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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Anderson County

The Honorable R. Lawton McIntosh, Trial Judge
The Honorable R. Scott Sprouse, PCR Judge

Appellate Case No. 2020-000941

ANDREW ANTONIO CLEMONS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON CERTIORARI

PETITIONER'S STATEMENT OF ISSUES

I. Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to call Dr. Elzbieta Syed, a pediatrician, as a witness during Petitioner's trial, where Dr. Syed examined Minor after the sexual abuse allegations arose and found Minor's hymen was intact, which indicated no trauma or penetration, and where Petitioner was prejudiced since, without Dr. Syed's testimony, the testimony of Dr. Sallie Carter, a state expert witness who maintained a portion of Minor's hymen was absent, which was consistent with penetration, went unchallenged, particularly where Dr. Carter's testimony was the only physical evidence against Petitioner?

II. Did the post-conviction relief (PCR) judge err by finding trial counsel was not ineffective when he failed to object to the testimony of Dr. Sallie Carter, who was qualified as an expert in child sexual assault examinations, where Carter asserted that after watching Minor's forensic interview, she was "more concerned" and "more convinced" that Minor's injury was caused by penetration and that Minor's "report . . . 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 . . ." since this testimony constituted improper bolstering and vouching, and where Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of Petitioner's trial would have been different if counsel had objected?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES

I. Did the PCR court correctly find that Petitioner failed to prove that trial counsel was constitutionally ineffective for not calling Dr. Syed as a witness at trial or moving for the admission of her exam notes when Petitioner has not proven that trial counsel was acting outside the bound of reasonable professional norms by not introducing that evidence and when Petitioner has not proven that there is a reasonable likelihood that the outcome of trial would have been different had the jury heard of Dr. Syed's opinion of the state of the victim's hymen?

II. Did the PCR court correctly find that Petitioner failed to prove that trial counsel was constitutionally ineffective for not raising a vouching or bolstering objection to some of Dr. Carter's testimony when Petitioner has not proven that there is a reasonable likelihood that he would have been acquitted even in the absence of the testimony?

STATEMENT OF THE CASE

Andrew Antonio Clemons ("Petitioner") is presently imprisoned in the South Carolina Department of Corrections. During its December of 2011 term, the Anderson County Grand Jury indicted him for first-degree criminal sexual conduct with a minor (2011-GS-04-1977). During its April of 2013 term, the Grand Jury indicted Petitioner for committing a lewd act upon a child (2013-GS-04-569). G. Scott Thomason, Esquire ("trial counsel")[1] represented Petitioner and Assistant Solicitors Kristin W. Reeves and Lauren Davis Price prosecuted him. On May 13-15, 2013, Petitioner was tried in his absence before a jury trial with the Honorable R. Lawton McIntosh presiding. At the conclusion of trial, the jury convicted Petitioner as indicted. Judge McIntosh sentenced Petitioner but sealed the sentence. On September 12, 2013, the parties appeared again before Judge McIntosh for sentencing. Judge McIntosh sentenced Petitioner to imprisonment for twenty-five years for first-degree criminal sexual conduct with a minor and for fifteen years for committing a lewd act upon a minor, with both sentences running concurrently.

Trial counsel filed a timely notice of appeal. Chief Appellate Defender Robert M. Dudek ("appellate counsel") of the South Carolina Commission on Indigent Defense perfected the appeal on Petitioner's behalf. Petitioner argued Judge McIntosh erred by allowing the prosecution'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. 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,

[1] Trial counsel passed away in 2017, before Petitioner's PCR hearing was held.

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.

A hearing regarding Petitioner's application for post-conviction relief ("PCR") was held before the Honorable R. Scott Sprouse ("PCR court") on February 19, 2020. On May 4, 2020, the PCR court issued an order denying post-conviction relief to Williams on all claims raised at the hearing. In an order issued on June 12, 2020, the PCR court denied Petitioner's motion to alter or amend the judgment, which was filed pursuant to Rule 59(e), SCRCP.

STATEMENT OF FACTS

The minor victim is the daughter of Petitioner's former girlfriend, and she was seven years old during the majority of the time during which she was being abused by Petitioner. App. 69-60. The victim's mother and Petitioner began dating when the mother was nineteen, and Petitioner lived with her from December of 2009 until August of 2010. App. 59-61. Since Petitioner was not working at the time, he was at home with the victim and her sister, Petitioner's biological daughter, after school. App. 61-62, 97-99. While Petitioner was living in the house, he began sexually abusing the victim while her mother was not home. App. 77-92. On one occasion, when the victim and Petitioner were alone in the living room, Petitioner made the victim pull down her pants and panties, and he pulled down his clothes. App. 77-78. Petitioner made the victim touch his private parts, and he touched her private parts with his. App. 78. Specifically, Petitioner touched his private part to the victim's between her legs while he moved her back and forth. App. 79. During another incident, Petitioner and the victim were alone in her mother's bedroom and Petitioner made the victim touch his private parts with her hands and rub her hands up and down. App. 80. Petitioner made the victim take off her pants and underwear during this incident. App. 80. At the conclusion

of the incident, "something came out" of Petitioner's private part. App. 81. When the victim left the bedroom following these events, her sister observed her run out of the bedroom without pants on. App. 80, 88-89, 99-100. On a third occasion, the victim and Petitioner were alone in the living room, and Petitioner made the victim touch his private parts again. App. 80. However, the victim's sister and a friend from down the street tried to get in the front door, and Petitioner told them to go around to the back door. App. 81. Petitioner hastily took the victim back to her room and "put the covers over [her]" before the victim's sister and friend came into the house. App. 81-83. On other occasions, Petitioner would place his private part in the victim's mouth, put his hands on her head, and move her head up and down. App. 87-88. On at least one occasion, "something came out" of Petitioner's private part and went in the victim's mouth, but she spit it out. App. 88. Additionally, Petitioner showed videos to the victim on two occasions in the bedroom. App. 87-88. The videos showed "people on there doing what [Petitioner] was doing to [the victim], but [the participants] were older." App. 86. Some of the people in the videos had clothes on and some of them did not. App. 86. Although the victim's sister would generally be at home with Petitioner and the victim, she would usually go outside to play. App. 89-100. Petitioner told the victim "not to tell anyone or [she] would get in very big trouble and he would get in very big trouble." App. 91. The victim testified that she did not tell her mother about the abuse because she was scared she would get in trouble. App. 92.

On cross-examination, trial counsel asked if Petitioner had put his penis "inside" the victim's vagina or butt, and she denied that he had done so. App. 94. Trial counsel also asked the victim why she did not mention "the oral sex" during her forensic interview. App. 218. The victim testified that she did not know why she did not mention "the oral sex" two years previously in her

forensic interview. App. 218. She stated that the first person she told was a counselor she was talking to during the year before the trial. App. 219-220.

The victim's mother found out about the sexual abuse after the sister reported seeing the victim running pantless out of Petitioner's bedroom. App. 63-64, 92. The victim told her mother that the abuse occurred in the living room and the bedroom and that it happened when she was about to turn eight years old. App. 63-64, 67. The mother then called the victim's father and they scheduled an appointment with the victim's pediatrician. App. 64-65. The mother testified that the pediatrician performed a basic visual exam without using any specialized equipment. App. 65. The mother testified that the pediatrician told her that the pediatrician could not rule anything in or out, but also that the pediatrician did not think that there had been any penetration because the victim's hymen "was still crescent-moon shaped." App. 65. Subsequently, the victim was taken to Foothills Alliance Child Advocacy Center for a forensic interview on March 28, 2011. App. 66-67, 169-72. The victim's sister also had a forensic interview. App. 176-77.

At trial, the State requested a hearing outside the presence of the jury regarding the testimony of Dr. Sallie Carter. App. 110, 133-68. The purpose of the hearing was to determine the admissibility of photographs taken by Dr. Carter and her findings. App. 138-39. Dr. Carter made an "abnormal" finding regarding the victim's genital exam because the posterior portion of the hymen was absent. App. 195. Trial counsel stipulated that Dr. Carter was an expert in the field of child sexual assault examinations. App. 133-38. Following Dr. Carter's testimony, the trial court asked trial counsel whether he objected to the photographs and related testimony. App. 146. Trial counsel responded by stating that, since the victim denied that Petitioner had penetrated her anus or vagina, "I don't know why we really need this testimony at all." App. 146-47. The trial court

asked Dr. Carter if she could say to a reasonable degree of medical certainty that some type of intrusion caused the hymen not to be present. App. 149. Dr. Carter responded, "Yes, something caused the hymen not to be present. And that would certainly be consistent with a penetrating type of injury. Now, other types of injuries can cause hymenal damage and urethral damage. And I've seen other types of injuries cause damage in the genital area, and I could comment on some of those. App. 149. She further stated that, in her experience and in the literature, children "don't really have a language to describe what happened" when dealing with things they are unfamiliar with in the genital area and that a lot of times, "their testimony is incomplete." App. 149. In clarifying for the court that she could not testify to a reasonable degree of medical certainty that Petitioner's actions in fact caused the absence of the victim's hymen, Dr. Carter stated that "although I can say that [the victim's vaginal abnormality] is consistent with penetration, I cannot tell you what caused the injury." App. 150-51. The trial court found that the subject matter of Dr. Carter's testimony was appropriate expert testimony. App. 153-54. After some back-and-forth regarding whether it would be speculation to conclude that Petitioner vaginally penetrated the victim, the trial court requested that Dr. Carter review the forensic interview DVD. App. 155-20. Following Dr. Carter's review of the recording, the court asked whether she had "an opinion to a reasonable degree of medical certainty that this event related by this child is most likely one of the causes of the lack of the hymen being present." App. 160-206. Dr. Carter responded that "there just wasn't enough description to determine whether or not there was penetration" by Petitioner but that watching the video led her "to think that there was every opportunity for there to be penetration." App. 161-63.

Trial counsel again stated that the victim testified at trial that "she was not penetrated except orally." App. 163. When asked if his argument was that "there's not sufficient facts in the record for her to give that opinion in this case," trial counsel stated "I'm saying that there are absolutely contradictory facts." App. 164. Trial counsel stated that he also had the Rule 403 argument that "it's more prejudicial than probative." App. 164. The court ruled that Dr. Carter's testimony was admissible. App. 165-66. Trial counsel objected to the admission of Dr. Carter's testimony "because her testimony is going to be more prejudicial than probative because the victim or alleged victim, herself, has stated that she was not penetrated by [Petitioner]." App. 167. Trial counsel added that Dr. Carter's testimony would be, "at best, speculative." App. 168.

Following the ruling regarding Dr. Carter's testimony, the forensic interviewer testified. App. 169-88. The recordings of the forensic interviews of the victim and her sister were admitted and published. App. 176. Thereafter, the State called Dr. Sallie Carter to testify before the jury. App. 188. Dr. Carter, a pediatrician and expert in child sexual assault examinations, had performed a physical examination of the victim in April of 2011. App. 188-93. Dr. Carter performed a full head-to-toe exam and did a genital inspection using a piece of medical equipment called a colposcope, which is used to magnify and examine the genital area. App. 193. The colposcope was equipped with a high-powered light and a digital camera. App. 193-94. The victim had a normal physical exam with the exception of the genital area. App. 195. Dr. Carter made an "abnormal" finding regarding the genital exam because the posterior portion of the victim's hymen was absent.[2] App. 195. The doctor testified that "absent" is not a normal variation in the female

[2] One of the images from the victim's genital exam was admitted at trial over objection as State's Exhibit # 3. App. 197-98. An image depicting the normal hymen of a same-aged child taken with

population. App. 196. She testified that typically "some sort of injury" would cause the hymen to be "torn or worn or absent." App. 197. She also testified that her findings regarding the victim were "consistent with a penetrating injury." App. 205. However, she also explained that other injuries to the female genital area can occur, and that unless there is something like a brand-type burn, it is impossible for a doctor to know with certainty what actions caused the injury. App. 205. When the assistant solicitor asked Dr. Carter whether the victim's allegations, as set forth in the forensic interview, were consistent with the injury found in the physical examination, trial counsel objected on the ground that "the allegations were that there was no penetration basically." App. 206. The trial court overruled the objection. App. 206.

Dr. Carter then explained that when she conducts physical examinations, she does not obtain any history of allegations from the child so that she will not inadvertently bring any "presumption" to the exams. App. 206. She stated that she followed that procedure in this case and did not have any history on the victim at the time of the exam. App. 207. She testified that she had not seen the forensic interview "until the judge asked me to listen to it about two or three hours ago." App. 207. She stated that she was "more concerned" after listening to the forensic interview because, although the victim may not have had the "language" to describe how the injury occurred, "the child did draw a picture of a person who groomed her for sexual activity or sexual abuse." App. 207. When Dr. Carter mentioned that the sexual incidents happened "in the presence of pornographic media," trial counsel objected on the ground that "pornographic has not been used" and that the testimony was that the victim "saw a video of two naked people kissing." App. 207.

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the same colposcope and resulting from the same exam was admitted over objection as State's Exhibit # 4. App. 199-203.

After the jury was sent out, defense counsel elaborated that he did not believe that the characterization of two naked people kissing is "pornographic" because it is on television every day. App. 208-09. The trial court overruled the objection and stated "that's not a proper objection here." App. 209.

When the jury returned, Dr. Carter pointed out the victim's lack of sexual knowledge as an eight-year-old child, the fact that the victim was unable to explain what "hunching" was in one of the videos she attempted to describe on the forensic interview, and the fact that the victim indicated that Petitioner had taken her pants down and involved her in sexual activity, and stated that when those things are considered alongside the abnormal genital exam, in her professional opinion, "that's like saying one and one is two or two and two is four." App. 211-12. She added, however, that, "I wasn't there. I didn't see it." App. 211. Dr. Carter explained that children are not able to describe things that happen to them in the same way as adults because children "have to learn the language of sexual activity." App. 212. If a child has not learned "the right words and the right description and the right function" of body parts, then "they don't have a very good way to describe sometimes the things that happen to them." App. 212. Dr. Carter also explained that a report of abuse from a child is often a continuing or gradual process rather than a one-time report of all allegations. App. 212-13. Finally, Dr. Carter testified that she did not see anything else that could have caused the hymen's absence. App. 213. On cross-examination, Dr. Carter could not say, to a reasonable degree of medical certainty, that [Petitioner] caused the injuries. App. 214. She testified that she could not possibly say who caused the injury unless the person left genetic material such as DNA behind. App. 214-15. When asked again whether she could tell to a degree of medical certainty whether this was a penetrating injury, Dr. Carter testified that her notes recorded her

opinion that the injury was "consistent with penetration." App. 215. When trial counsel asked what else it was consistent with, Dr. Carter stated that this injury was "most consistent with penetration," but that a child can have a traumatic vaginal injury that could cause a similar injury. App. 215. She elaborated that such a traumatic vaginal injury would include things like falling astride a tree limb, fence, rake with rigid teeth, or bicycle handlebars. App. 215. In this case, she testified, "all I can say is the injury that I saw is consistent with a penetrating vaginal injury." App. 216. When asked for the time frame in which the injury to the victim would have occurred, Dr. Carter stated that it was not an acute injury and that it would have happened "some weeks to months earlier" because it was "completely healed" and there was not any fresh bruising or swelling. App. 216.

After the State rested, the defense presented no witnesses. App. 220-21. Following closing argument and the jury charge, the jury deliberated for thirty minutes and found Petitioner guilty of both charges. App. 291.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed de novo without deference to the lower court. Smalls, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse

the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The PCR court correctly found that Petitioner failed to prove that trial counsel was constitutionally ineffective for not calling Dr. Syed as a witness at trial or moving for the admission of her exam notes because Petitioner has not proven that trial counsel was acting outside the bound of reasonable professional norms by not introducing that evidence and because Petitioner has not proven that there is a reasonable likelihood that the outcome of trial would have been different had the jury heard of Dr. Syed's opinion of the state of the victim's hymen.

Dr. Elzbieta Syed, a pediatrician, testified at the evidentiary hearing before the PCR court. App. 448. Dr. Syed prepared a medical record in January of 2011 after conducting an examination of the victim, who was Dr. Syed's patient at the time. App. 448-50. Dr. Syed performed her examination of the victim over "one year after the incident." App. 452. Dr. Syed testified that she did not use any instruments in conducting her examination other than a flashlight, and that she "probably" looked at the victim's hymen for a couple of minutes. App. 460-61. Dr. Syed wrote in the record that she "can't rule out or rule in [the] possibility of sexual abuse". App. 546. Over Respondent's objection, Dr. Syed testified from her record about her findings from the examination, testifying that the victim's hymen was "crescent-shaped," had a "smooth border," was "intact," and had a "[s]mall border . . . ." App. 452, 455. The following exchange took place between Dr. Syed and Petitioner's counsel:

> Q: And smooth border. What do you mean by that?
> A: Smooth border, **especially fresh penetration**, you can see the borders are not smooth. They are, you know, after trauma. So here there was smooth border and crescent, yeah.
> Q: So that would suggest no trauma?
> A: No trauma **at that time**.

App. 452-53 (emphasis added). Dr. Syed testified that "[s]exual abuse have different shape and form." App. 454. Dr. Syed admitted that "**there [was] some space**, you know" in the victim's hymen. App. 455 (emphasis added). "[T]heoretically," Dr. Syed reasoned, "**it can be some abuse** but not penetration. You know, can be like, you know, finger penetration. You know, it's just too small to have full penetration, you know . . . ." App. 455 (emphasis added). Dr. Syed did not think that the state of the victim's hymen indicated that there had been "full penetration", but she could not "rule out" abuse because "[t]here was not any physical evidence **at that moment**." App. 455 (emphasis added). Dr. Syed felt that, considering that one year had passed since the "incident" and her examination of the victim, her examination was "neutral" as to whether abuse had occurred. App. 455-56.

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 the post-conviction relief action, and when alleging that counsel was constitutionally ineffective, she 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, at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. 668). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, at 117, 386 S.E.2d at 625 (quoting Strickland, at 690). In order for a post-conviction relief applicant to

successfully prove that his defense attorney's performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Id. (citations omitted). The "preeminent authority for all" courts when they are considering an applicant's claim of constitutional ineffectiveness requires that the courts be highly deferential to a defense lawyer's performance because:

> [I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting Strickland). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Petitioner has failed to prove that trial counsel's performance was deficient with respect to his not calling Dr. Syed as a witness at trial. We do not know why trial counsel did not call Dr. Syed as a witness at trial, but we can see that there are valid reasons that he may not have done so. See Dunn v. Reeves, No. 20-1084, 2021 WL 2742771, at *4-5 (U.S. July 2, 2021) (noting that Reeves' lawyers might have given information that would have justified their strategic decision

not to hire an expert "if the attorneys had been given a chance to testify," and offering multiple, valid justifications for the lawyers' decision). First, evidence of Dr. Syed's findings was admitted at trial during the State's case-in-chief. The victim's mother testified at trial that she took the victim to Dr. Syed for an examination after she learned of the abuse since Dr. Syed was the victim's pediatrician. App. 65. The mother testified on direct examination about Dr. Syed's findings: "[Dr. Syed] told me that she couldn't rule in or out anything, but that she did not think that there was any penetration because [the victim's hymen] was still crescent-moon shaped." App. 65. The victim's mother testified again, this time in response to a question from trial counsel, that Dr. Syed "said that she couldn't rule [penetration] in or out, but she did not think that there was any penetration because [the victim's hymen] was still crescent-moon shaped." App. 72. The mother explained the reason that she contacted a counselor at Dr. Syed's suggestion and not the police:

> I thought [Dr. Syed] was telling me basically what to do. You know, she told me to call the counselor, and that's what I did. And I felt also if we were in there and it felt like it need – you know, if anything went wrong that [Dr. Syed] would have told me, you know, well, you need to go contact the police or she would have contacted the police while we were there.

App. 73. The jury did not hear from Dr. Syed directly at trial, but they heard through the testimony of the victim's mother Dr. Syed's conclusion that no penetration occurred, or at least that there was no evidence of "full" penetration at that time, based upon the doctor's examination of the victim's hymen. It was clear to the jury that Dr. Syed's medical opinion was that there was no reason to be alarmed because Dr. Syed did not get law enforcement involved and because the victim's mother did not get law enforcement involved based upon her reliance upon Dr. Syed's medical opinion. Trial counsel elicited that evidence at trial through his questioning of the victim's mother. Since evidence of Dr. Syed's opinion had thus been admitted—and by way of the victim's own mother, no less—there was no need for trial counsel to call Dr. Syed as a witness merely to

have her repeat the same information. See Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (finding that a lawyer's decision not to call someone as a witness was reasonable, in part, because the witness would have provided cumulative testimony).

Second, trial counsel may have thought that Dr. Syed's opinion as to the condition of the victim's hymen would have been of little value to the defense. Dr. Syed testified at the evidentiary hearing that she had seen "a lot of cases of sexual abuse" during her medical training, that she had completed approximately three months' of training in a sexual abuse clinic, and that she had she had dealt with approximately 100 potential sexual abuse cases in total during her training and subsequent medical practice. App. 454, 459-60. Assistant Solicitor Reeves testified that she interviewed Dr. Syed before trial and that Dr. Syed had told her **at that time** that "she had no sexual assault training," which is the reason that Reeves did not call Dr. Syed as a witness during the State's case-in-chief. App. 520. Additionally, Dr. Syed used only a flashlight to perform her examination, which "probably" lasted for a couple of minutes, at best. App. 460-61. A lawyer's decision not to do some investigation should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (S.C. Ct. App. 2014). We do not know whether or not trial counsel interviewed Dr. Syed, as Petitioner did not put that information before the PCR court. However, if trial counsel had, it would have certainly given him a valid reason not to call Dr. Syed as a witness for the defense if Dr. Syed had told him the same thing that she told to the assistant solicitor or if he had been aware

of the cursory nature of her examination. There would have been need for trial counsel to call a witness who was "neutral" as to whether abuse had occurred. App. 455-56. The PCR court correctly found that Dr. Syed's testimony would not have been very helpful to the defense had she given it at trial. App. 599.

Third, trial counsel may have thought that there was a chance that Dr. Syed would give testimony harmful to the defense if she were to testify at trial. Dr. Syed wrote in her note from the examination of the victim that she "can't rule out or rule in [the] possibility of sexual abuse". App. 546. Dr. Syed testified that her findings suggested that there was not "[n]o trauma at that time," which left open the possibility that trauma had occurred at some other time. Dr. Syed did see "some space" in the victim's hymen. App. 455. Dr. Syed reasoned that it was possible that the victim had been abused sexually. App. 455. Dr. Syed's inability to say whether the victim was sexually abused was due to her belief that "[t]here was not any physical evidence at that moment." App. 455. Dr. Syed's note alone could have given any defense lawyer a reasonable fear that Dr. Syed, if she were to testify at trial, could make some statement damaging to the defense because it left open the possibility that the victim had been abused sexually. If trial counsel did, in fact, speak with Dr. Syed before trial and heard her make statements similar to those she made during her testimony before the PCR court, it would certainly have been reasonable for trial counsel to worry that Dr. Syed would say something harmful to the defense if she were on the witness stand. No matter the reason that trial counsel chose not to call Dr. Syed as a witness, the record certainly "does not reveal that counsel took an approach that no competent lawyer would have chosen." Dunn, No. 20-1084 at *4 (quotation omitted).

Petitioner has failed to prove that he suffered prejudice from trial's counsel's performance as to this claim. First, the assistant solicitor's testimony that Dr. Syed told them that she had no training in sexual abuse casts serious doubt on Dr. Syed's credibility. Dr. Syed testified before the PCR court to a certain extent about training that she had received in sexual abuse cases while completing her medical education and about sexual abuse exams that she had conducted in her work since completing her medical training. Since Dr. Syed maintained at the evidentiary hearing that she had good knowledge about sexual abuse examinations but told the assistant solicitor before Petitioner's trial that she knew nothing about them, Dr. Syed's credibility on the issue of sexual abuse examinations is in doubt. Second, the testimony from the victim's mother about the way Dr. Syed conducted her evaluation calls into question Dr. Syed's credibility. Dr. Syed testified that her examination "probably" lasted for minutes and involved the use of a flashlight. That testimony was directly contradicted by the mother's testimony, which was that Dr. Syed looked at the victim for "maybe, like 10 or 15 seconds." App. 526. The PCR court limited Respondent's ability to challenge Dr. Syed's credibility regarding the thoroughness and circumstances of her examination of the victim, but there is evidence enough for this Court to question Dr. Syed's credibility. See Hillerby v. State, 431 S.C. 323, 334, 847 S.E.2d 500, 505 (S.C. Ct. App. 2020) (acknowledging that there are times in which it is appropriate for a PCR court to reject expert testimony due to the lack of witness credibility).

Third, Petitioner did not seek to have Dr. Syed qualified as an expert witness at the evidentiary hearing, so the Court should not take into account Dr. Syed's opinion about the state of the victim's hymen and whether sexual abuse is indicated thereby. "[B]efore a witness is qualified as an expert, the circuit court must find (1) the expert's testimony will assist the trier of

fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) the expert's testimony is reliable." State v. Andrews, 424 S.C. 304, 316, 818 S.E.2d 227, 234 (S.C. Ct. App. 2018) (quotation omitted). "The party offering the expert has the burden of showing his witness possess the necessary learning, skill, or practical experience to enable the witness to give opinion testimony." Id. at 317, 818 S.E.2d at 234 (quotation omitted). In the evidentiary hearing, not only did Petitioner not offer Dr. Syed as an expert, one qualified to assess the state of the victim's hymen, but Petitioner went further by resisting Respondent's attempts to assess the doctor's qualifications. App. 451, 453-54, 460. For this reason, the PCR court found that Petitioner failed to show that Dr. Syed was properly qualified to testify as an expert in child sexual assault examinations, meaning that Petitioner failed to prove that there is a reasonable likelihood that the outcome of his trial would have been different had Dr. Syed testified at trial and had her notes been offered into evidence by trial counsel. App. 599. Furthermore, the testimonies of Dr. Syed and the victim's mother show that Dr. Syed's procedure for determining whether there was damage to the victim's hymen and determining the source of any damage was likely less reliable than Dr. Carter's.

Fourth, there was evidence that Petitioner was guilty independent of the evidence regarding the victim's hymen. Petitioner was convicted of first-degree criminal sexual conduct with a minor. App. 618. "A person is guilty of criminal sexual conduct with a minor in the first degree if: [] the actor engages in sexual battery with a victim who is less than eleven years of age . . . ." S.C. Code Ann. § 16-3-655(A)(1). As it is used in section 16-3-655, "sexual battery" includes fellatio and "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 . . . ." S.C. Code Ann. § 16-3-651(h). The victim testified

at trial that Petitioner put his penis in her mouth, put his hands on her head, moved her head up and down on his penis, and ejaculated into her mouth. App. 87-88. "Fellatio" is "[t]he sexual act involving oral stimulation of a person's penis." Fellatio, BLACK'S LAW DICTIONARY (11th ed. 2019). Dr. Syed did not testify about the victim's allegation that Petitioner made her fellate him nor did she testify about whether there was any physical evidence of fellatio. Since Dr. Syed's testimony was focused on the state of the victim's hymen and the possibility that Petitioner had penetrated the victim, the evidence that Petitioner had the victim fellate him is wholly independent of the evidence of his penetration of her genitals. The jury likely would have convicted Petitioner of criminal sexual conduct even if Dr. Carter had not testified at trial about the condition of the victim's hymen. And even Dr. Syed did not foreclose on the possibility that the victim was penetrated vaginally in some form or fashion by Petitioner. Dr. Syed's testimony and the information contained in her examination note did absolutely nothing to negate one of the elements of first-degree criminal sexual conduct with a minor.

Petitioner was also convicted of committing a lewd act upon a child. App. 619. A person over the age of fourteen commits a lewd act upon a child whenever he:

> Willfully and lewdly commit[s] . . . a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child.

S.C. Code Ann. § 16-15-140 (repealed 2012). The victim testified at trial that Petitioner touched his penis to her private parts and moved her back and forth and that he had her fellate him while he moved her head up and down on his penis. App. 78-79, 87-88. The victim's testimony about these acts was evidence that Petitioner committed lewd and lascivious acts upon the victim's body. See Dep't of Soc. Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (S.C. Ct. App. 1984) (finding

that Forrester's fondling the breasts and vagina of a child was sufficient to constitute a violation of this section). Petitioner has failed to prove that Dr. Syed's testimony and note would have had any effect on the jury's verdict as to the crime of lewd act as it could be proven without any evidence whatsoever about the victim's hymen. Certiorari should be denied.

II. The PCR court correctly found that Petitioner failed to prove that trial counsel was constitutionally ineffective for not raising a vouching or bolstering objection to some of Dr. Carter's testimony because Petitioner has not proven that there is a reasonable likelihood that he would have been acquitted even in the absence of the testimony.

Petitioner argues that trial counsel was ineffective for not raising a bolstering or vouching objection to some of Dr. Carter's testimony because the testimony improperly bolstered or vouched for the minor victim's credibility and because the trial hinged on the victim's credibility. Dr. Carter, the prosecution's expert witness, made some improper statements after watching the recording of the forensic interview of the victim. App. 205-07, 210-11. Nevertheless, the PCR court found that Petitioner failed to demonstrate that there is a reasonable likelihood that the outcome of the trial would have been different had trial counsel objected to those comments. App. 593. The PCR court was correct because the statements from Dr. Carter were related to Dr. Carter's testimony about the condition of the victim's hymen, and there was evidence of Petitioner's guilt wholly independent from the evidence regarding the victim's hymen.

Dr. Carter testified that she was more concerned after watching the video recording because she did not think that the victim had the ability to "completely describe how the injury occurred" and noted that the victim reported "that there was skin-to-skin contact." App. 205-07. Dr. Carter testified that "one and one is two or two and two is four" after saying that she was considering the victim's allegations that Petitioner removed her pants and invited the victim to get under a blanket with him, along with Dr. Carter's finding of an abnormality during her examination of the victim's

genitals. App. 211. While opining that the victim may not have had the life experiences or vocabulary to inform others that Petition had penetrated her vaginally, Dr. Carter testified that, while referring to the video recording that she had watched, adults have to careful to listen to and watch children "because they will tell you things in their moments of silence or when they point to pictures, you know, as well as when they speak with their mouths." App. 213-14. In these instances, Dr. Carter was linking her statements about the video recording with the abnormality she observed in the victim's hymen. Dr. Carter was at trial, after all, to testify about the condition of the victim's hymen in order to support the prosecution's case that Petitioner penetrated the victim vaginally. The victim testified at trial that Petitioner put his penis in her mouth, put his hands on her head, moved her head up and down on his penis, and ejaculated into her mouth. App. 87-88. This evidence was wholly independent of the evidence of Petitioner's penetration of the victim's vagina. The jury likely would have convicted Petitioner of criminal sexual conduct even if Dr. Carter had not testified at trial about the condition of the victim's hymen or about the forensic interview of the victim. Similarly, the victim's testimony about the fellatio was evidence that Petitioner committed lewd and lascivious acts upon the victim's body independent of anything that Dr. Carter thought about the victim's hymen or forensic interview. Furthermore, as the PCR court noted, the victim's sister testified at trial that she had witnesses the victim running from Petitioner's room to the siblings' room wearing only panties and a shirt. App. 99-100, 593. Petitioner's case is, as a result, distinguishable from Chappell v. State, in which the Court of Appeals found that Chappell had successfully proven that his lawyer's error caused him to suffer prejudice because "the only evidence against Chappell was the victim's **uncorroborated** testimony." 429 S.C. 68, 81, 837 S.E.2d 496, 502 (S.C. Ct. App. 2019) (emphasis added).

This Court should not grant the petition as to this claim. The PCR court correctly denied relief because Petitioner failed to prove that there is a reasonable likelihood that he would have been acquitted if trial counsel had objected to the aforementioned testimony from Dr. Carter on the basis of vouching or bolster. The victim's testimony, and her sister's corroborating testimony, provided evidence of Petitioner's guilt as to both charges regardless of the condition of the victim's hymen and Dr. Carter's consideration of the medical evidence along with the victim's allegations. Even if Dr. Carter's testimony had been suppressed or stricken in its entirety, there would have been sufficient evidence to convict Petitioner of his crimes. For that reason, this Court should deny the petition.

CONCLUSION

For all the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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