 85-86, 602 S.E.2d 786, 792-93 (S.C. Ct. App. 2004), aff’d, State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007). The Court of Appeals noted there were multiple reasons there was no error in the admission of the testimony, including that the witness did not repeat statements made to him by others at the crime scene but testified regarding conclusions he made based upon what his investigation had revealed, the witness’s testimony was responsive to cross-examination from Weaver about the witness’s failure to perform gunshot residue tests on everyone at the crime scene, the witness’s testimony did not refer to any specific statements identifying Weaver as the perpetrator, the witness’s testimony was cumulative to other testimony admitted at trial, and an eyewitness identified Applicant at trial as the shooter. Id. (citations omitted). In State v. Thompson, the South Carolina Court of Appeals found testimony from law enforcement witnesses that, after receiving a tip from a bystander, they discovered Thompson and other evidence after Thompson’s father consented to a search of the house was admissible because the testimony explained and outlined

the officers' investigation and their reasons for going to Thompson's home. *Id.*, 352 S.C. 552, 556-559, 575 S.E.2d 77, 79-82 (S.C. Ct. App. 2003) (citations omitted). In this case, the witness's testimony served as an explanation for the witness's charging Applicant for sexually abusing the victim. For example, moments after providing the testimony identified by Applicant, the witness affirmed that, as a result of her investigation, she brought charges against Applicant. Tran. 121-22. The witness did not comment upon Applicant's guilt, but instead provided an explanation of her investigation without providing hearsay. Reeves's testimony from the PCR hearing indicated she asked the question of the witness because she wanted the investigator to testify as to who she arrested and charged.

This Court finds Applicant has failed to show any prejudice resulting from trial counsel's not objecting to the exchange between the State and the detective. At the start of the trial, the trial court informed the jury that the indictments did not constitute evidence of Applicant's guilt and that they did not raise any presumption that Applicant was guilty; rather, the court explained that the indictments were "simply the mechanisms by which the State of South Carolina [brought] the Defendant before a jury such as yourselves for a trial and a determination of guilt or innocence." Tran. 223. The trial court also instructed the jury properly regarding the presumption of Applicant's innocence, the State's burden of proving Applicant's guilt beyond a reasonable doubt, and the jury's role as the sole finder of fact. The witness's testimony about her indicating Applicant for sexual abuse after the conclusion of her investigation was similar to the nature of the allegations found in the indictments, serving as information about the process by which Applicant was investigated, indicted, and brought into court for trial.

Furthermore, the case did not hinge on the victim's credibility because Dr. Carter provided physical evidence. Dr. Carter testified the victim's hymen was abnormal because there

was an absence of hymeneal tissue. Tran. 203. She concluded that the results of her examination were consistent with a penetrating injury. Tran. 204. Additionally, the victim's sister saw the victim coming out of the bedroom followed by Applicant. The jury also viewed the forensic interview of the minor victim and her sister, as well as heard testimony from both at trial. In light of this other evidence, Applicant has failed to show there is a reasonable likelihood the outcome of his trial would have been different had trial counsel objected to the detective's statement that she identified Applicant as the suspect in her criminal investigation and charged him with the offenses for which he was on trial.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object when the detective testified she identified Applicant as the suspect in the criminal investigation because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for stipulating to the State's witness's expertise in child sexual assault cases.

Applicant argues trial counsel was constitutionally ineffective for stipulating that Sallie Carter, M.D., was qualified to testify as an expert witness during Applicant's trial. Dr. Carter, who performed an examination of the minor victim on April 4, 2011, testified at trial as an expert in child sexual assault examinations. Tran. 187-216. A witness may be qualified as an expert in a particular area based upon his knowledge, skill, experience, training, or education. Watson v. Ford Motor Co., 389 S.C. 434, 447, 699 S.E.2d 169, 175-76 (finding the trial court erred in qualifying a witness as an expert in the training and operation of cruise control and brakes and allowing the witness to testify as to cruise control diagnosis when the witness had no knowledge, skill, experience, training, or education related to cruise control systems specifically) (citing Rule

702, SCRE). The test for whether a witness should be qualified as an expert is one that is dependent upon the witness's reference to the subject. *Id.*, at 447, 699 S.E.2d at 176 (citing Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004)).

This Court finds Applicant has failed to demonstrate any deficiency in trial counsel's performance with regard to this claim. Applicant has presented no evidence as to the lack of the witness's qualifications. Dr. Carter testified at trial that she was a physician at the Anderson-Oconee-Pickens Child and Adolescent Mental Health Center. Tran. 133. She had been conducting child sexual abuse examinations for the Foothills Sexual Trauma Center for ten years leading up to trial. She had an undergraduate degree in psychology from Mercer University, a master's degree from Yale Divinity School, and a doctorate of medicine from the Medical College of Georgia in Augusta. She had had an internship at Emory University Affiliated Hospitals and a pediatric residency at the Yale New Haven Hospital in Connecticut. She testified she had been in private practice for approximately twelve years in Anderson County in the field of pediatrics. She had been the director of the newborn nurse, treating approximately one thousand patients annually. She testified she had conducted vaginal examinations on female children, including those who were allegedly the victims of sexual assault. She testified she had also worked at the Anderson-Oconee-Pickens Department of Mental Health. She worked for ten years at the Child Advocacy Center, where she conducted genital exams on children at a rate of about fifty per year. She testified she had participated in basic and advanced trainings in conducting sexual abuse and sexual assault examinations. She testified she had been qualified as an expert in child sexual assault exams on between thirty-five and fifty different occasions. After Dr. Carter so testified, trial counsel stipulated that she was an expert in the field of child sexual assault examinations. Tran. 137. Furthermore, Reeve's testimony about her notifying trial

counsel of Dr. Carter's qualifications and their discussions thereto shows that trial counsel would have been well aware of the witness's qualifications at the time of trial.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for stipulating that Dr. Carter was qualified to testify as an expert witness at trial because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to object or making the wrong objection to the admission of the photographs of hymens, the State's expert's testifying as to the ultimate issue, and the State's expert's vouching and bolstering by testifying that "one plus one is two".

Applicant argues trial counsel was constitutionally ineffective for failing to object or for making the wrong objection to the admission of the photographs of hymens. At trial, the State moved to admit a photograph of the victim's vagina and hymen. Tran. 197. Trial counsel unsuccessfully objected, noting that his basis had been stated previously. Tran. 198. The State moved to admit a photograph of a vagina of another child, which depicted a normal vagina for purpose of comparison. Tran. 199. Trial counsel unsuccessfully objected on the ground of relevance and Rule 403, SCRE. Tran. 199. At the PCR hearing, Reeves testified she and trial counsel discussed the admissibility of the photographs on and off the record. She testified trial counsel objected to their admission not only at trial, but also during the pre-trial hearings that occurred the week before trial began. She did not remember specifically upon what grounds trial counsel opposed the admission of the photographs pre-trial, but believes they were speculation, Rule 403, and that they would inflame the passions of the jury. She did not remember whether trial counsel objected on the basis that an examination had been conducted by a physician prior to the date on which the photograph of the victim's hymen had been taken.

Applicant argues trial counsel should have objected to the admission of the photographs on the ground that they lacked probative value when Dr. Syed examined the victim on an earlier date than that on which the photograph was taken and concluded that the victim's hymen was intact. This Court finds Applicant has failed to show trial counsel's performance was deficient due to his not objecting on this ground. For whatever reason, trial counsel did not call Dr. Syed as a witness and it does not appear from the record that he intended to call her as a witness at trial. Notwithstanding the issues with Dr. Syed's testimony, as addressed later herein, trial counsel could not have raised this objection without calling Dr. Syed as a witness. Additionally, as noted later, Dr. Syed's testimony was not particularly helpful to the defense. And, Dr. Syed's testimony did not remove the probative value in the photograph taken by Dr. Carter of the victim's hymen. Dr. Syed did not take a photograph of the victim's hymen during her examination and testified the victim's mother informed her that the abuse or disclosure had occurred about one year before the victim's visit to Dr. Syed, which would have placed it within the date range noted in the indictment. As such, the photographs were probative.

During a break in the proceedings at trial, Dr. Carter watched the recording of the forensic interview of the minor at the request of the trial court. Afterwards, the State asked if the witness saw the victim's type of injury to be consistent with the victim's allegations based upon her examination of the victim and her review of the recording. Tran. 205. Trial counsel objected that the victim's allegations were "that there was not penetration basically." Tran. 205. The trial court overruled trial counsel's objection. Tran. 205. Dr. Carter answered the question by testifying:

[A]fter listening to the interview, I was more concerned because what you – what the child – although the child did not have perhaps the language and give the detail that would completely describe how the injury occurred, the child did draw a picture of a person who groomed her for sexual activity or sexual abuse.

Tran. 206.

Dr. Carter went on to testify (without objection) as follows about her conclusions based upon her viewing of the recording of the forensic interview:

The child reported that there was sexually explicit material played at least some of the time when the individual was involving her in sexual activity. And she indicated that this happened a number of times. And she indicated that it was at his invitation that she get under the blanket with him, that she do this. She indicated that he had taken her pants down, you know. So together with an abnormal genital exam, to me in my professional opinion, that's like saying one and one is two or two and two is four. I wasn't there. I didn't see it. But I have a lot of experience in this area.

Tran. 210.

Applicant argues trial counsel was constitutionally ineffective for failing to object to Dr. Carter's testimony on the ground that she was improperly testifying as to an ultimate issue. An expert witness can express an opinion about the ultimate issue in a case. State v. Wilkins, 305 S.C. 272, 276, 407 S.E.2d 670, 672 (S.C. Ct. App. 1991) (citations omitted). Questions of and testimony from an expert witness about the state of mind of a defendant is not admissible. Id. (citations omitted). An opinion may be offered on an ultimate issue only where the expert witness is otherwise qualified to do so. State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (finding the trial erred in allowing an expert in crime scene processing and fingerprint identification to testify as to the location of the victim and the position of his body at the time of the shooting because that testimony went to the defendant's claim that he was acting in self-defense at the time of the shooting) (citing Wilkins). This Court finds the witness's testimony was not objectionable on the ground that it constituted testimony as to the ultimate issue. The testimony does not address the ultimate issue of whether Applicant sexually abused the victim. Instead, the witness's testimony, when viewed in the larger context, concerns her ability to determine whether penetration had occurred based upon the lack of information about the

victim's allegations at the time of her examination. And certainly the testimony was not outside the scope of the witness's expertise.

Applicant argues trial counsel was constitutionally ineffective for failing to object that Dr. Carter's testimony improperly vouched for and bolstered the victim's credibility. This Court finds Applicant has failed to demonstrate he suffered prejudice from trial counsel's failure to object to Dr. Carter's testimony that one plus one is two and two plus two is four. This case was not a classic swearing contest between the victim and Applicant. In this case, there was physical evidence, admitted through the photograph of the victim's hymen and through Dr. Carter's testimony, that the victim had been sexually abused. The jury heard testimony from both the victim and her sister. Additionally, Dr. Carter had already given her opinion that the victim had been penetrated even before she watched the video recording of the forensic interview of the victim; the video did not change her medical opinion as to the victim's injury.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object or for making the wrong objection to the admission of the photographs of hymens because Applicant has failed to show any deficiency in his attorney's performance. This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object to Dr. Carter's testimony on the ground that she was improperly testifying as to an ultimate issue because Applicant has failed to show any deficiency in his attorney's performance. This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object that Dr. Carter's testimony improperly vouched for and bolstered the victim's credibility because Applicant has failed to show any prejudice resulting from trial counsel's failure to raise the objection. These claims are denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for telling the jury to find Applicant guilty.

Applicant argues trial counsel was constitutionally ineffective for telling the jury to find Applicant guilty. During his closing argument, trial counsel told the jury that it was his job to defend Applicant and that he would do that to the best of his ability. Tran. 260. Trial counsel informed the jury that Applicant was asserting his innocence by pleading not guilty and having a trial. Tran. 261. Trial counsel argued that there were many inconsistencies in the State's case. Tran. 261. Trial counsel argued the State did not have evidence to prove that Applicant was guilty of first-degree criminal sexual conduct because they could not prove that penetration had occurred. Tran. 262, 265. Trial counsel argued the fact that the minor victim testified that Applicant engaged in oral sex with her but did not mention oral sex in the recording from her forensic interview should cause the jury to have a reasonable doubt as to Applicant's guilt. Tran. 263-64. Trial counsel argued the victim's sister's seeing the victim running across the room, followed by Applicant, did not show that Applicant had abused the victim because the sister said that Applicant and the victim were "both giggling" Tran. 265. Trial counsel argued that he did not "think they've proved criminal sexual conduct in the first degree." Tran. 267. He argued Applicant was cloaked in a "shroud of innocence." Tran. 267-68. He argued the jury had to find guilt "beyond any reasonable doubt" in order to convict Applicant. Tran. 270. He then argued that Applicant "should certainly be found guilty [sic] on the criminal sexual conduct. And I think that is enough to shed reasonable doubt on the charge of lewd act." Tran. 270.

This Court finds Applicant has failed to demonstrate that trial counsel's performance was deficient in his closing argument for saying that Applicant "should certainly be found guilty [sic] on the criminal sexual conduct . . ." and that there is a reasonable likelihood the outcome of trial would have been different had counsel not made the statement. When considering whether a defense attorney's performance was deficient, the PCR court is to measure its "reasonableness

under prevailing professional norms.” Cherry, at 117, 386 S.E.2d at 625. Applicant has failed to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, at 697. Although it certainly would have been more appropriate for trial court to ask the jury to find Applicant “not guilty” in the final paragraph of his closing argument, it appears that trial counsel’s statement was a slip of the tongue and not a genuine request that the jury convict his own client. The court reporter’s inclusion of “[sic]” indicates it was obvious to him or her that trial counsel did not actually mean to ask the jury to find his client guilty, and it was be reasonable for the jury to reach the same conclusion, especially when trial counsel’s statement followed a long argument advocating Applicant’s innocence and the insufficiency of the evidence. Reeve’s testimony at the PCR hearing indicates she noticed the statement at the conclusion of trial counsel’s closing argument and likewise did not interpret it as a genuine request that the jury convict trial counsel’s client. The slip of trial counsel’s tongue may have been unfortunate, but a one-off slip from a defense attorney, when viewed in the context of all statements made by that attorney during the course of a closing argument, does not cause that attorney’s performance to fall outside the “wide range” of professional competence required of him. See Strickland, at 690 (instructing that the PCR court is to determine the proficiency of a defense attorney’s performance by questioning whether, “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney).

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for making a single statement asking the jury to find Applicant guilty of first-degree criminal sexual conduct with a minor because Applicant has failed to show any deficiency in his

attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to make reasonable arguments.

Applicant argues trial counsel was constitutionally ineffective for failing to make certain arguments, which Applicant identifies as (1) "why didn't State produce evidence of pornographic DVDs through reference to them by mother or during search of home", (2) in house where sister thought child with no pants was suspicious how could penetration injury and blood go unnoticed", and (3) "why first pediatrician Dr. Syad did not think there was any penetration because and noted hymen intact and crescent moon shaped or that maybe the examination caused injury".

During his closing argument, trial counsel argued, among other things, that the State's indicting Applicant with committing a lewd act upon a child so close to trial indicated the State did not believe it had sufficient evidence to prove the element of penetration required for the jury to convict Applicant of first-degree criminal sexual conduct with a minor, that the victim made her first allegation that she had had oral sex with Applicant only weeks before trial despite having previous opportunities to do so called into question her credibility, that Dr. Carter's testimony was too speculative to constitute evidence of Applicant's guilt, that there were inconsistencies in the stories of the victim and the victim's sister, that the victim did not testify that she had been penetrated by Applicant. Tran. 261-70. This court finds Applicant has failed to show that the arguments he suggests now had more merit at the time than those put up by trial counsel at trial. Trial counsel's arguments were reasonable, and it is not the place of this Court to second-guess reasonable and strategic decisions made by trial counsel with regard to strategy.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for making the arguments he did instead of those put forth by Applicant now because

Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to take exception or move for a mistrial when the trial court gave the jury an improper corroboration charge.

Applicant argues trial counsel was constitutionally ineffective for not taking exception or moving for a mistrial when the trial court instructed the jury that the minor victim's testimony did not need to be corroborated. The trial court's charge was as follows: I charge you that the testimony of the victim need not be corroborated in prosecutions under this code section which is § 16-3-655. Tran. 285.

The South Carolina Supreme Court held in State v. Rayfield that a trial court did not err in charging the jury that the victim's testimony did not need to be corroborated by quoting South Carolina Code Section 16-3-675. Id. 369 S.C. 106, 115-16, 631 S.E.2d 244, 249 (2006), overruled by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). Section 16-3-675 provides that "[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658 . . .," which includes the offense for which Applicant was tried and convicted. The Supreme Court in Rayfield held that a trial court did not have to instruct the jury on the statute, but that a court that does so should not unduly emphasize the single charge and should ensure that the jury instructions as a whole comport with the law. Id., at 117-18, 631 S.E.2d at 250. The trial court in Rayfield instructed the jury that the jury was the sole judge of the facts of the case, that the court was prohibited from commenting upon the facts of the case, and that the jury could "believe one witness as against several witnesses or several witnesses as against one witness" Id. at 118, 631 S.E.2d at 250. At the time of Applicant's trial in 2013, though, Rayfield was in effect and had not yet been overruled by Stukes. As such, the jury charge was proper at the time of Applicant's trial, and Applicant has failed to show any basis

upon which trial counsel could have objected thereto in light of Section 16-3-675. Furthermore, it would not be reasonable to have expected trial counsel to object to the charge in anticipation that it would be found improper by the Supreme Court years later, as the Court has explained that it "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) (citations omitted). Therefore, Applicant has failed to demonstrate any deficiency in trial counsel's performance with respect to this jury charge.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to object to the trial court's jury instruction that the victim's testimony did not have to be corroborated because the instruction was proper and Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Trial counsel was constitutionally ineffective for failing to present medical records showing that the minor victim's hymen was intact when she was subject to a medical examination on January 28, 2011 in light of the testimony from the State's expert that the hymen was absent on April 4, 2011, and the indictments' specifying that the sexual battery occurred between December 1, 2009, and August 31, 2010.

Applicant argues trial counsel was constitutionally ineffective for failing to present medical records from Dr. Syed's examination of the victim in order to show that the victim's hymen was intact at the time of the examination.

This Court finds Applicant has failed to show any deficiency in trial counsel's performance with respect to his failure to offer the records from Dr. Syed's examination into evidence or call Dr. Syed as a witness at trial. Applicant failed to show Dr. Syed had the proper qualifications to testify as an expert in child sexual assault examinations. Dr. Syed also testified at the PCR hearing that the victim's hymen was intact but that she could not rule out the possibility that the victim had been sexually abused. She testified she suggested, after concluding

her examination of the minor, that the victim's mother take her to sexual abuse counselling with a psychologist. She testified at the PCR hearing that she conducted her examination of the victim approximately one year after the abuse occurred, which would mean that there would be little significance to the fact that the dates of abuse alleged in the indictment predate the victim's appointment with Dr. Syed. Applicant has failed to show that trial counsel should have had the records and Dr. Syed at trial because her testimony was not particularly helpful to the defense.

This Court finds Applicant has failed to show any prejudice resulting from trial counsel's failure to offer the records from Dr. Syed's examination into evidence or call Dr. Syed as a witness at trial. As an initial matter, Applicant failed to show Dr. Syed had the proper qualifications to testify as an expert in child sexual assault examinations. This Court could only speculate as to the prejudice in the records' not being in evidence at trial without hearing proper expert testimony. See Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). As such, Applicant has failed to establish the value that Dr. Syed's records and testimony would have had at trial. Applicant has further failed to establish the result of trial would have been different had Dr. Syed testified at trial about her medical notes and examination of the victim. If Dr. Syed had testified at trial, the jury would have heard of the relative lack in her qualifications to diagnose sexual assault injuries as compared to those of Dr. Sallie Carter. The jury would have heard that Dr. Syed conducted her examination of the victim's hymen with her naked eye and would have taken note that Dr. Carter's opinion was accompanied by a photograph comparison of hymens, whereas Dr. Syed's diagnosis was supported only by her testimony. The State would have been able to call into question Dr. Syed's credibility in light of the discrepancies between her testimony about her examination of the victim and the testimony of the victim's mother and in

light of the discrepancy between her statements to Reeves and Price about her experience and training in treating sexual assault patients, which contradicted her testimony at the PCR hearing.

This Court finds Applicant has failed to demonstrate trial counsel was constitutionally ineffective for failing to present medical records from Dr. Syed's examination of the victim in order to show that the victim's hymen was intact at the time of the examination because Applicant has failed to show any deficiency in his attorney's performance and resulting prejudice. This claim is denied and dismissed with prejudice.

Appellate counsel was constitutionally ineffective for failing to argue on appeal that the testimony of the State's expert witness constituted bolstering.

Applicant argues appellate counsel was constitutionally ineffective for failing to argue on appeal the trial court erred in allowing the Dr. Carter, the State's expert witness, to bolster the victim's credibility.

As noted earlier in this order, trial counsel stipulated that Dr. Carter was an expert in child sexual assault examinations. During an in camera hearing regarding the admissibility of the witness's testimony and the admissibility of photographs of hymens taken by the witness, the witness testified she had conducted an examination of the victim on April 4, 2011. Tran. 138. She testified she inspected the victim's genitalia using a colposcope, a device that magnified and recorded its subject so that the witness could view the genitalia in "a lot higher resolution than the naked eye." Tran. 139-40. She testified there was an abnormality with the victim's hymen because the victim had "an absent posterior hymen." Tran. 140. She described the absence of a hymen as "significant" in light of the victim's age. Tran. 141. She explained that, although there can be variations in the form and appearance of hymens, "[n]early everybody has one." Tran. 142. Despite seeing thousands of newborns every year, about half of which were female, the witness had never personally seen a child born without a hymen or seen it recorded in medical

literature. Tran. 142. She clarified that she was not saying that the victim did not have an absent hymen; instead, she "said it was an absent posterior hymen." Tran. 142. She testified this particular sort of injury was typical after the patient has suffered a penetrating injury. Tran. 142-43. The witness compared a photograph she took of the victim's hymen with a photograph of different child of similar age, lying in the same position as the victim in the other photograph, and taken with the same colposcope; she described that photograph of one of a "normal hymen." Tran. 144-45.

Trial counsel objected to the witness's testimony on the ground that the witness was testifying as to her medical opinion about the state of the victim's hymen and the possible causes therefor while the minor victim testified Applicant did not penetrate her. Tran. 145-46. The trial court noted he agreed with trial counsel's characterization of the victim's testimony to the extent that she testified that Applicant did not penetrate her vagina or anus. Tran. 146. The State's position was that Dr. Carter identified a penetrating injury to the victim's hymen, which was not explainable outside of the victim's being abused by Applicant due to there being no other reported injury to the victim. Tran. 147. The trial court asked the witness if she could state to a reasonable degree of medical certainty that "some type of intrusion" caused the victim's hymen not to be present during her examination of the victim. Tran. 148. The witness answered, "Yes, something caused the hymen not to be present. And that would be certainly consistent with a penetrating type of injury." Tran. 148. The witness agreed when the trial court asked if her position was that the victim's lack of hymen was abnormal and could have been caused by penetration even though the witness did not know to a reasonable degree of medical certainty that Applicant caused the injury to the victim's hymen by penetrating her. Tran. 149. The witness testified other accidents and injuries can cause the hymen to be absent in a child. Tran. 149-50.

Trial counsel argued there was no evidence that Applicant injured the victim's hymen. Tran. 150. The State argued the victim's statements during the forensic interview that Applicant tried to stick his penis between her "butt" while she was lying face down were ambiguous and could mean that Applicant was trying to penetrate the victim's vagina rather than her anus. Tran. 154. The State noted the victim testified that she did not remember anything Applicant did to her hurting but argued the victim may have not understood that she was being penetrated due to her young age at the time of the abuse. Tran. 155.

Appellate counsel unsuccessfully argued on appeal that the trial court erred by allowing the State's expert witness to testify that the minor victim's injuries were consistent with penetration because the victim testified that no penetration had occurred, making the expert's testimony speculative and inadmissible under Rule 403, SCRE. Appellate counsel testified at the PCR hearing that, when Dr. Carter testified she became more convinced of penetration and concerned after she watched the recording of the forensic interview of the victim, the objection from trial counsel was that the witness was giving speculative testimony about an assumption that the victim had been penetrated, which was contradicted by the victim's own testimony. Tran. 205. Appellate counsel's testimony at the PCR hearing indicated he believed the issue raised in his brief, based upon the objection from trial counsel, was a stronger issue as to the relevant testimony from Dr. Carter because it was an issue that went to the State's supposed failure to present evidence of all the elements of first-degree criminal sexual conduct. In his words, if there was no evidence at trial that Applicant had penetrated the victim, the jury would not have been able to convict him.

Applicant argued at the PCR hearing that there was another issue that appellate counsel should have raised on appeal instead of the issue he did raise. While testifying before the jury at

trial, Dr. Carter testified that the victim reported to her that her abuser abused her multiple times "in the presence of pornographic media." Tran. 206. Trial counsel objected and the jury was excused for argument on the objection. Tran. 206-07. Trial counsel argued the witness was inappropriately characterizing the movies she watched with Applicant as "pornographic" based upon the victim's statement and testimony about the content thereof. Tran. 207-08. The trial court overruled the objection, and the witness's testimony before the jury continued. Tran. 208-09. At that point, Dr. Carter testified (without further objection) as follows about her conclusions based upon her viewing of the recording of the forensic interview:

The child reported that there was sexually explicit material played at least some of the time when the individual was involving her in sexual activity. And she indicated that this happened a number of times. And she indicated that it was at his invitation that she get under the blanket with him, that she do this. She indicated that he had taken her pants down, you know. So together with an abnormal genital exam, to me in my professional opinion, that's like saying one and one is two or two and two is four. I wasn't there. I didn't see it. But I have a lot of experience in this area.

Tran. 210.

At the PCR hearing, Applicant identified this as testimony constituting vouching or bolstering on the part of the expert witness. When questioned about the above-quoted testimony from Dr. Carter, appellate counsel testified, if it had been preserved for appellate review, he would have argued on appeal that the testimony constituted vouching or bolstering instead of the issue that he did raise. He based that testimony upon his view that this area of law has been developing over the past few years in this State's appellate courts.

Generally, in analyzing a claim of the ineffective assistance of appellate counsel, the reviewing court applies the Strickland test just as it would when analyzing a claim of the ineffective assistance of trial counsel. Southerland, at 616, 524 S.E.2d at 836. Thus, in this case, the reviewing court is to ask (1) whether appellate counsel's performance was deficient and (2)

whether the applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Although an appellate attorney is required to provide his client with the effective assistance of counsel, "appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, at 754.

A moving party must contemporaneously object when evidence with which he takes issue is offered for admission before the jury. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (citations omitted). The party seeking to prevent the admission of the evidence must challenge the admission upon the same legal basis in order to preserve the objection for appellate review. Id. It must be clear that the party is presenting the argument upon the same ground. Id. The objection should have enough specificity to bring into focus the nature of the alleged error so that it permits the trial court to reasonably understand the objection and alleged error. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). An issue will not be preserved for appellate review if the substance of the objection at trial does not comport with the specific issue raised on appeal. State v. Dickman, 341 S.C. 293, 295 S.E.2d 268, 269 (2000).

This Court finds Applicant has failed to show appellate counsel was constitutionally ineffective for arguing the issue in his brief instead of arguing that Dr. Carter's testimony bolstered the victim's credibility. Appellate counsel correctly noted during his testimony at the PCR hearing that the issue of supposed bolstering on the part of Dr. Carter was not raised by trial counsel, indicating the issue was likely not preserved for appeal. Since appellate counsel could not have argued the bolstering or vouching issue on appeal due to its not being preserved, he is not ineffective for failing to raise that issue over the issue he did raise, which was preserved. In articulating the reason for raising the issue he briefed and not the vouching or bolstering issue that Applicant suggested at the PCR hearing as a better issue, appellate counsel articulated a valid and reasonable strategy that should not now be second-guessed.

This Court finds Applicant has failed to demonstrate appellate counsel was constitutionally ineffective for raising the issue in his brief rather than raising the issue of whether the trial court erred in allowing Dr. Carter to supposedly vouch for or bolster the minor victim's credibility because Applicant has failed to show appellate counsel's choice of issue was deficient when the issue Applicant argues should have been raised was not preserved for appellate review and appellate counsel has articulated a valid, reasonable, and strategic decision for choosing the issue he raised in his brief. This claim is denied and dismissed with prejudice.

Applicant's due process rights were violated because the State vouched for and bolstered the credibility of the minor victim, the trial court improperly instructed the jury that the victim's testimony did not need to be corroborated, Applicant was afforded the ineffective assistance of counsel by trial and appellate counsel, and the trial in Applicant's absence constituted a total breakdown in the adversarial process.

Applicant argues that his due process were violated in multiple respects. This Court finds Applicant's issues are not proper grounds for post-conviction relief as he could have raised most of them on direct appeal or at trial. Post-conviction relief is not a substitute for remedies incident to the proceedings in the trial court or on direct appeal. S.C. Code Ann. § 17-27-20(B). Because


an application for post-conviction relief is not a substitute for a direct appeal of trial court error, and because of the modern simplification of criminal jurisdiction jurisprudence in South Carolina, the overwhelming majority of cognizable claims fall under the broad umbrella of “ineffective assistance of counsel,” a contention under the Sixth Amendment to the Constitution of the United States. See Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (“Allegations of trial court error are not cognizable on PCR.”) (citing Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999)); but see Fortune v. State, 428 S.C. 545, 837 S.E.2d 37, 44 (2019) (instructing that, in some circumstances, an applicant may argue a claim for post-conviction relief based on constitutional violations other than a violation of his Sixth Amendment right to counsel due to the ineffective assistance of counsel. The Supreme Court found Fortune’s was “one of those cases” because the State argued in closing that, among other things, a solicitor’s job is to find the truth, unlike the job of a normal lawyer, and that a defense attorney’s job is to manipulate the truth, shroud the truth, and confuse jurors). Errors that could have been reviewed on direct appeal cannot be asserted for the first time in a post-conviction relief proceeding. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) (citing Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975)). The allegation regarding Applicant’s indictment does not support a cognizable claim for post-conviction relief under any of the statutory grounds.

This Court had dispensed with Applicant’s claims of the ineffective assistance of counsel elsewhere in this order, and this Court incorporates those findings here and reaffirms that Applicant is not entitled to relief on those grounds. This Court finds the claim that the trial court erred could have been raised on direct appeal, but appellate counsel did not do so nor did Applicant allege in this action that appellate counsel should have done so. As such, that claim is

2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

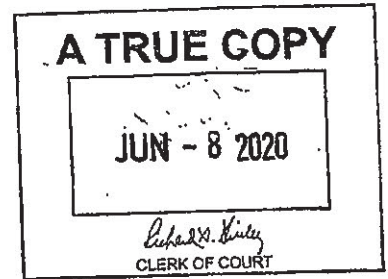
AND IT IS SO ORDERED this 4th day of May, 2020

2020 MAY 11 09:59
RECEIVED
SOUTH CAROLINA
DEPARTMENT OF CORRECTIONS



R. SCOTT SPROUSE
Chief Judge for Administrative Purposes
Tenth Judicial Circuit

Waltham, South Carolina



STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON)	IN THE TENTH CIRCUIT
)	
ANDREW ANTONIO CLEMONS)	
APPLICANT,)	MOTION TO ALTER OR AMEND
)	
VS.)	
)	
THE STATE OF SOUTH CAROLINA)	
RESPONDENT.)	CASE NO: 2017-CP-04-279

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCP, to alter or amend the judgment of this Court filed on June 8, 2020, to grant post-conviction relief (PCR) as outlined in the attached proposed order which was submitted to the court on March 20, 2020. See Exhibit 1. The Applicant argues that each allegation set forth in the Amended Application filed February 13, 2020, standing alone, amounted to ineffective assistance of counsel resulting in undue prejudice; furthermore, petitioner argues that if each allegation did not meet that standard, cumulative error prejudiced the Applicant to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry v. State*, 386 S.E.2d 624, 625 (1989).

The Applicant takes issue with a number of findings of fact and conclusions of law set forth in its Order of Dismissal. The order fails to reflect the testimony presented at the PCR hearing and incorrectly interprets the law. The Order incorrectly states that the case did not hinge on the victim's credibility so that the Applicant failed to meet his burden as to the allegations of improper bolstering and vouching. The stated reasoning for this finding was that there was other evidence of sexual battery from State's witness Dr. Carter; Dr. Carter testified that the victim's hymen was abnormal due to an absence of

hymeneal tissue consistent with a penetrating injury. Furthermore, the victim's sister testified that she saw the child come out of the bedroom followed by the Applicant, and there were also forensic videos of the victim and her sister submitted at trial. See Order pp.27, 33, & 39. This misstates the case law regarding vouching and bolstering and ignores the facts presented in this case. (See *Briggs v. State*, 806 S.E.2d 713 (S.C. 2017)(Despite the fact that Briggs did not strongly deny the accusations and instead told detectives he was "sick and needed help", and the fact that two jailhouse informants testified Briggs admitted the offenses, the Supreme Court upheld the PCR court's determination that Briggs was prejudiced.) Dr. Syed, who was the alleged victim's regular pediatrician with over twenty years experience and training to recognize signs of physical and sexual abuse, testified at the PCR hearing that she performed a physical examination of the child and noted that the child's hymen was intact. It was undisputed that the applicant had no contact with the victim after this examination. This intervening exam occurred after the child's report of abuse and two months before Dr. Carter's exam.

The Order misstates the Applicant's arguments as to trial counsel's failure to make proper objections to Dr. Carter's testimony. It finds that trial counsel was not ineffective for stipulating to Dr. Carter's testimony, because Dr. Carter had expert qualifications. The issue was not whether Dr. Carter was an expert, the issue is that the victim had an intact hymen two months before Dr. Carter's examination; therefore, Dr. Carter's findings were irrelevant and misleading, and were more prejudicial than probative.

Even if Dr. Carter's testimony was permissible, the failure of trial counsel to call Dr. Syed as a witness was clearly prejudicial. Trial counsel never mentioned Dr. Syed's examination during the Applicant's trial, and Dr. Syed testified at the PCR hearing that

trial counsel never even contacted her or issued her a subpoena in the case. There was also no testimony by Dr. Carter at the Applicant's trial concerning Dr. Syed's prior examination and finding that the child's hymen was intact and normal. The undisputed evidence was Applicant had had no contact with the child in over a year, so this normal exam goes directly to the admissibility of Dr. Carter's testimony and reliability of her opinions. While trial counsel argued Dr. Carter's testimony was irrelevant because it found sexual battery when the child had never alleged battery against the Applicant, the transcript clearly shows that trial counsel never mentions Dr. Syed's examination.

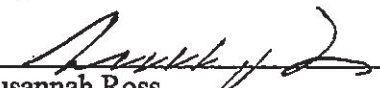
The Applicant takes issue with the Order's finding that trial counsel was not ineffective for failing to object to Dr. Carter's testimony because the allegation of abuse and an abnormal vaginal exam is like one and one is two. Citing *State v. Wilkins*, the Order says that an expert may testify to the ultimate issue. *State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670, 672 (S.C. App. 1991). See Order p. 38. However, that case is distinguishable because it does not involve bolstering and vouching, which our appellate courts have repeatedly found to be reversible error: See, e.g., *State v. Anderson*, 413 S.C. 212, 776 S.E.2d 76 (2015); *State v. Chavis*, 412 S.C. 101, 771 S.E.2d 336 (2015); *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013); *State v. Whitner*, 399 S.C. 547, 732 S.E.2d 861 (2012); *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011). *Briggs v. State*, 421 S.C. 316, 806 S.E.2d 713 (S.C. 2017). Appellate counsel testified at the PCR hearing that he found Dr. Carter's testimony to be problematic, and he would have argued on appeal that her testimony constituted vouching and bolstering if the issue had been preserved by trial counsel. Order p. 49.

Finally, the Order states that the Applicant failed to show prejudice from trial counsel's failure to call Dr. Syed to testify or offer her records indicating that the child's hymen was normal at trial because "her testimony was not particularly helpful to the defense". The Applicant takes issue with this finding in light of the evidence and testimony presented by Dr. Syed at the PCR hearing and believes the citation of *Dempsey v. State* to be misplaced. *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (S.C. 2005). The Order seems to be saying that despite Dr. Syed's twenty years experience as a pediatrician and training to recognize signs of physical and sexual abuse, she would not be qualified as an expert in child sexual assault examinations. Whether or not this is true, it is irrelevant. Dr. Syed's value as a witness was not to give an opinion as to whether CSC had occurred, she checked the child's vagina two months before the expert in child sexual assault examinations and noted that the child's hymen was normal and intact.

CONCLUSION

For the foregoing reasons, the Applicant requests this Court to alter its Order of Dismissal and grant Applicant relief.

Respectfully submitted,


 Susannah Ross
 Attorney for the Applicant
 333 E. Coffee Street,
 Greenville, SC 29601
 (864) 242-0029

This 9 day of June, 2020.

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

) IN THE COURT OF COMMON PLEAS
) IN THE TENTH CIRCUIT
)
)

ANDREW ANTONIO CLEMONS
APPLICANT,

) AFFIDAVIT OF SERVICE
)
)

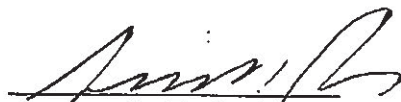
VS.

THE STATE OF SOUTH CAROLINA
RESPONDENT.

) CASE NO: 2017-CP-04-279
)
)

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion to Alter or Amend** on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

**Office of the Attorney General
PCR Division
P.O. Box 11549
Columbia, SC 29211**



Attorney for Defendant

This 9 day of June, 2020

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
 Andrew Clemons,)
)
 Plaintiff,)
)
 v.)
)
 State of South Carolina,)
)
 Defendant.)

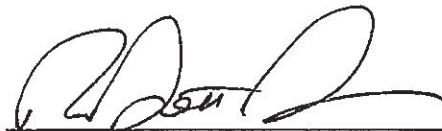
IN THE COURT OF COMMON PLEAS
 TENTH JUDICIAL CIRCUIT

CASE NO.: 2017-CP-04-00279

ORDER DENYING APPLICANT'S MOTION
 FOR RECONSIDERATION

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Applicant's Motion, pursuant to Rule 59, SCRCP,¹ is DENIED.

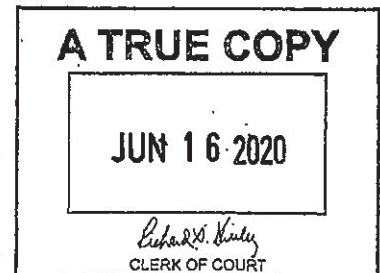
AND, IT IS SO ORDERED.



R. SCOTT SPROUSE
 Judge, Tenth Judicial Circuit

Walhalla, South Carolina
 June 12, 2020

'20 JUN 16 AM 11:13:27
 Anderson, SC CCC, CP/BS



¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

DOCKET NO. 2011GS04 01977

The State of South Carolina
County of Anderson

COURT OF GENERAL SESSIONS

DEC 06 2011
Term

TRUE COPY
FEB 10 2017
Anderson Clerk of Court

614

WITNESSES

M Partain, Anderson Police Dept.

ARREST WARRANT NUMBER

1723721

THE STATE

vs.

Andrew Antonio Clemons

TRUE BILL
ACTION OF GRAND JURY

DEC 6 2011

Foreperson

KWR

Indictment for

Sex / Criminal sexual conduct with minor -
victim under 11 years of age- First Degree

SC Code: 16-03-0655(A)(1)
CDR Code: 0385

Foreperson of Grand Jury

Date:

VERDICT

Guilty

Foreperson of Petit Jury

Date: 5-15-13

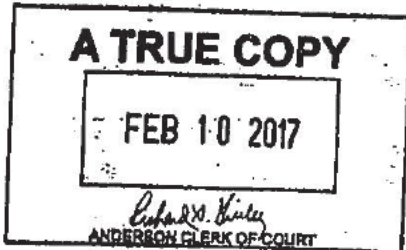
STATE OF SOUTH CAROLINA)
)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on DEC 06 2011, the Grand Jurors of Anderson County present upon their oath:

Sex / Criminal sexual conduct with minor - victim under 11 years of age- First Degree

That **Andrew Antonio Clemons** did in Anderson, South Carolina between **December 1, 2009 and August 31, 2010**, willfully and unlawfully commit the crime of Criminal Sexual Conduct with a minor in the first degree by engaging in sexual battery with a minor who was less than eleven (11) years of age, to wit: _____, whose date of birth is [REDACTED]. This is in violation of 16-3-655(A)(1) of the South Carolina Code of Laws (1976) as amended.



Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

[Signature]
ASSISTANT SOLICITOR

DOCKET NO. 2013GS0400569

The State of South Carolina
County of Anderson

COURT OF GENERAL SESSIONS

APR 16 2013

Term

A TRUE COPY
FEB 10 2017
Anderson, South Carolina
ANDERSON CLERK OF COURT

616

WITNESSES

M Partain, Anderson Police Dept.

ARREST WARRANT NUMBER

DIRECT INDICTMENT
REFERENCE WARRANT #I723721

ACTION OF GRAND JURY

TRUE BILL

APR 16 2013

Foreperson of Grand Jury

Date: Foreperson

VERDICT

X *[Signature]*

Cruity

X Foreperson of Petit Jury
Date: 5-15-13

THE STATE

vs.

Andrew Antonio Clemons

KWR

Indictment for

Sex / Lewd Act, committing or attempting lewd
act upon child

SC Code: 16-15-0140
CDR Code: 2468

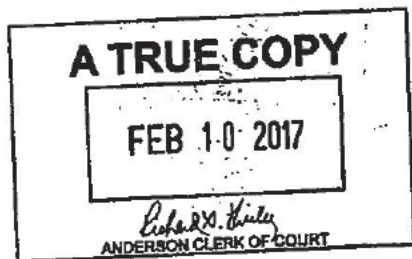
STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on APR 16 2013, the Grand Jurors of Anderson County present upon their oath:

Sex / Lewd Act, committing or attempting lewd act upon child

That **Andrew Antonio Clemons**, who is over fourteen years of age, did in Anderson, South Carolina, between December 1, 2009 and August 31, 2010, willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of _____ whose date of birth is _____ with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of himself or of the child. This is in violation of 16-15-140 of the South Carolina Code of Laws (1976) as amended.



Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

K.F.R.

ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Anderson
STATE VS.
Andrew Antonio Clemons
AKA:
Race: Sex: M Age: 30
DOB: SS#:
Address: Gray Street
City, State, Zip: Anderson, SC 29621
DL#: SID#: SC01209513

INDICTMENT/CASE#: 2011-GS-04-01977
A/W#: 1723721
Date of Offense: 12/1/2009
S.C. Code §: 16-03-0655(A)(1)
CDR Code #: 0385

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
In disposition of the said indictment comes now the Defendant who was
TO: Sex / Criminal sexual conduct with minor - victim under 11 years of age- First Degree

CONVICTED OF or PLEADS



in violation of § 16-03-0655(A)(1) of the S.C. Code of Laws, bearing CDR Code # 0385
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS
Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Reeves, Kristin W. SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 25 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

PTUP
days/hours Public Service Employment

Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly installments
pmts. of \$ beginning

A TRUE COPY

FEB 10 2017

Richard A. Miller
ANDERSON CLERK OF COURT

\$ paid to Public Defender Fund
Other:

Sealed Sentence opened & read
by Judge McIntosh on 9-12-13.

Appointed PD or appointed other counsel.
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge
Judge Code:
Sentence Date: 5-13-13

Table with 3 columns: Description, Amount, Total. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114 (BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$, TOTAL \$ 130.00

Clerk of Court/Deputy Clerk: Richard A. Miller
Court Reporter: R. Dollison (for trial)
SCCA/217 (03/2011) W. Rice (for opened sentence)

COUNTY OF Anderson
STATE VS.

Andrew Antonio Clemons

AKA:

Race: B Sex: M Age: 32

DOB: SS#:

Address: Railroad Street

City, State, Zip: Anderson, SC 29625

DL#: SID#: SC01209513

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was TO: Sex / Lewd Act, committing or attempting lewd act upon child

INDICTMENT/CASE#: 2013GS0400569

A/W#: DIRECT INDICTMENT

Date of Offense: 12/1/2009

S.C. Code §: 16-15-0140

CDR Code #: 2468

SENTENCE SHEET

CONVICTED OF or PLEADS

in violation of § 16-15-0140 of the S.C. Code of Laws, bearing CDR Code # 2468
NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Reeves, Kristin W. SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on:
The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered
Total: \$ plus 20% fee: \$
Payment Terms:
Set by SCDPPPS

Recipient:

Table with 3 columns: Description, Amount, Total. Includes items like Assessments 107.5%, Conv. Surcharge \$100, DUI Surcharge \$100, DUI Assessment \$12, DUI Breath Test \$25, Public Def/Prob \$500, Law Enforce. Funding \$25, Drug Court Surcharge \$150, BUI Breath Test Fee \$50, Vehicle Assessment \$40/ea, SCCJA Surcharge \$5, 3% to County, TOTAL \$130.00

PTUP Public Service Employment
Obtain GED
Attend Voc. Rehab. or Job Corp.
May serve W/E beginning
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive pmts. of \$ beginning
paid to Public Defender Fund
Other:
A TRUE COPY FEB 10 2017

Clerk of Court/Deputy Clerk: Richard A. Miller
Court Reporter: R. Talis (for opening)
SCCA/217 (03/2011) J. Rice (for opened sentence)

Presiding Judge: [Signature]
Judge Code:
Sentence Date: 2-15-13

sealed sentence opened & read by Judge McIntosh on 9-12-13.

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.