

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Mark Hayes, II, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2022-000434

Daniel W. Spade Petitioner,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL CORSS-APPEAL

Daniel W. Spade appeals the order of the Honorable J. Mark Hayes, II, dated November 12, 2021, granting, in part, and dismissing, in part, his application for post-conviction relief. This appeal is taken from the orders of Judge Hayes, dated November 12, 2021, granting, in part, and denying, in part, his Rule 59(e), SCRCP motion regarding Judge Hayes' order dated October 8, 2020, and the order dated March 11, 2022, denying The State's Rule 59(e), SCRCP motion.

Respectfully Submitted,

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Daniel W. Spade, SCDC #358974

Applicant

vs.

State of South Carolina,

Respondent

) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL
) CIRCUIT
)

) Case No.: 2017-CP-42-02372
)

) Order

) Denying the State's Motion to
) Reconsider, Alter or Amend the Court's
) Prior of November 12, 2021 Order

) Which

) Granted a New Trial by Modifying in
) Part the Court's Prior Order of
) Dismissal Dated October 8, 2020.

This Post-Conviction Relief (PCR) case arises from the applicant's 2014 conviction of first-degree criminal sexual assault with a minor. The minor is applicant's biological daughter. The factual and legal background of this PCR is extensive because its relevancy extends back to a brief relationship the minor's biological mother had with applicant and the subsequent related family court matters.

The initial PCR application was filed in 2017. Prior to the evidentiary hearing, the application was amended several times to include thirty-one (31) different allegations of ineffective assistance of counsel. The PCR hearing was conducted between May 14, 2019 to May 20, 2019.

As mentioned, the factual information in the record of this PCR is extensive. The background dates back to January 2006 when the applicant and the minor child's mother met and the minor's birth in September of that same year. The record also includes several contested family court proceedings involving the minor child's mother and step-father's desire to terminate the applicant's parental rights and applicant's efforts to establish visitation with the minor. The

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record also contains a lengthy and substantial Department of Social Services (DSS) file that reflects DSS and law enforcements investigations.¹

The record in this PCR also contains numerous post PCR trial briefings and arguments on a variety of issues; including, the missing DSS file, order preparation and motions for reconsideration. The thirty (30) month record since the PCR evidentiary hearing also includes the briefs and oral arguments related to the applicant's Rule 59(e) that occurred on March 29, 2021.

This matter now comes before the Court on the State's Motion for Reconsideration.² In the present motion, the State seeks to have this Court reconsider, alter or amend its prior Order dated November 12, 2021. The November 12, 2021, Order granted the applicant a new trial by modifying this Court's initial Order of October 8, 2020. The October 8, 2020, Order had denied the applicant's request for post-conviction relief. As will be discussed herein, the State's motion has been appropriately considered and is denied.³

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¹ The DSS file was not available for the PCR evidentiary hearing. This Court's impression was that the DSS file was unavailable because it was lost. Subsequent to the hearing, an order of this Court was issued, resulting in DSS producing the file. A redacted copy is filed under seal and part of the record.

² The present motion is the second SCRCR Rule 59(e) for reconsideration motion addressed by this Court. During the more than thirty (30) months since the evidentiary hearing to the filing of the present motion; this Court, has reviewed hundreds of pages of materials, conducted multiple reviews of the child's forensic interviews, conducted the hearing related to the missing DSS file and received multiple written submissions on various factual and legal issues.

This Court notes that applicant raised SC Constitution Article I, Section 8, SC Code Section 17-27-80 and SCRCR Rule 52 concerns as to the methodology used by this Court in issuing its October 8, 2020. Even though this Court felt its initial Order preparation did not violate the directives of Fishburne v. State, 427 S.C. 505, 832 (2019), the November 12, 2021, Order was written by this Court without reliance on proposed Orders from either party. While this Court's opinion was that it's Order preparation methodically did not violate Fishburne, the constitutional, statutory, and procedural issues raised by applicant were eliminated from this case. The present Order is also issue by this Court without reliance on proposed Orders from either party.

³ As allowed by SCRCR Rule 59(f), this Court exercises its discretion to determine this motion without oral arguments. After reviewing the State's motion, the applicant's response and given this Court's extensive history in this matter, this Court does not believe additional oral arguments will be of assistance in ruling upon the present motion.



ISSUE PRESENTED BY THE STATE

The sole challenge to the November 12, 2021, Order is related to the trial counsel's failure to object to the State's closing argument. The objectionable closing argument was presented to the jury by a private attorney⁴ appointed as a Special Counsel to assist the State in the criminal trial. This Court found the argument constitutionally improper because it shifted the role of the jury away from being fair and impartial arbiters of the facts. The State disagreed with this Court's finding that the argument was improper, disagreed with the Court's finding that trial counsel should have objected to closing argument and disagreed with this Court's analysis finding prejudice. In the motion, the state asserted this Court's "findings and conclusions are not supported by the record or case law".⁵

In response, applicant asserted the State's motion should be denied. Applicant maintained that this Court was correct in finding that the Special Prosecutor's closing argument "shifted the role of the jury away from being a fair and impractical arbitrator of the facts" and "were crafted to have the jury view the evidence through an unconstitutional lens". Applicant

⁴ The private attorney had represented the minor child's mother and step-father in a related Family Court action where in the applicant's parental rights were terminated.

⁵ A second issue is, arguably, found in Footnote 5 (page 10) of the State's motion. In Footnote 5, the State seeks to have Footnote 18 (prior order page 17), of the November 12, 2021, Order removed from the November 12, 2021, Order or, at least, clarified.

Footnote 18 of the November 12, 2021, Order stated that the issue of improper bolstering was a "close call". This Court went on to make a finding of prejudice on the issue of improper bolstering in the event the Court's finding that no improper bolstering occurred was reversed on appeal.

As to the issue raised in Footnote 5 of the State's Motion concerning Footnote 18 of November 12, 2021, Order, applicant agreed with the Court's finding of prejudice regarding trial counsel's failure to object to improper bolstering. Notwithstanding, applicant went on to contend that he had also established trial counsel deficient performance to the allegations of improper bolstering for the reasons set forth in prior pleadings and during the prior 59(e) motions.

This Court has reviewed Footnote 18 of the November 12, 2021, Order and finds it is proper. The issue of bolstering as to witness Thompson-Loftis (State v. Makin analysis) and/or the Advocacy Center's forensic interviewer Weber (Douglas, Emsie, Cromer and Dawkins) is a close call. For clarity purposes, this Court found prejudice existed in the event this Court was incorrect and that Trial Counsel should have objected to the presentation of either or both of these witnesses. After having reconsidered this issue, including but not limited to the arguments presented during the reconsideration hearing on March 29, 2021, this Court believes its finding of prejudice is a proper and is an efficient use of Court resources given the questionable use of the forensic interviewer as a fact witness at trial when the forensic interviews were not presented to the jury and the manner in which Thompson-Loftis (Makin) was used at trial.

also maintained that this Court properly applied a Smalls⁶ analysis when prejudice was determined.

Having considered the arguments, the prior filings in this matter and, again, reviewed applicable portions of the record, the State's motion to alter or to amend this Court's November 12, 2021, Order is denied.

SCRCP RULE 59(e)

The purpose of SCRCP Rule 59(e), to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

To preserve issues for the appellate review, "after an order is filed, counsel has an obligation to review the order and file a 59(e) motion if the order fails to set forth findings and the reasonings for those findings. Simmons v. South Carolina, 416 S.C. 584, 788 S.E.2d 220 (2016). One of the reasons for this preservation requirement is that it prevents a party from keeping an ace card up its sleeve – intentionally or by chance – in hopes an appellate court will accept the card. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.C. 406, 526 S.E.2d 716 (2000). A party cannot use Rule 59(e) to present to the trial court an issue the party could have raised previously but did not. See, Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995); Crary v. Djebelli, 321 S.C. 38, 467 S.E.2d 128, 131-32 (Ct. App. 1995) *rev'd* on other grounds, 329 S.C. 385, 496 S.E.2d 21 (1998). Also, a party should not use a 59(e) motion to assert a position which is inconsistent with positions previously taken in the same action on the record or issues the party had previously conceded on the record. See, Steven & Wilkinson of South Carolina v. City of Columbia, 409 S.C. 563, 762 S.E.2d 693 (2014).

⁶ Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In the prior analysis, this Court also relied on Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018).

DISCUSSIONS

As previously noted, the State's position in the present motion is that this Court's findings and conclusions related to Special Counsel's closing, trial counsel's failure to object, and the finding of prejudice, are not supported by the record or case law. After reviewing the motion and the applicant's response, the relevant portions of the record and the applicable case law, this Court finds the State's positions are without merit. Therefore, the motion is denied.

In addition to the State's motion having no merit, this Court notes prior to receiving the present motion, the State and the applicant agreed that Smalls was the controlling authority when determining prejudice related to the closing argument. When summarizing its position during oral arguments, the State presented to this Court:

We totally agree that Smalls is the appropriate analysis, that your Honor needs to look at for prejudice in the State of South Carolina, not a cumulative error.

The present motion is void of any reference to Smalls or the requested Smalls analysis.

Also, the State asserted to this Court that it did not challenge this Court's finding that Special Counsel's motivation for his closing was to appeal to the jury's sympathies. While the State's position was that the analysis was not limited to the Special Prosecutor's motivation, the State agreed with this Court's prior position and that the record supported this Court's views as to Special Counsel's motivation. The State's comment during the hearing was that it did not wish to "impugn" State's PCR counsel's "credibility" by challenging Special Counsel's motivation.⁷ The audio recording of the prior oral arguments indicates the following was presented to this Court:

State – Again we go back to the closing argument the state asserts Mr. Brannon testified as to his motives for making the statements the inquiry does not end there, you have to look at the entire record. and the state cited in our Return Smalls. We totally agree

⁷ After reviewing the State's motion, this Court felt the need to obtain an unofficial audio transcript of the March 29, 2021, oral arguments.

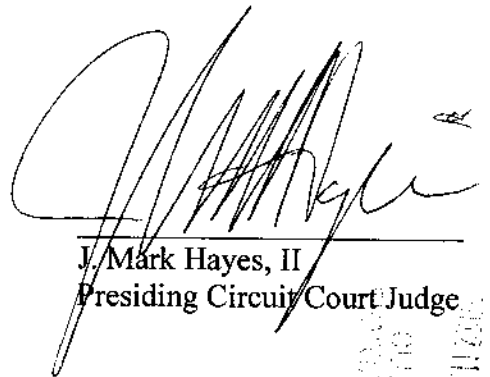
Smalls is the appropriate analysis that your honor needs to look at for prejudice in the state of South Carolina, not a cumulative error analysis. Smalls actually I think heightens the need to compare the specific prejudice or the deficiencies, compare it to the record as a whole and determine whether or not prejudice was established. And the State will rely on it in its return.⁸

As reflected in the prior Order, this Court performed the analysis using Smalls that was requested by the State and agreed to by applicant. Pages 19 to 27 of the November 12, 2021, Order, contains this Court's analysis of the closing argument presented by the Special Counsel. This Court finds no reason to modify this Court's factual or legal analysis or the conclusions reached in the November 12, 2021, Order relating to the closing argument.

CONCLUSION

Having reviewed and considered the State's SCRCR Rule 59(e) motion, the applicant's response, the prior orders, the filings, and transcripts, the State's motion is, again, without merit and is denied.

It Is So Ordered.



J. Mark Hayes, II
Presiding Circuit Court Judge

Spartanburg, South Carolina

This 11th day of March, 2022.

⁸ In the State's motion pp 19 to 20, a portion of Brannon's PCR hearing testimony is quoted in an effort to explain the State's disagreement with this Court's finding that the argument made at trial was not unconstitutional. Having witnessed and heard this testimony of the Special Counsel during the PCR hearing, the more reasonable and accurate conclusion of the quoted testimony is that, being a private attorney, Special Counsel incorrectly viewed the role of zealous advocacy of a private attorney in a criminal trial as constitutionally the same as the role of a solicitor.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Daniel W. Spade, SCDC #358974

Applicant

vs.

State of South Carolina,

Respondent

) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL
) CIRCUIT

) Case No.: 2017-CP-42-02372

)
) **SCRCP Rule 59(e) Order**
) **Modifying in Part the Order of Dismissal**
) **Dated October 8, 2020**
) **And**
) **Granting a New Trial¹**

This is a post-conviction relief (PCR) case. The matter is presently before this Court on the Applicant's SCRCP Rule 59(e) Motion. Applicant's 59(e) motion timely challenges this Court's prior order (Order of Dismissal) dated October 8, 2020, dismissing his application. As will be explained herein, the motion is granted to the extent that this Order modifies this Court's prior order. If not modified by this Order, the Order of Dismissal is unchanged. Based on this Court's modifications, the application for post-conviction relief is granted and a new trial is ordered.

General Background

While the PCR case arises from the Applicant's 2014 conviction for first degree criminal sexual conduct with a minor, and his subsequent efforts of direct appeal, the record in this PCR case also involves a bitterly fought private Family Court dispute, a Department of Social

¹ The granting of a new trial in a post-conviction relief (PCR) case is not a judicial conclusion that an Applicant is guilty or innocent of the crime he is accused. A post-conviction relief proceeding is a collateral challenge to the underlying criminal case that examines the constitutionality of the underlying proceeding. Typically, a PCR challenges the underlying process by raising issues related to the adequacy of trial counsel's representation, improper actions of the prosecutor or other aspects of the underlying criminal case. PCR matters are authorized by statute S.C. Code § 17-27-10, et al.

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Services (DSS) investigation, and law enforcement investigations in two states; South Carolina and Virginia.²

The PCR, the criminal case, the family court dispute and the DSS investigation arise from the same factual background. This chronological and factual background began in early 2006 with a brief relationship between the Applicant and the minor child's mother. As a result of the brief relationship, the minor child's mother became pregnant, and the victim in the criminal case was born. As early as 2007, Applicant's attorney/client relationship with his trial attorney, Ken Shabel, began when he was hired to assist Applicant with obtaining visitation with his daughter. At that time, Applicant lived in Virginia (with Cara Lintner, the mother of his other children). His daughter lived in South Carolina with her mother and step-father. Initially, Applicant's lawyer was successful with his representation of Applicant. He obtained visitation rights for Applicant with his daughter. Months later, however, the child's mother brought a Family Court action to terminate Applicant's parental rights (TPR). After a trial, Mr. Shabel was again successful stopping the effort to terminate Applicant's parental rights and, subsequently, visitation with his daughter was restored.³

After a sexual abuse report between the Applicant and his daughter was made in 2011, Mr. Shabel continued to represent Applicant. Mr. Shabel served as Applicant's attorney in the

² The record in this PCR case is voluminous. In comparison to other non-capital PCR cases, the present record is substantial in size. As will be discussed herein, once the PCR hearing concluded in May of 2019, the DSS file (which previously could not be located) was produced and made part of the record of this case. Subsequently, briefing of the DSS issue was made part of the record. Once a preliminary ruling was issued by this Court and circulated, comments and objections were presented by the parties (pre-SCRCP Rule 59 submissions). After the formal Order of Dismissal was issued, additional briefings were submitted into the record. Prior to the issuance of this Order, Applicant's counsel submitted information concerning collateral but related complaints for disciplinary actions involving three (3) of the attorneys and the investigating law enforcement officer.

³ The factual nexus and overlap with the Family Court proceedings and the criminal case was also explored by the South Carolina Supreme Court in In the Matter of Kenneth Philip Shabel, Opinion No. 28059 (Filed September 22, 2021).

subsequent Family Court matter brought to terminate his parental rights (basis for termination was the sexual abuse allegations with the minor).⁴ Mr. Shabel also served as his attorney through various governmental investigations involving allegations of sexual abuse in South Carolina and Virginia. Additionally, he represented Applicant during the General Session criminal trial that resulted in Applicant's 2014 conviction of first-degree criminal sexual conduct with a minor. Applicant was prosecuted and convicted on a single act of placing, as the child described, "his private part in my mouth" in a bathroom close to a hotel pool located in South Carolina. (Trial pp. 141-142).

After the appeals⁵ were exhausted, the present PCR followed. Prior and subsequent to the 2019 PCR evidentiary hearing, extensive briefing was presented. The DSS file was not located until after the May 2019 PCR hearing. On May 7, 2020, this Court's initial/informal ruling was issued. Further comments were received from the parties. The formal Order of Dismissal was issued on October 8, 2020. Subsequently, the Applicant's present Rule 59(e) motion was timely filed. Additional briefings followed.

Oral arguments were received remotely by the Court on March 29, 2021. E. Charles Grose, Jr., Esq., presented the arguments on behalf of the Applicant. Megan Harrigan Jameson Esq., Senior Assistant Deputy Attorney General, presented the arguments for the State.

⁴ The record indicates Mr. Brannan (referred to as Special Prosecutor in the criminal case) became involved shortly before the TPR action that was based on the abuse allegations.

⁵ Mr. Shabel withdrew as Applicant's attorney during the appeal process when he changed jobs to work for a new law firm. His new job potentially created a conflict of interest with his work for the Applicant. He became a member of the private law firm belonging to the lawyer that the Solicitor designated as a "Special Prosecutor" to prosecute the criminal case against the Applicant.

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After considering the arguments and reviewing the extensive record, this Order was issued modifying the Order of Dismissal and granting the Applicant's relief of a new trial.

PCR Specific Background

This PCR seeks to set aside the Applicant's 2014 jury conviction of first-degree criminal sexual conduct with a minor and the resulting thirty-five (35) year prison sentence. Direct appellate review was exhausted in 2016. In 2017, the initial PCR application was filed pro se. Numerous amendments to the application were filed and accepted up to the date of the PCR hearing. The PCR evidentiary hearing was conducted on May 15 through May 20, 2019. Even though the evidentiary hearing was lengthy, as mentioned, it did not end the development of the record for this PCR.

Significantly, after the evidentiary hearing, a consent order was issued on May 20, 2019, requiring DSS to produce a copy of its investigative file concerning the minor, the Applicant, and minor's family members. This Court was previously advised the DSS investigative file could not be located.⁶ It was anticipated that the consent order would merely serve as a means of clarifying the record that the DSS investigative file no longer existed. Surprisingly, the DSS file was produced. An in-camera review of the investigative file was conducted. With the consent of DSS, the investigative file was ordered released to the attorneys. Additional briefing concerning the DSS file was subsequently received. With the cooperation and consent of DSS and the PCR

⁶ Given the substantial effort by law enforcement and DSS to investigate the allegations in both South Carolina and Virginia, the fact the file was lost was very disturbing.

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parties, a redacted version of the DSS investigative file was submitted/filed under seal and made part of the record of this PCR.⁷

After the evidentiary hearing, this Court undertook an extensive review. After reviewing the DSS investigative file, the trial transcript of the criminal trial, the criminal trial's exhibits, and the PCR hearing exhibits (including multiple reviews of five (5) forensic interviews contained in video discs), this Court issued its preliminary ruling on May 7, 2020. The preliminary ruling was contained as part of a SCRCP Form 4C. This Court's ruling included a request that the Attorney General submit a proposed formal order. After reviewing and editing the proposed order, a final order denying the application was signed and filed on October 8, 2020. The present SCRCP Rule 59(e) motion before this Court followed.

Decision

After considering the arguments presented by the parties and an extensive review of the entire record, this Court's prior Order of Dismissal dated October 8, 2020, is modified as set forth herein. The October 8, 2020, Order of Dismissal is incorporated by reference. Unless modified as set forth herein, the provisions of the October 8, 2020, Order of Dismissal, along with this Order, are the final ruling of this Court on the Applicant's request for post-conviction relief. For the reasons stated herein, the application is granted and a new trial is ordered.

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⁷ Subsequent to being notified by the State and Applicant that the redacted DSS file was not in the Clerk's file, this Court secured from DSS a redacted file. The DSS file is now part of the Clerk of Court's file.

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Discussion

Threshold Matter⁸

Applicant raised what he termed a “Threshold Matter” wherein he asserted this Court denied him his statutory and constitutional right to have a judicial officer make findings of fact and conclusions of law because the Court asked one of the attorneys to submit a proposed final order. This Court disagrees. A PCR trial court's requesting one party to submit a proposed order does not create a statutory or constitutional violation. See, Fishburne v. State, 427 S.C.505, 832 S.E.2d 584 (2019)⁹.

While the exact effort by this Court in reaching its rulings is not documented in the record, the effort was substantial. Additionally, this Court employed the same order preparation process stated in Fishburne. In issuing its prior ruling, this Court finds no basis to support the proposition that Applicant's procedural, statutory, or constitutional rights have been breached or violated or compromised because of the method used to prepare its' prior formal order in this PCR.

This Court finds no violation of S.C. Code Section 17-27-80, no violation of Article I, Section 8 of the South Carolina Constitution, and no violation of SCRCP Rule 52. Also, see Hall v. Catoe, 360 S.C. 353, 601 S.E 2d 335 (2004). The sections of the formal Order of Dismissal

⁸ The headings contained within the discussion section are intended to mirror the headings used by Applicant in his 59(e) motion.

⁹ The Supreme Court has never prohibited a PCR trial judge from requesting a proposed order. This is especially true in a non-capital case. A court requesting a proposed order is only part of the process of issuing a statutorily and constitutionally proper final order. See, Fishburne, where the majority noted that the attorney preparing the proposed order is obligated to be “meticulous in doing so”, the opposing attorney “should bring to the attention” of the judge omissions, and the judge is obligated to “carefully review” the order prior to signing a final order. Even after the first formal order is signed, a PCR Applicant has, as further noted in Fishburne, the right to file a SCRCP Rule 59(e) motion to alter or amend or raise issues not properly ruled upon. *Id.*

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referenced by Applicant as being "identical" to proposed order offered by the Attorney General are identical because they are a correct statement of this Court's opinion and decisions in this matter. The sections of the proposed order that differed from the formal Order of Dismissal were altered because this Court felt they needed to be altered to properly reflect this Court's rulings. Again, this Court views Applicant's arguments that the processes used by this Court in finalizing its prior order violated Applicant's rights meritless.¹⁰

Footnote 2

In his 59(e) motion, Applicant claims that the Family Court matters stated in Footnote 2 of the Order of Dismissal were overlooked as a consideration on the issue of trial counsel's need to consult expert witnesses and to present a more vigorous defense. After considering the arguments, this Court finds no need to alter or amend the Order of Dismissal for the reasons asserted by the Applicant.

Trial counsel's participation as the Applicant's attorney in the Family Court litigation was explored in the prior order. His service as the Applicant's lawyer for six (6) to seven (7) years preceding the 2014 criminal trial provided trial counsel access to critical and detailed factual information about the criminal allegations. His long-time service as Applicant's attorney provided him access to extensive information about the motivation of the minor child's family. Because of this prior work, trial counsel was aware of factual details that supported his proposed narrative against the child's family he desired the jury to hear.

¹⁰ This Court notes that the Fishburne informal PCR order preparation process was used and expanded by the Applicant and State in this case as a "formal" process similar to the Rule 59(e) process. In their respective Rule 59(e) filings, general references were made to the order writing process when addressing substantive issues and new positions were asserted. In this case, Fishburne was used by the attorneys as a "formal" pre-59(e) review before the 59(e) motion was filed.

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Trial Counsel's prior involvement and representation of the Applicant in the various Family Court matters were broadly successful until the disclosure of abuse was reported by the grandfather. Counsel had secured visitation rights with the child and stopped the efforts to terminate his parental rights. Applicant eventually secured unsupervised visitation with the child and the right to have the child visit him in Virginia. Due in part to trial counsel's success in the Family Court, an independent therapist eventually recommended a global family (including Applicant) counseling approach to better incorporate Applicant into the minor child's life. Three days after recommending the Applicant, as part of a family therapy, the child's grandfather left a phone message with the child's treating therapist stating "would like to talk to you about a situation they've uncovered." (Trial p. 215). These facts and narrative were presented during the criminal trial. Trial counsel was also aware that the initial disclosure did not result in an immediate report to DSS or law enforcement. But rather, the initial report outside the family was a hearsay report of abuse by the minor child's grandfather to the Family Court guardian ad litem and treating counselor. Nevertheless, because of trial counsel's knowledge that a disclosure was made, trial counsel's broad strategy significantly changed to include defending the Applicant from the potential of a criminal liability. During the PCR hearing, trial counsel explained the differing burdens of proof between a Family Court trial and a criminal trial in General Sessions. He also explained his effort to minimize the negative effects of the Family Court proceeding upon his defense of his client in the criminal trial.

Because of his involvement in the Family Court litigation, trial counsel had unquestionable knowledge of the family's efforts to prevent access to the child by the guardian ad litem. As mentioned previously, he had knowledge of the DSS investigation into both the South Carolina and Virginia allegations. Moreover, because of his involvement with the Family

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Court matter, trial counsel was able to make strategic decisions in the Family Court litigation that limited its effect on the criminal case. Critical factual matters were known by trial counsel when he made his decisions to not present the forensic video interviews to the jury. Obviously, these same facts were known to counsel when he did not consult with expert witnesses about the forensic interviews.¹¹

This Court notes that Applicant's trial attorney knew of the DSS investigation prior to the criminal trial but did not have access to the DSS investigative file until after his PCR evidentiary hearing. After performing an in-camera review of the DSS file and considering the position of the parties about the content of the DSS, this Court finds no need to alter its prior order.

Weik v. State

Applicant also asserts that the prior order did not address the Weik v. State, Ard v. Cateo, and Edwards v. State, decisions. Applicant asserts that this Court failed to properly consider these cases in deciding the issues of what constituted a "reasonable investigation" by trial counsel. Applicant believes that trial counsel should have consulted with and retained expert witnesses. He asserts that not retaining/consulting with experts, trial counsel never learned how experts may help with defending the Applicant.

¹¹ Applicant's PCR theory includes that his lawyer was constitutionally deficient in his representation because he did not consult and call experts at trial to discuss the forensic interviews and present the forensic videos to the jury. While this Court believes the Order of Dismissal is correct, to clarify, this Court's opinion remains that counsel did not err in presenting the forensic interviews to the jury. The value of the videos of the forensic interviews to either the state or defense is, as a factual matter, questionable and debatable. Previously, this Court noted the confusing nature of the child's conduct and her words. Viewing the videos was critical and material to forming this Court's opinion. If the videos had been presented at trial as incriminating evidence, most likely expert testimony would have been needed to explain, among other things, to the jury the child's conduct, her inconsistent and exculpatory statement about Danny D (the Applicant), the interviewer's methodology of questioning, and the child's statements about the inappropriate conduct of the male child from her class. Nevertheless, the risk to the defense of presenting the child's forensic interviews to jury is high. Again, the videos were not presented by either the State or the defense to the jury. This Court's opinion remains that no error was made by trial counsel for not presenting the forensic interviews to the jury.

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Weik, Ard and Edwards are instructive for analytical purposes. Broadly, they represent points of law already considered in the Order of Dismissal. A significant difference in these cases to the present one is that trial counsel, due to his prior involvement representing Applicant for many years in Family Court, possessed the factual information that formed his strategic decisions when preparing his defense. Did Applicant's trial attorney know the contents of the forensic video? Yes, he did. Was he aware of the factual background of that proceeded and followed the making of the videos? Yes, he was. The desire to not have the jury view the minor child's forensic interviews was a strategic decision based on counsel's knowledge of the content within the videos. This Court cannot find Applicant's trial attorney's decision to be unreasonable or based on a lack of factual knowledge. After reviewing these cases and considering the arguments, the Order of Dismissal requires no alteration.

Expert Witnesses & Child Advocacy Center Interviews

Applicant raises the analysis in the Order of Dismissal that involved the decision to not publish the minor's forensic interviews to the jury and to not call expert witnesses to discredit the minor child's testimony and methodology of the Child Advocacy Center when conducting the interviews. In reading his motion, Applicant appears to approve of this Court's findings of the suggestiveness of the forensic interviews and of this Court's favorable view of the Applicant's PCR experts' testimony, including their establishing best practices for conducting child forensic interviews. While Applicant asserts that this Court's rulings require a conclusion of unreliability of the minor's testimony, this assertion was not presented to the trial judge and not specifically requested in the PCR hearing.

As this Court also referenced in its Order, the Child Advocacy Center's forensic interviewer asserted her methodology and interview tactic were proper. During the PCR hearing,

her demeanor was adamant in support of her position. If the videos had been presented during the criminal trial, this Court reasonably infers her testimony would have reflected a similar passion for her work and opinions. (See supra, note 11). She agreed with the Applicant's PCR position that the minor's interviews should have been published to the jury. She asserted, as trial counsel feared, the jury would conclude from viewing the videos a young child having knowledge of and talking about age-inappropriate sexual matters. Whether the videos reflect what was asserted by the forensic interviewer would have been a question of fact for the jury, if the videos had been published to the jury. The videos also support the factual conclusions offered by Applicant's experts that the forensic interviewer's methodology was improper and that the child was led by the interviewer into giving certain answers. Again, whether the jury accepted Applicant's experts' conclusions would have been a factual matter for the jury to decide.

The interpretations of the child's conduct and statements contained in videos were factual matters and arguments trial counsel avoided by not publishing the videos to the jury. For PCR purposes, the decision to publish (or not) the videos to the jury is viewed by this Court through a Strickland analysis that examines trial counsel's decision that determines if counsel's performance fell below an objective standard of reasonableness. This Court does not view the decision to not publish the videos to the jury as unreasonable when applied to the Strickland standard. Also, see Thompson v. State, 423 S.C. 235, S.C. S.E.2d 487 (2018). Applicant has not met his burden of proof on this issue.

Even if trial counsel had convinced the trial judge to allow him to present the videos to the jury and to allow competing experts to testify as to the content of the videos, this Court cannot rule that the jury would have rejected or accepted the opinions of either the Applicant's

experts or of the forensic interviewer. For PCR purposes, this Court views its prior opinions sufficient.¹²

Special Prosecutor

Applicant raises; again, the Special Prosecutor issues in his 59(e) motion. In the motion, he references that this Court expressed its opinion about an email taken from the Special Prosecutor's records that the private family court matter was a higher concern over the criminal prosecution. This Court's opinion has not changed.¹³ After, once again, reviewing the nature of the alleged initial disclosure of abuse reported in the DSS investigative file, the trial testimony and the PCR hearing testimony, this Court finds no need to alter the Order of Dismissal. Also, as stated in the Order of Dismissal, pg. 23, footnote 11, the issue of the appointment of the Special Prosecutor was addressed in In the Matter of N. Douglas Brannon, Op. No. 27933 (filed Dec. 18, 2019). Thus, this Court finds Applicant is not entitled to relief of any claim pertaining to the appointment of a Special Prosecutor.

State v. Daniels

In his 59(e) motion, Applicant acknowledges this Court rejected the analysis offered by the Attorney General concerning State v. Daniels, 401 S.C. 251, 737 S.E.2d 473(2013). Applicant disagrees, however, with this Court's opinion that trial counsel did not err by not

¹² Applicant seems to contend this Court was required to conduct a separate hearing about the reliability of the victim's testimony; a taint hearing (Reply brief p.3). Applicant asserts factors from S.C. Code Section 17-23-175(B) should have been applied by this Court to determine the child's testimony was unreliable. No such hearing was previously requested to trial judge or to this Court.

¹³ This Court's opinion is supported further because the record indicates that the referral to the Child Advocacy Center for the forensic video interviews was not made by the Sheriff's Office investigator, but rather privately. See, S.C. Code Section, 63-7-310, Persons Required to Report. Thus, the motivation for the referral was not related to the law enforcement's investigation. 63-7-310 requires certain persons to make reports to law enforcement when the person has "reason to believe" a child has been subject to abuse.

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objecting to the initial jury instruction and this Court's opinion that Applicant failed to establish prejudice.

As stated in the Order of Dismissal (p.29), Applicant was correct that "the trial court's statement and his attorney's statement crossed into the Beaty sphere of improper statements." This Court agreed these statements "shifted the jury's focus away from the State's obligation of meeting its burden of proof." To clarify, the better practice would have been for trial counsel to object to the trial court's statement. Likewise, trial counsel's use of the "truth seeking" comments should not have been made to the jury. Under South Carolina jurisprudence that exists today, trial counsel should definitely object to a trial court's use of the "search for truth" terminology and it would be clearly an error for trial counsel to argue such terminology to the jury. See, State v. Beaty, 423 S.C. 26, 813 S.E.2d 502, which was not issued by the Supreme Court until April of 2018. Nevertheless, the remaining parts of the Order of Dismissal on this issue are correct. Also, see Infra, State's Closing Argument, analysis of the prejudice element related to trial Counsel's failure to object to Special Counsel's closing argument. To the extent this clarification amends or alters the Order of Dismissal, it is so ordered.¹⁴

Meredith Thompson-Loftis and Footnote 13

In his Rule 59(e) motion, Applicant also questions the Order of Dismissal pages 32-37, involving trial counsel's failure to move for a continuance to have an expert review the records of

¹⁴ This Court notes that notwithstanding the above, because trial counsel failed to object to the trial court's use of a "search for the truth" terminology and because trial counsel erred in using the same terminology when explaining the purpose of a criminal trial, the significance or weight of the Special Prosecutor's improper closing argument when performing a Smalls analysis, increased the prejudicial effect of the improper closing argument. (See, Infra pp. 20-23).

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Meredith Thompson-Loftis. This Court's opinion is that the Order of Dismissal is correct. While the late production of some of Ms. Thompson-Loftis's records is concerning, Applicant's trial attorney properly raised the issues with the trial judge (Trial pp 24-29). Pages 32 – 37 of this Court's prior order provided a detailed statement of trial counsel's efforts to object to the late production of the records, the arguments presented by both sides, and the trial court's rulings.

In regard to footnote 13 on page 36, this Court adds that the DSS records confirmed this Court's opinion of Cara Lintner's potential hostility toward the Applicant that existed at the time of the criminal trial. Even though Ms. Lintner was investigated by law enforcement, she was never charged with any crime that involved her conduct with the child. For clarity purposes, nothing in the record before this Court suggests that Ms. Lintner's conduct was opined as criminal. Even though she may not have assisted the State in their prosecution, Ms. Lintner, once again as reflected in DSS files, was potentially hostile towards Applicant.

To the extent the above items clarifies the Order of Dismissal, it is so ordered. Otherwise the Order of Dismissal as it relates to the Thompson-Loftis and Footnote 13 issues remains.¹⁵

Improper Bolstering

Applicant also takes issue with the Order of Dismissal as it relates to his assertion that trial counsel allowed improper bolstering to occur with certain witnesses: the forensic interviewer, Webber, and the counselors, Roseborough and Thompson-Loftis.¹⁶

¹⁵ The relatedness of Footnote 13 to the Meredith Thompson-Loftis testimony was not clear to this Court. Nevertheless, Applicant is correct that this Court's use of the words "inconclusive and speculative" in referencing Ms. Lintner's involvement with the minor child suggests some doubt remains that Ms. Lintner committed or was involved with an act of sexual abuse with the minor. No such evidence exists in the present record that Ms. Lintner committed, participated, knew, or otherwise condoned any act of abuse.

¹⁶ Roseborough (pre-disclosure) and Thompson-Loftis (post-disclosure) were counselors who treated the child. Even though a medical doctor did not testify at trial, the State represented to the Trial Court as a pre-trial matter that, after a physical examination of the child by a doctor, no physical or medical evidence of abuse was found. (Trial pp. 34-38).

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This Court notes that in its prior analysis, the testimony about Ms. Webber was referenced as not necessary. This Court did not make the same, "not necessary" observation as to Ms. Roseborough¹⁷ or Ms. Thompson-Loftis. The "not necessary" observation related solely to the introductory comments concerning Ms. Webber's background. Since Webber was presented as a fact witness, her credentials were not necessary and counsel should have objected to them being presented to the jury. In isolation, his failing to object was not prejudicial to Applicant. Ms. Webber made the initial report to law enforcement. Thus, a valid factual reason for her testimony existed. In addition, the testimony of these three witnesses could not be considered "improper" bolstering under South Carolina jurisprudence existing at the time of Applicant's trial when their qualifications were presented. See State v. Anderson, 413 S.C. 212, 776 S.E.2d 76 (2015). See, State v. Perry, 410 S.C. 191, 763 S.E.2d 603 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part, where bolstering is explained).

To the extent improper bolstering occurred with the testimony of Ms. Thompson-Loftis' qualifications as an expert, trial counsel did object. Trial counsel properly objected when she was offered as an expert in "child abuse diagnosis" and the trial judge limited her qualifications to a "family counseling and child therapy" expert. Nevertheless, Applicant notes that she went on to testify to, without objection, to the following:

Special Prosecutor: When did you first meet [the child]?

Thompson-Loftis: [The child] first came to my office back in May 2011.

¹⁷ Ms. Roseborough was the child's initial treatment therapist. Her treatment resulted in the recommendation that all parties, including the Applicant, join in therapy for the child's benefit. The child did not make a disclosure of abuse to her. Within a few days after joint therapy with the Applicant was requested by Roseborough, the grandfather called Roseborough's office to report "a situation they uncovered." (Trial p. 215). Her trial testimony was that, after consulting with the family's then private attorney, her treatment services ended and she referred the child on to the Child Advocacy Center. (Trial pp. 203-204). The record does not indicate the grandfather's report resulted in a report to DSS or law enforcement.

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Special Prosecutor: Okay, Do you have any idea how or why she appeared in your office? Was she referred there?

Thompson-Loftis: She was...I used to work for the Child's Advocacy Center in Spartanburg, so I also do a tremendous amount of victim assistance, which means I treat people who qualify for victim services. And since I took that, Ms. Webber referred [the child] to see if I could provide therapy for her under the victim's assistance and I agreed, and [the child] was brought for her session in May 2011.

Special Prosecutor: Okay, And the lady who just testified before you, Tab Webber, is this the one who referred [the child] to you, is that correct?

Thompson-Loftis: Yes.

Xxxx

Special Prosecutor: ...Now, in cases where there is abuse of any kind, is it typical for a child after the Children Advocacy Center interviews to change therapists?

Thompson-Loftis: I think once a determination has been made or a recommendation has been made, I typically see most forensic interviews resulting in therapy or further therapy, and I don't think it's unusual for someone to be referred to different therapist, based upon the type of treatment they provide, or based upon the types of insurance panels they [sic] are on. There could be a number of reasons.

Special Prosecutor: Okay, so what this jury already knows is that [the child] then went to the Children's Advocacy Center, and then [the child] came to see you. Is that unusual in the typical case of abuse?

Thompson-Loftis: No, not at all. (Trial p. 259 – 260).

Ms. Thompson-Loftis subsequently testified generally to define "partial disclosure", "delayed disclosure", and "coaching." She further testified as to her working with the child "seventy-one times." She bolstered the child generally when she stated, among other things, she had seen a lot of "transformation" in the child from her therapy. (Trial p. 270). She referred to the child as remarkable. See Anderson and Makin, Infra, for Supreme Court's warning against use of such expert witnesses for dual purposes. She was also questioned about the child's disclosure of sexual abuse.

Special Prosecutor: At any time during your treatment of [the child] up through December 30, 2013, did she make a disclosure of sexual abuse to you?

Thompson-Loftis: Yes, she did. (Trial p. 270).

Applicant asserted the above established a link between Ms. Webber, who contacted law enforcement and recommended therapy for the child to the testimony of Ms. Thompson-Loftis who accepted the child for therapeutic treatment under "victim services." Applicant also supports his improper bolstering position by referencing Ms. Thompson-Loftis' testimony, "being that a majority of my clients are trauma victims, or have been in the past, I have quite an extensive amount of forensic and sexual abuse training, Post-Traumatic Stress training." Applicant also notes that trial counsel felt the testimony of Ms. Webber and Mrs. Thompson-Loftis had the effect of vouching for the child's credibility. (Reply pp 11-14).

This Court's opinion is that trial counsel was not constitutionally deficient based on South Carolina jurisprudence that existed at the time of his trial for not objecting to the testimony Applicant asserts. Our Supreme Court has made it clear, trial counsel should object to this type of testimony when it is presented before a jury as a means to indirectly bolster testimony. State v. Anderson was not decided until 2015. 413 S.C. 212, 776 S.E.2d 76. State v. Anderson, set forth better practice to be used by prosecutors. The better practice is not to have the individual who treated the alleged victim testify, but rather to call an independent expert as a "blind" expert. Also, see State v. Makin, 433 S.C. 949, 860 S.E. 2d 666 (2021) where the Supreme Court explained that an expert who testifies as a treating expert and an expert as to general characteristics of abuse is not per se improper. However, the Supreme Court warns against the practice.¹⁸

¹⁸ As in the Makin case, the present PCR is a close call on the bolstering issue. In the event this Court's decision on this issue is reversed, based upon State v. Douglas, 380 S.C. 499, 505, 671, S.E.2d 606, 610 (2009) (Pleicones, J., dissent) and Infra the Smalls analysis of State's Closing Argument, trial counsel's failure to object to improper

DSS Records

The Applicant also takes exception to the Order of Dismissal's finding that Applicant failed to establish the State (the solicitor's office) was in possession of the DSS file or that the file had material information not already known to counsel. This Court finds that the Order of Dismissal is proper.

Nevertheless, this Court continues to be troubled by the investigating officer's change in testimony at the evidentiary hearing. Applicant references the cases of State v. Pulley, 423 S.C. 371, 85 S.E. 2d 461 (2018); Cotheran v. Brown 357 S.C. 210, 592 S.E. 2d 629 (2009); McMaster V. Dewitt, 411 S.C. 138, 767 S.E. 2d 451 (Ct. App. 2014); and State v. Durant, 430 S.C. 98, 844 S.E. 2d 49 (2020) (citing Brady, 373 U.S. 83 (1963)), in an effort to persuade this Court that the investigating officer's testimony was "sham" and that a Rule 5 discovery violation occurred. This Court continues to not be persuaded. Applicant has not met his burden of proof to establish a Rule 5 violation occurred. This Court's concerns relate to the officer's inconsistent testimony as to her role in making, or not, a referral of the case to the Child Advocacy Center, regarding her involvement in the investigation, and the whereabouts (misplacement or loss) of the DSS file.

What happened to the DSS file remains a mystery to this Court. No explanation was offered. The file seems to have simply vanished for a period of time that is material to this matter. The evidence before this Court does not rise, however, to the level of prosecutorial misconduct or a discovery violation.¹⁹ Additionally, having reviewed the DSS file on several

bolstering would meet the Strickland standard of prejudice. Again, this Court notes that no physical evidence was presented to establish guilt.

¹⁹ Even though this Court was made aware that the officer is no longer employed with the Spartanburg County Sheriff's Office, the issue of her employment status was not presented to this Court. Nevertheless, very similar to the suggestion Ms. Lintner was involved in abuse, the record before this Court does not support a link between the reason for the officer no longer being employed by the Sheriff's office and her involvement in the underlying matters.

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occasions, the Applicant has not established the element of prejudice. The material evidence in the DSS file appears to have been known to trial counsel or was not explained to this Court. Notwithstanding, this Court is disturbed by the mystery behind the loss or unexplained misplacement of the DSS file and its unavailability.²⁰

State's Closing Argument

Applicant also takes exception with the Order of Dismissal's ruling concerning the State's closing argument. This Court's prior ruling was that trial counsel was not constitutionally ineffective for failure to object to the State's closing argument that included an emotional narrative (Trial pp. 305-308) that ended with the jury being told it "takes care of good" (Trial p. 308) people. This Court noted that during the hearing, trial counsel testified he did not believe the closing was objectionable and, accordingly, did not object. After further review and reconsideration, this Court alters its original decision to find that Special Prosecutor's argument was improper and trial counsel erred by not objecting to the argument. Applying the Strickland standard, an objection should have been made by trial counsel.

As referenced by Applicant in the present motion, this Court expressed concerns as to the constitutionality of certain statements made by the Special Prosecutor during the closing argument. The overall emotional tenor of the prosecutor's argument was to define the Applicant as different from the members of the jury because he was a "bad" person.²¹ Since the jury was told "you" are "good" people, "you" take care of "good" people and the child was also a "good" person, the accused was not worthy of the jury's obligation of reviewing the evidence objectively

²⁰ This Court also notes that its opinions and conclusions about the DSS file and its contents were made without the benefit of live witnesses. The DSS file was not produced, even though subpoenaed, until after the PCR hearing.

²¹ The child was quoted as calling the Applicant as bad. For clarity, quoting the child's comment is not unconstitutional. Multiple times, however, the Special Prosecutor stated the Applicant was a "bad" guy, and the jury was told "the police, they arrest the bad people." (Trial pp. 303-304).

and fairly. (Trial p. 306).²² The constitutional problem with the Special Prosecutor's closing argument is not that grown men who commit a sexual battery on children are not bad. The argument unconstitutionally negates the presumption of innocence.²³ It is also constitutionally impermissible for a solicitor to argue to a criminal jury that simply because a man is "accused" or "arrested", no matter how serious a charge, that he is a "bad person" and thus, unworthy of fair review of the State's evidence to establish his guilt.²⁴

In the Order of Dismissal, this Court referenced that the Special Prosecutor acknowledged during the PCR hearing that his motive in making this type of argument was to appeal to the jury's sympathies. His motives were also to appeal to jury's emotions. The Special Prosecutor's words and demeanor at the PCR hearing were candid and clear that he had the intent to appeal to and invoke the passions or the emotions of the jury. An unofficial version of the PCR transcript reflects the following colloquy between PCR Counsel and the Special Prosecutor.

PCR Counsel: You are familiar with case law about closing arguments that prohibit making an emotional appeal to jurors to decide the case on something other than the elements of the crime?

Special Prosecutor: Yes sir, I am aware of that but I know that I have tried cases for years and saw [the solicitor] stand in front of the box with people in

²² This phrasing beseeches the jury to become an advocate for the victim, thus asking them to depart from their constitutional duty to consider the facts of the case impartially.

²³ See *supra*, note 21 and 22.

²⁴ When a prosecutor asks the jury to put themselves in the place of the victim, or to speak for the victim, such argument is improper and constitutes reversible error. *Brown v. State*, 383 S.C. 506, 680 S.E.2d 909 (2009); *State v. Gilstrap*, 205 S.C. 412, 32 S.E.2d 163 (1994). *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995). Such arguments ask the jurors to become advocates for the victim. Such arguments ask the jury to ignore their obligation to exercise calm and reasonable judgment. *State v. Reese*, 359 S.C. 260, 597 S.E.2d 169 (Ct.App. 2004), reversed in part; affirmed on this ground, 370 S.C. 31, 633 S.E.2d 898 (2006). Such argument, which suggests to jurors to put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. See 75A Am.Jur.2d Trial § 650 (1991) as referred in Reese.

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tears and telling that story²⁵ so yes, I am aware of that case law but I am also aware of what happens in the courtroom on a daily basis.

PCR Counsel: Did you ever object *** when he made that argument?

Special Prosecutor: Dozens of them [arguments]. I did not.

PCR Counselor: Did you think it was objectionable?

Special Prosecutor: It might have been but that's not for me to um. It might have been but I knew that I had gone and been just as passionate as him or I was about to go and be more passionate than him so I mean those are [...] for trial strategy. [The solicitor] is a passionate trial lawyer and I try to be one myself.

PCR Counselor: Right and you started to say it's not for you to decide whether it would be appropriate or not?

Special Prosecutor: I would believe that would be correct.

Again, this Court notes, the Special Prosecutor's comments were candid. He spoke honestly. This Court views Special Prosecutor's candid comments during the PCR hearing as evidence respecting the judicial process.

Thus, in this case, the PCR hearing establishes that Special Counsel had the intent of making an appeal to the jury's emotions or passions when he made his argument.

This Court's prior decision was based on a flawed analysis. The objectionable statements made by Special Counsel were unconstitutional, even without knowing Special Counsel's intent, because they shifted the role of the jury away from being fair and impartial arbitrators of the facts. Additionally, the statements were crafted to have the jury view the

²⁵ Presumably the "story" contained in the closing argument is one where he explains to his young daughter that juries take care of "good" people. The closing argument contains no other "story." (Trial pp. 307-307).

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evidence through an unconstitutional lens. This Court concludes and finds that these statements should not have been made to the jury. These statements were constitutionally improper. Trial counsel should have objected. The acknowledgement during the PCR hearing that Special Counsel's intent was to present a closing argument that invoked the emotions and passions of the jury further supports the conclusion that the arguments were improper and that an objection should have been made by trial counsel.

Since trial counsel did not object, the record contains no argument by trial counsel or curative instruction from the trial judge to the jury that corrected the argument. Because no objection was made, the trial record also does not reflect an independent warning as part of the judge's charge on the law to the jury that their verdict must not be based on passion or emotions.

Our Supreme Court has long held that in its closing, a solicitor has the right to state his/her version of the testimony and to comment on the weight to be given such testimony. Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). A solicitor's closing argument must not, however, appeal to the personal biases of the jurors nor be calculated to cause the juror's passions or prejudices, and its content should stay within the record and reasonable inferences to it. Simmons v. State 331, S.C. 333, 503 S.E.2d 164 (1998). A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. The State's closing argument must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Vasquez, citing State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). A solicitor's closing argument is bound to the rules of fairness, as was explained in Vasquez when the Supreme Court quoted State v. Northcott, 372 S.C. 207, 641 S.E.2d 873 (2007), quoting State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981); a solicitor should prosecute vigorously, the closing argument must be carefully tailored so as not to appeal to

personal bias of the juror nor be calculated to arouse the juror's passion or prejudice. Vasquez at 458.

This Court's prior analysis was too narrow and, thus, flawed. The prior order narrowly measured the constitutionally improper sections of the argument against other sections of the argument that were legally and factually correct. Upon reconsideration, this limited and narrow analysis is not consistent with South Carolina's Strickland case precedent. See, Smalls and Thompson. Additionally, this Court's prior analysis was wrong because it could be read as condoning constitutionally improper closing arguments that are calculated to alter the jury's constitutional role away from a neutral fact finder.²⁶

Having found Counsel erred by not objecting to the argument, this Court is required to address the second prong of Strickland ----- prejudice. To satisfy the prejudice prong of Strickland, an Applicant must demonstrate there is a reasonable probability that, but for Counsel's errors, the results of the trial would have been different. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) and Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018). In examining Strickland prejudice, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Id.

²⁶ A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738 (2004) (citing State v. Copeland, 321 S.C. 318, 324 S.E.2d 324, 468 S.E.2d 620, 624 (1996) and State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)). Our Supreme Court "strongly disapproves" of closing argument calculated "to improperly arouse the passions and prejudices of jurors, urging them to abandon their sworn role as fair and impartial arbiters of the facts and view the evidence from an improper perspective." Id. The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom. Id. The effect of such argument is potentially to cause jurors to decide a case based on passion and prejudice instead of a reasoned, impartial consideration of the evidence presented to them. Id. State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965), to explain that such an argument "tends to completely destroy and nullify all sense of impartiality in a case of this kind."

reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* Based on the following, this Court makes such a finding.

In Smalls and Thompson, the Supreme Court has provided additional clarity to longstanding rules and provided guidance to trial courts when applying the Strickland prejudice analysis to PCR cases. In determining whether an Applicant has proven prejudice, a PCR court should consider the specific impact that Counsel's error had on the outcome of the trial. See Smalls citing Strickland at 695 – 96 explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case. Smalls at 174.

[I]n addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury...In deciding whether [the Applicant] was prejudiced, we must bear in mind the strength of the government's case..., and we must consider the totality of the evidence before the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the Applicant met his burden of providing prejudice. See Strickland, 466 U.S. at 696... (stating "a verdict only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.")

In the context of the required Smalls analysis, the record of the present PCR does not establish that the State's case at trial consisted of "overwhelming evidence of guilt" as defined by Strickland and Smalls. At trial, the only evidence of the Applicant's guilt was the testimony of minor victim. (Trial pp 135 – 140 direct testimony, pp. 141 – 148 cross examination, pp.148 and pp. 149 redirect).²⁷ As the State indicated to the trial judge, there was no medical or physical evidence of abuse to present to the jury. (Trial p. 35). There also was no DNA evidence or other physical evidence to establish the Applicant's guilt. See Smalls citing Ford v. State, 314 S.C. at 247-48, 442 S.E. 2d at 605-06. There were not multi-witnesses as to the events. *Id.*, citing

²⁷ Solicitor Leskanic's examination of the child and trial counsel's cross examination appears proper. No challenge was offered in this PCR to Solicitor Leskanic's or trial counsel's examinations of the child.

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Huggler v. State, 360 S.C. 627, 634-35, 602 S.E. 2d 753, 757 (2004). The Applicant's guilt was established at the trial only from the testimony of the minor child.²⁸

Our Supreme Court has ruled that to be "overwhelming" the evidence must include something conclusive such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of "a reasonable probability --- the fact finder would have had "a reasonable doubt cannot possibly be met."

Smalls. Even though a finding of "overwhelming" evidence does not exclude an applicant from establishing prejudice, a finding of overwhelming evidence, or a lack thereof, does affect a court's Strickland analysis.

Not finding "overwhelming" evidence of guilt in the trial record, the analysis turns to the specific impact of trial counsel's failure to object to the solicitor's improper argument to determine if Applicant has met his burden of proving prejudice; i.e., a reasonable probability the result of the trial would have been different without counsel's error. This Court finds that trial counsel's failure to object to the solicitor's improper closing argument was prejudicial to the Applicant and there exists a reasonable probability the trial would have been different without counsel's error. This Court finds counsel's error undermines confidence in the outcome of the trial and that a reasonable probability exists for a different outcome.

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²⁸ Since the victim did not testify before this Court during the PCR hearing, Supreme Court rules limit this Court's ability to weigh the total effect of her testimony. Her testimony and the other trial witnesses can only be viewed from the written trial transcript if they do not also testify during a PCR hearing. As referenced in Thompson, since the victim did not testify during the PCR hearing, this Court lacks the opportunity to judge the credibility of the victim's statement outside of the written trial transcript. As directed by Thompson, this Court lacks the ability to comment on the victim's credibility, favorably or not, beyond what is found in the trial transcript. Id. 247. The transcript reads that trial counsel raised issues related to issues to the child's credibility. (Trial pp. 141-148).

More specific, in the trial, the evidence of the Applicant's guilt was from the minor child's testimony. Therefore her believability was central to the State's case. Likewise, trial counsel's strategy in defending the Applicant from the allegations also weighed significantly on the believability of the child. Moreover, once the Applicant asserted his Fifth Amendment right, the jury's role as an impartial fact finder became magnified. Also, with the State being successful in limiting any evidence of alternative causes for the child's anxiety other than the allegations of abuse, the credibility of her allegations of guilt magnified even further. The jury could not weigh the credibility of one part of testimony against another part of her testimony. Thus, the jury would not be evaluating the evidence of guilt based on competing evidence.

Therefore, the closing argument altering the jury's constitutional role had an even greater prejudicial effect when applying Strickland. The solicitor's closing argument unconstitutionally shifted the jury role away from being an impartial arbiter of the facts. Therefore, Applicant's trial counsel's error in allowing the argument to go unchallenged was prejudicial.²⁹ By not objecting, the trial record is void of the trial judge being given any opportunity to correct the error through his ruling on the objection. Also, because no objection was raised, the trial judge was denied an opportunity to instruct the jury against the improper influence of emotion and passion when evaluating the evidence.

²⁹ The record of this PCR contains no evidence to suggest that the child was nothing other than a good person. The difficulty this Court has with its decision to grant a new trial is due to the great empathy it has for the child. The stress of testifying in a trial before a jury is a stressful event. The stress of the moment is no doubt greater for a seven (7) year old child. This Court can infer courage and bravery to the child when offering her testimony. There is no better example of the stress placed on the child than the decision to provide the child with an emotional support prop of a teddy bear to hold while on the witness stand before the jury. (Trial p. 148).

Notwithstanding, the Supreme Court's longstanding rule is that a trial jury, no matter the seriousness of the charge, is to be an impartial arbiter of facts. Without such a jury, a constitutionally fair trial is impossible. (See supra, note 26).

As stated previously, in the State v. Daniels portion of this Order (supra, pp 12 – 13), the prejudicial weight of the improper argument and of counsel's error by not objecting increased because of the improper statements concerning a jury's role that occurred at the beginning of the trial. Thus, the presentation of the evidence in the trial was "bookended" with unconstitutional statements that altered the jury's role from being an impartial fact finder when determining if the State had met its constitutional obligations of proving guilt. The weight of counsel's error significantly increased the prejudicial element under Strickland since the jury was presented unconstitutional references as to their role as impartial fact finders.

Compounding and intensifying the prejudicial harm caused by trial counsel's failure to object to the Special prosecutor's argument, trial counsel used the prohibited Beaty "seeking the truth" and "search for the truth" language when he began his closing argument. Moreover, he concluded his closing with the same prohibited "search of the truth" language. (Trial. p. 314).

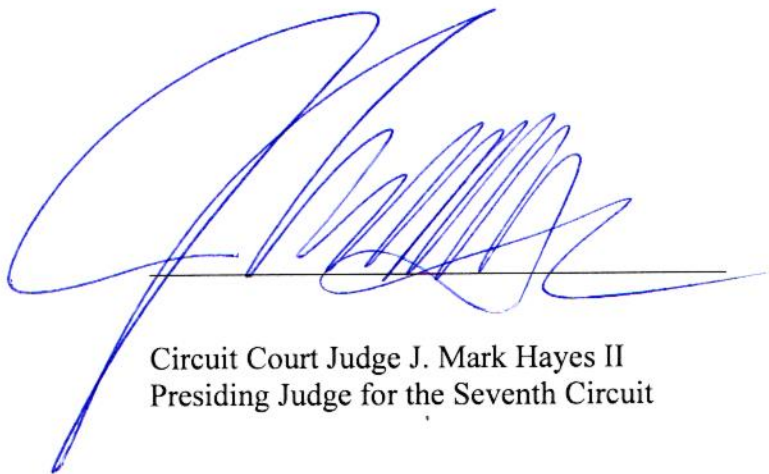
Based on the above, the prior Order of Dismissal is modified as reflected herein. With the Applicant having met his burden of proof, his application is granted.

Therefore, the present application for Post-Conviction Relief is granted and a new trial is ordered.



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IT IS SO ORDERED.



Circuit Court Judge J. Mark Hayes II
Presiding Judge for the Seventh Circuit

November 12, 2021
Spartanburg, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Daniel W. Spade, SCDC # 358974

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-42-02372

ORDER OF DISMISSAL

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This matter comes before this Court by way of an application for post-conviction relief filed on July 13, 2017, by Daniel W. Spade (Applicant). Thereafter, Applicant retained E. Charles Grose, Jr., to represent him in this action, and, through counsel, filed three subsequent amendments to his application on October 2, 2017, December 24, 2018, and May 14, 2019. The State of South Carolina (Respondent) filed a return requesting an evidentiary hearing.

An evidentiary hearing was convened May 15 through May 20, 2019 at the Spartanburg County Courthouse. Applicant was present and was represented by counsel Grose. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson and Assistant Attorney General Johnny Ellis James, Jr. At the hearing, testimony was taken from several witnesses and numerous exhibits were introduced. Following the hearing, the Court and both parties reviewed the Department of Social Services (DSS) file regarding the underlying custody action involving Applicant, the minor victim, and her parents (mother and adoptive father). Thereafter, the Court requested post-hearing memorandums from each party on the issues raised in the third amended application for post-conviction relief and at the evidentiary hearing.

Following the hearing, this Court undertook a lengthy review of the record, the evidence and testimony presented at the evidentiary hearing, and the memoranda presented, after review and consideration, this Court finds that the Applicant has failed to establish any constitutional

violations or deprivations entitling him to post-conviction relief and denies this application with prejudice. ¹

PROCEDURAL HISTORY

The records establish that Applicant is presently confined in the South Carolina Department of Corrections following his conviction in Spartanburg County. During February 2014 term, the Spartanburg County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor based the allegation he had sexually assaulted his four-year-old biological daughter during an overnight visit at a hotel in Spartanburg County (2011-GS-42-4171). Applicant retained the services of Shawn Campbell, Esquire, and Kenneth Shabel, Esquire, who had been representing him in an on-going custody dispute involving the minor child, to represent him in this criminal matter. Seventh Circuit Solicitor Barry J. Barnette, Assistant Solicitors Jennifer Jordan and Kimberly Leskanic, and Special Prosecutor Doug Brannon prosecuted the case. On February 24, 2014, Applicant proceeded to a jury trial before the Honorable R. Keith Kelly, circuit court judge. The jury convicted Applicant as indicted. Judge Kelly sentenced Applicant to imprisonment for thirty-five years. ²

Applicant filed a timely notice of appeal and was represented on appeal by C. Rauch Wise,

¹ In an effort to comply with Fisburne v. State 427 S.C. 505, 832 S.E.2d 584 (2019), initially this Court issued a lengthy preliminary analysis to the attorneys wherein the State was requested to prepare a proposed formal order for this Court's review and editing. Consistent with Fisburne (pre-SCRPC Rule 59 Motion for Reconsidering), this Court also received written input from Applicant's Counsel. The present order is the by-product of this Court's effort to comply with the intent and spirit of Fisburne's directives to comply with S.C. Code § 17-27-80 (1976).

² History relevant to this matter but not procedurally linked to the success or failure of the application includes that on June 29 and 30, 2009, the Honorable Georgia C. Anderson convened a hearing in the Family Court for Spartanburg County regarding Heather and David Jolley's petition to terminate Danny Spade's parental rights. This action was not successful. Judge Anderson issued a final order on January 13, 2010. This order was supplemented on June 29, 2010. Heather Jolley filed another Family Court Action on November 23, 2010. On May 3, 2011, Investigator Nikki Cantrell and officers of the Prince William County Police Department arrested Mr. Spade in Virginia, charging him with first-degree criminal sexual conduct with a minor involving his daughter. On January 9, 2012, the Jolleys amended the November 2010 complaint to petition to terminate Mr. Spade's parental rights and to allow David Jolley to adopt the child. Beginning on October 15, 2012 the Honorable James F. Farley, Jr. convened a hearing in the Family Court for Spartanburg County. Judge Farley ultimately terminated Mr. Spade's parental rights and allowed Mr. Jolley to adopt the child.



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Esquire.³, Mr. Wise raised the following grounds on appeal:

Question I: Did the trial court err in excluding the testimony of Dale Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the state to prove Mr. Spade had abused his daughter?

Question II: Did the trial court err in declaring that the attorney for Daniel Spade improperly struck Juror 199 based upon her gender strike when the attorney specifically stated the juror was struck for her age and being retired?

Question III: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Question IV: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

Question V: Did the trial court err in failing to exclude the testimony of Meredith Thompson-Loftis when the state had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness within a reasonable time before trial and the state did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

(Final Brief of Appellant). The South Carolina Court of Appeals affirmed Applicant's conviction by unpublished opinion on July 6, 2016. State v. Spade, Op. No. 2016-UP-352 (S.C. Ct. App. filed July 6, 2016). Applicant subsequently filed a petition for rehearing, and, following the denial of rehearing, filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. On June 16, 2017, the Supreme Court denied the petition for certiorari. The Remittitur was returned to the circuit court on June 22, 2017.

Thereafter, on July 13, 2017, Applicant filed a *pro se* application for post-conviction relief, initiating this current action. Subsequently, Mr. Grose appeared on applicant's behalf and filed amended applications.

³ Trial counsel Kenneth Shabel originally assisted in the appeal but withdrew as counsel for Applicant when he changed law firms and began practicing law with Special Prosecutor Brannon. Counsel Shabel filed a motion to be relieved as counsel with the Court of Appeals on March 21, 2016, and his motion was granted on May 6, 2016.



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SUMMARY OF FACTS ELICITED AT TRIAL

The following factual summary was provided in the Court of Appeals opinion from Applicant's direct appeal, State v. Spade, Unpub. Op. 2016-UP-352 (filed July 6, 2016):

[Petitioner] is Victim's biological father, and in September 2010, he traveled from his home in Virginia for visitation with Victim. During the visit, [Petitioner] sexually abused Victim in a bathroom located in the pool area of a Duncan, South Carolina hotel.

Victim—who was seven years old at the time of the February 2014 trial—testified [Petitioner] stuck his “private part” in her mouth inside the bathroom and told her that if she did not perform the act he would not take her home. Mother testified that when she picked Victim up from the visit, Victim displayed signs of extreme anxiety such as wetting herself and crying uncontrollably. Mother alerted [Petitioner] to Victim's high anxiety levels, but after another visit with [Petitioner] in October 2010, Victim displayed continued anxiety. Specifically, Mother testified Victim became terrified of the dark, hid in a corner and refused to come out, and suffered panic attacks. Victim complained of stomach and head aches and would “revert back to the way a two year old would talk.” Mother subsequently sought anxiety counseling for Victim, and in November 2010, Mother filed to suspend [Petitioner]'s visitation based on Victim's anxiety.⁴

On cross-examination, Mother acknowledged Victim also showed signs of anxiety after visiting [Petitioner] in Virginia in July 2010, and she admitted that the ten-day visit was the first time Victim had been away from her for an extended time period. The anxiety counselor diagnosed Victim with anxiety and adjustment disorder. The counselor also testified Victim displayed nervousness and anxiety when asked to talk about [Petitioner], but Victim did not disclose sexual abuse. In March 2011, Victim disclosed the sexual abuse to her maternal grandmother (Grandmother). Subsequently, Victim disclosed during a forensic interview with a Children's Advocacy Center employee that she was sexually abused at “the hotel with a pool.” Additionally, Victim disclosed abuse to Meredith Thompson-Loftis, who served as Victim's therapist after May 2011.⁵ The jury convicted [Petitioner] of first-degree CSC with a minor.

State v. Spade, Unpub. Op. 2016-UP-352 (filed July 6, 2016):

CURRENT PROCEEDING

In his *pro se* application for post-conviction relief filed July 13, 2017, Applicant alleged

⁴ The anxiety counselor diagnosed Victim with anxiety and adjustment disorder. The counselor also testified Victim displayed nervousness and anxiety when asked to talk about Applicant, but Victim did not disclose sexual abuse.

⁵ The record indicates Applicant's parental rights were terminated in November 2012 due to abuse and failure to support.

he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of counsel in failing to request continuance to fully review exculpatory therapist records given last-minute."
 - a. "Court of Appeals opined as much; several critical exculpatory findings within the notes post-conviction."
2. "Ineffective assistance of counsel in failing to call character, lay, and expert witnesses."
 - a. "No expert witness to counter State's witness in that notations in records support therapist was inappropriately "prepping" child for trial."

Thereafter, Applicant, though retained counsel, filed three amended applications setting forth numerous allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct. At the hearing, Applicant proceeded forward on the following claims from his third amended application:

A. Ineffective assistance of counsel during the guilt phase for:

1. "Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information."
2. Not only failing to object to the trial judge instructing the jurors that their role is to "search for the truth" and make sure "justice is done," which impermissibly diminishes and shifts the burden of proof, but also adopting that language in closing argument, thereby diminishing and shifting the burden of proof."
3. "Failing to call available lay, character, and expert witnesses that would have established the unreliability of the child's allegations."
4. "Failing to investigate, develop, and present evidence that the Special Prosecutor, N. Douglas Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting the case."
5. "Failing to request a ruling on Mr. Spade's contention that the Private Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470."
6. "Failing to move for disclosure of exculpatory information in the possession of the [Special] Prosecutor, N. Douglas Brannon."
7. "Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which

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would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony."

8. "Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility."
9. "Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualification as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. *See, e.g., S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011)."
10. "Failing to admit the videotaped interview from the Children's Advocacy Center that contained exculpatory information."
11. "Failing to investigate, develop, and present evidence that venue was not in Spartanburg County."
12. "Failing to support the directed verdict motion with evidence that venue was not in Spartanburg County."
13. "Failing to request a jury instruction on venue."
14. "Failing to object to the Special Prosecutor's improper closing argument that appealed to the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest 'bad people,' he (as Special Prosecutor) tells the complaining witness' story, and 'the jury takes care of good people.' Tr. 305-07."
15. "Advising Mr. Spade not to present any evidence, including but not limited to his own testimony."⁶
16. "Excluding evidence from the forensic computer examination that was exculpatory."
17. "The cumulative effect of trial counsel's errors denied Mr. Spade his right to a fair trial."
18. "Failing to obtain through discovery, by subpoena, or court order relevant Department of Social Services records."

⁶ Allegation #15 as set forth in the third amended application was expressly withdrawn at the hearing and accordingly will not be addressed herein.

19. "Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony."

20. "Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."

21. "Failing to present expert testimony to confront the State's witnesses and demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."

22. "Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with his daughter P.J. Law enforcement determined these allegations by P.J. to be unfounded. This ground is based on the deposition testimony of Cara Lintner."⁷

B. Ineffective assistance of counsel during the sentencing phase for:

23. "Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing."

24. "Failing to present any information or evidence to the trial judge in order to mitigate the sentence imposed."

C. Ineffective assistance of appellate counsel, in that

25. "Failing to brief on appeal the trial court judge denying the motion for directed verdict when the State failed to present evidence establishing venue in Spartanburg County."

D. Denial of due process because of prosecutorial misconduct, in that

26. "Failing to disclose *Brady* information including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County."

27. "Failing to disclose *Brady* information in a timely manner including, but not necessarily limited to, statements by the child demonstrating that venue was not in Spartanburg County."

28. "Eliciting false testimony regarding venue."

29. "Failing to correct false testimony regarding venue."

⁷ Applicant did not introduce transcripts of the depositions of Cara Lintner or John Hall during this proceeding. Neither deposition is part of this record.

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30. Failing to disclose relevant Department of Social Services records obtained by Spartanburg County Sheriff Investigator Nicki Cantrell
31. Failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and LE found them to be unfounded.

At the evidentiary hearing, Applicant presented the following witnesses in support of his application for post-conviction relief:

- Dr. Maggie Bruck, Ph.D, who was admitted as an expert in child abuse disclosure, forensic interview techniques, treatment of child sexual abuse victims, and suggestibility;
- Meredith Thompson-Loftis, who was the victim's counselor;
- Appellate Counsel C. Rauch Wise;
- Seventh Circuit Solicitor Barry Barnette;
- Dr. Michael Lamb, Ph.D., who was admitted as an expert in psychology with a specialty in child interviews;
- Trial Counsel Kenneth Shabel;
- Applicant's brother-in-law Josh Trumpower;
- Applicant's close friend Michael Mizak;
- Alexandria Wolf, the victim's former guardian ad litem in the family proceedings, and
- Special Prosecutor Douglas N. Brannon.

Respondent presented the following witnesses:

- Investigator Nicki Cantrell, formerly with the Spartanburg County Sheriff's Department;
- Trial counsel Shawn Campbell
- Tabitha Weber, MSW, LISW-CP, the Clinical Director and Forensic Supervisor of the Children's Advocacy Center of Spartanburg, Cherokee, and Union Counties who was admitted as an expert in the field of child abuse assessment and treatment.

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Numerous exhibits were also introduced during the hearing, including the videotaped forensic interviews of the victim with Weber. This Court has watched all forensic interviews in full.

Following the hearing, both parties and the Court reviewed the DSS file regarding the victim, which has been made a part of this record under seal.⁸

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged various claims of ineffective assistance of trial counsel during both the guilty phase and sentencing phase, ineffective assistance of appellate counsel, and prosecutorial misconduct. Applicant claims each of these instances of counsel error or prosecutorial misconduct is so significant that it impacted the verdict and warrants a reversal of his conviction and should be remanded back to the court of general sessions for a new trial. As will be set forth in detail below, this Court finds that Applicant has failed to meet the high burden required for the grant of post-conviction relief and all allegations are denied with prejudice.

Ineffective Assistance of Trial Counsel

Applicant's first twenty-four allegations assert trial counsel was constitutionally ineffective for a litany of reasons and Applicant asserts each of these errors caused him to suffer the requisite prejudice to warrant a new trial. After a thorough review of the record and in light of the findings above, this Court finds Applicant has not met his burden of proof and is not entitled to relief on any of these grounds.

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, U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action,

⁸ Considerable efforts by the parties and the Court were expended to obtain the DSS file and perform the necessary reviews. The Court requests the parties to inform this Court if a seal copy (with redactions) is not in Clerk's file. If a copy of the redacted DSS information is not filed with the Clerk's Office, the parties should proceed forth with having a copy filed under seal.

and when alleging that 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

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney,' " 466 U. S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 770 (1970)). Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation, a lack of foresight, or for failing to prepare for what appear to be remote possibilities. Id.

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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 8 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Strickland at 688; Harrington v. Richter, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding,” Id. at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687. See Harrington, 562 U.S. 86.

“Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 690. Even under de novo review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney that observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S. at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result

would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on the testimony and evidence presented at the evidentiary hearing, Applicant has failed to meet his burden of proof as to each allegation of ineffective assistance of counsel. This Court will address each individual allegation against counsel below:

Allegations Pertaining to the Forensic Interviews (Failure to Call Expert Witnesses, Failure to Publish the Forensic Interviews to the Jury)

A significant and material approach of the present PCR was to attack the decisions of trial counsel to not publish the victim's forensic interviews to the jury and to not call expert witnesses to attack the credibility/reliability of the victim's single trial accusation made against him by discrediting the forensic interviews. Since a substantial portion of the PCR testimony and evidence related to the forensic interviews, this Court's discussion of the forensic interviews will be disproportionately longer than its discussion of other issues.

Significant to this Court's post-conviction relief analysis was that the video interviews were not seen by the trial jury that convicted the applicant. The prosecution nor the defense offered the video tapes into evidence during the trial. Therefore, the videos were not screened pursuant to the rules of evidence for admissibility purposes. Therefore, this Court reviewed all content of the videos without consideration of issues related to admissibility. Here Applicant offers the videos and the expert analysis to attack the reliability of the interview process.

Applicant's assertion at trial and as part of this PCR was that the victim's claim was untrue because she was coerced or coached into saying it. Applicant buttressed his position that the singular trial allegation was untrue with the undisputable historical timing/link to the bitter

domestic litigation then existing between the victim's mother and soon-to-be adoptive father, and the Applicant. Applicant presented new evidence (evidence not presented during the criminal trial) that supported the timing/link of the beginning of the criminal process against applicant to a material development in the family court litigation that could have potentially derailed the victim's mother and soon-to-be adoptive father's desire to terminate Applicant's parental rights with the child.⁹

The history preceding the forensic interviews strategically link the motivation for the interviews to the domestic dispute. Nevertheless, the history preceding the forensic interviews also does not disprove the single sex abuse trial allegation against the Applicant. A therapist had recommended that meetings/sessions should begin with the goal of long term association of Applicant with the child. These sessions were to involve all members of the family, including the applicant. Significant to this new evidence was the testimony of the victim's family court guardian ad litem (GAL). Part of the GAL's testimony included that she was closed off from the victim by the mom and soon-to-be adoptive father. This Court easily concluded the GAL felt strong hostility from the mom and soon-to-be adoptive father. Their conduct and attitude toward the GAL materially interfered with her work as the GAL for the minor. This new evidence and the timing/link to the family court issues was further supported by the information revealed post-PCR hearing from the DSS file.

This Court was troubled that the legal history of this case includes private parties being encouraged to be uncooperative and thereby frustrate the work of the DSS and a family court GAL. This Court was also troubled that law enforcement made inconsistent factual statements to different courts.

⁹ This statement is not a finding of fact, but rather an explanation of this Court's view of the purpose of Applicant's use of the evidence during the PCR to buttress applicant's trial narrative. The Applicant did not convince this Court that his lawyer was wrong in not seeking to admit the evidence (with expert testimony). And, even if admitted, did not persuade this Court a different trial outcome was possible or probable.

Again, the forensic interviews were material to the PCR. Applicant was successful at discrediting the forensic interviews in this case. As part of the review process, the forensic interviews were viewed by this Court. Certain sections of the video interviews were reviewed several times. The PCR hearing testimony of the Applicant's two expert witnesses and the testimony of the forensic interviewer (also admitted as an expert) were all considered. The audio recording of the PCR testimony was also reviewed by this Court post-PCR hearing.

The expert witnesses called by Applicant have the highest credentials in their areas of expertise. They both can be considered experts of the highest esteemed. Also they both appeared credible on the witness stand. Together, they explained what the "best-practices" are for obtaining information from a child during a forensic interview. They both explained how the forensic interviews in this case deviated from their "best-practices." They were also critical of the prior sworn testimony of the forensic interviewer when that testimony was compared to what is reflected in the video interviews.

The forensic interviewer also testified during the PCR hearing. She strongly defended the techniques she used with the child in this case. While she acknowledged the expertise of the Applicant's two expert witnesses and did not directly discredit their methodology, she strongly advocated for her methodology and defended its application with the interviews conducted with the victim.

In reaching the conclusion that Applicant was successful in discrediting the video interviews, this Court notes, again, that no witness challenged the credentials of Applicant's experts nor the validity of their methodology. Based on the information presented to this Court, these two witnesses presented the highest levels of expertise in their respective fields. They appeared extremely credible during the hearing. After viewing the videos and applying the standards offered by these experts, this Court agrees with their assessment that the forensic

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interviews were suggestive.¹⁰

All three expert witnesses (Applicant's two experts and the forensic interviewer who was also admitted as an expert) felt the videos should have been played to the jury. Each felt that if videos had been played to the jury, the publication to the jury would have supported their respective positions. All three encouraged this Court to view the videos. As stated, this Court did so extensively.

The forensic interviewer and Applicant's two experts assisted the Court in understanding the complexities and challenges generally faced when attempting to obtain information from a minor victim. The forensic interviewer testified to her interaction with the victim in obtaining information from the victim. The forensic interviewer also explained the historical need and her methodology in obtaining disclosures from child victims of sexual abuse. Applicant's two experts also explained the historical perspective of needing a reliable method to obtain information from a child so that wrongful convictions based on information obtained during a forensic interview do not occur.

The forensic interviews in this case may be classified as uncharacteristic in several respects. The forensic interviews were privately arranged (not by law-enforcement). The more common practice is for the forensic interviewers to be arranged by law enforcement for law enforcement investigation purposes. The interviews here were arranged for a private purpose. The initial purpose for conducting the forensic interviews was to determine what, if any, bad thing(s) the victim would disclose about Applicant. The motivation behind the initial arranging of the interviews may explain some of the manner of the questioning seen in the interview videos.

¹⁰ This Court's agreement with applicant that interviews were suggestive, should not be interpreted as a finding that conclusively supports his application. In the present case, neither party admitted the videos. Thus, the videos in this PCR are collateral to the evidence presented by the State to establish applicant's guilt. While true the videos, when accompanied by appropriate expert testimony establish exculpatory evidence, the videos (with or without countering expert testimony), also, present evidence consistent with the jury's finding of guilt.

This Court notes that the term "disclosure" was used broadly by the witnesses. Also the relatedness of the victim's trial testimony to what was disclosed on the videos is, at best, only related by inference.

As mentioned herein, Applicant's experts were critical of the forensic interviewer's suggestive style of questioning and lack of scrutiny of the child's statements. The testimony was that the victim made some type of sexual assault disclosure, that involved Applicant to her maternal grandmother. The testimony was that this disclosure was revealed by the grandmother just after the therapist recommended that counseling sessions should include Applicant. The therapist's services were terminated after the grandmother revealed the disclosure and referrals were made for the forensic interviews. Testimony was presented to this Court that indicated the "treating" therapist made the referral for the forensic interviews because of the disclosure. This Court can conclude that whatever "disclosure" may have been made to the "therapist", it did not rise to the level of abuse or neglect to merit reporting by the therapist, to law enforcement. The earliest that law enforcement may have been notified was after the second interview. After the forensic interviews concluded, the victim did not return to the treating therapist. A new therapist was hired by the family. The new therapist was formerly employed with the forensic interviewing center. The new therapist regularly received referrals from the forensic interview center.

The exact nature of what the grandmother revealed about the initial sexual abuse disclosure is unknown from the videos. Even though the victim made repeated statements during the videos that Applicant had done nothing or otherwise exculpated Applicant, nothing was seen in the interviews (and Applicant's experts were very critical of the interviewer) that tests the validity of the child's accusatory statements. Most evident was that the forensic interviewer failing to explore what may have influenced a young child of four years to "strongly" declare that her biological father was "not her father" in the videos even though the subject of fatherhood had not been

brought up. Also, it appears the only direct questioning of the child about coaching occurred only for a few seconds at the end of the fifth (last) session while the child appeared to be running around the room.

Again, as suggested and encouraged by all three witnesses, this Court viewed the videos to determine the content of the videos instead of basing its decision on the testimony of the witnesses as to what was contained in the videos. In so doing, this Court was able to view consistencies and inconsistencies in the descriptions offered by the forensic interviewer and the expert witnesses during the PCR hearing when compared with what is reflected in the videos.

Again, Applicant claimed that his trial counsel was constitutionally deficient by not publishing the interview videos to the jury and not calling experts to testify before the jury to discredit the interviews. On this issue, this Court cannot find that applicant met his burden of proof, as his attorneys made a strategic decision not to publish the videos or present expert testimony.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis omitted). "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" Id. (quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). The decision not to call witnesses, including expert witnesses, can be part of a reasonable trial strategy. Putnam v. State, 417 S.C. 252, 261, 789 S.E.2d 594, 599 (Ct. App. 2016)

"[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998). See also Abney v. State, 408 S.C.

41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (Pieper, Jr., concurring) (“[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined. What motions to file and whether to put on evidence so as to preserve the final word in closing argument are also strategic and tactical decisions to be made by trial counsel.” (internal citations omitted)).

“In most PCR cases in which the applicant seeks relief for trial counsel’s failure to call witnesses, the PCR court’s analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.” Buckson v. State, 423 S.C. 313, 320–21, 815 S.E.2d 436, 440 (citing Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64–65 (2011) (deferring to trial counsel’s strategic considerations); Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770–71 (1998) (same); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same)). “A PCR court’s analysis of counsel’s strategic decisions must be ‘highly deferential’ to counsel’s judgment, and ‘a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.’ ” Buckson, 423 S.C. at 321, 815 S.E.2d at 440 (quoting Strickland, 466 U.S. at 689)). “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id.

This Court concludes trial counsel made a sound, well-reasoned strategic decision not to present any expert witnesses or introduce and publish the forensic interviews. In CSC with a minor cases where these type of forensic interviews were videotaped, every defense trial attorney faces the decision, “what do I do about the videos?” The law, at the time of Applicant’s trial and now, allows the publishing of the videos (subject to evidentiary rulings). In Applicant’s trial, the State

made the decision not to offer the videos for publication to the jury. Applicant's trial attorney also did not offer the videos for publication to the jury. As mentioned before, the facts of this PCR mean that substance of the videos and the testimony of three (3) experts are collateral to the evidence that established the applicant's guilty beyond a reasonable doubt to the jury.

Trial counsel felt it best to defend against a single/isolated allegation rather than the other references made by the minor/victim (arguable some non-specific and vague) on the tapes. While this Court finds Applicant has been successful in discrediting the forensic interviews for being suggestive, this Court also agrees with the testimony and opinion of the forensic interviewer that if the videos were shown to the jury, they would view a young four-year-old-child with non-age appropriate knowledge of potentially sexual matters. This Court cannot criticize trial counsel for his decision, even if that decision may have proved to be wrong. This Court also notes the use of the word "disclosure" by the forensic interviewer and Applicant's experts and the broad difference in meaning.

The Applicant's asserted factual narrative from the trial and the PCR was that Applicant did not commit the offense and that his daughter's statement should not be believed because it was the product of an aggressively fought Family Court proceeding. The acrimonious history of the corresponding Family Court action/proceedings is well documented and cannot be contested. The Family Court timeline supports the inferences desired by Applicant. The timing of the initial disclosure by the grandmother after the counselor recommended therapy to include Applicant, the lack of cooperation by the family with the Family Court GAL after the grandparent revealed the disclosure, the private referral to the Child Advocacy Center (not by law enforcement), and the resistance by the family to cooperate with DSS, are factual events consistent with Applicant's narrative. Additionally, information from the DSS file also support Applicant's narrative.

This factual narrative was presented to the jury during the criminal trial and argued by trial

counsel. Notwithstanding, the jury convicted applicant. Again, at trial, Applicant's attorney wanted to minimize the focus on the victim's allegations. His attorney desired the focus to be on the motivation to fabricate the allegations.

The child did not appear before this Court. The only opportunity by this Court to witness the child was through the videos. As expected, she was a very young child speaking about some (although vague) adult subject matter through child-like means (primarily pointing at crayon drawn pictures). In contrast, her trial testimony reads that she was assured and unambiguous about what the applicant had done to her. Her testimony reads in stark contrast to the video interviews which, frequently, appeared chaotic and uncontrollable. The child/victim's video version of Applicant's conduct towards her was not as clear or direct. Rather, her video statements generally ranged from that nothing bad happened, if something bad happened it was by a third person from class, to applicant doing something bad, including bad things happening involving her father's girlfriend while in Virginia.

The victim's examination at trial was brief, just over five pages in length. The victim was seven years of age at the time of the trial. In response to the question, "can you tell the ladies and gentlemen what happened to you at the hotel", her response was "he stuck his private part in my mouth." She went on to physically demonstrate to the jury what she meant by private part by pointing to its location using her own body and explaining that this event happened in the bathroom by the hotel's pool.

In response to the direct examination, trial counsel performed a cross examination. The cross examination reads that trial counsel performed a relevant and competent examination. Trial counsel's cross examination reads that he successfully made several points attacking the credibility of the child, including the fact that the teddy bear she took with her to the witness stand and held while testifying was not her bear, the location of the pool/bathroom, the crowd at the pool and that

the events she related did not happen in their hotel room's bathroom.

Trial counsel attempted to establish, as was strongly asserted through the PCR, that the child should not be believed because she was coached into creating the allegations against Applicant. At trial, and as part of the PCR, some very consequential facts were proven true to support this theory. Again, when the initial disclosure was made by the grandmother, motivation to influence the child existed due to the ongoing family court litigation. The timing of the disclosure was argued to be suspect due to it occurring immediately after the therapist recommended a joint meeting with the parents, child and Applicant. Once the disclosure was made, the services of the therapist ended. A private referral was made to the forensic interview service. Information suggested that the parents paid for the forensic interview services. Cooperation with the Family Court GAL ended. Once the multiple sessions of forensic interviews concluded, referral was made to a new therapist who was formerly with the forensic interview service.

The difficulty, again, for applicant's PCR purposes, was that the jury received these facts before returning their guilty verdict. Again, this Court cannot find error in trial counsel's decision to not publish the video tapes nor can error be found in not calling expert witnesses. The same clash/conflicting testimony concerning the interviews presented during the PCR hearing most likely would have been presented to the jury. The Court can conclude the reasoning why the State did not publish the videos. The videos potentially could do more harm than good to the State's case. Also, from the State's position, the videos may at best, as described by the forensic interviewer, reflect generally age-inappropriate sexual knowledge by the child, but do not support the specific act alleged at trial. At best for Applicant, if the videos had been published and experts presented to the jury, the factual narrative that the child/victim's trial testimony was the result of undue influence potentially may have been enhanced. The risk was also present that the child single accusation against the applicant would have been made more believable.



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In conclusion, this Court finds trial counsel has a sound, well-reasoned trial strategy not to present expert witnesses or publish the forensic interviews to the jury, and accordingly, Applicant cannot establish any constitutional ineffectiveness of counsel as to these allegations.

Allegations pertaining to Special Prosecutor Brannon, including "Failing to investigate, develop, and present evidence that Brannon, had a conflict of interest and, therefore, was disqualified from prosecuting the case," "failing to move for disclosure of exculpatory information in the possession of Brannon," and "failing to request a ruling on Applicant's contention that Brannon was unqualified to serve as a special prosecutor because the Solicitor failed to produce a governor's commission pursuant to S.C. Code Ann. § 1-7-470."

Applicant also asserts trial counsel's efforts of objecting to the use of the private trial attorney who represented the victim's parents against the Applicant in the prior trial of the related Family Court matter to assist the Solicitor's office in prosecuting the criminal case amounts to ineffective assistance of counsel.¹¹ The PCR record established that the family court private trial attorney was associated late by the family's private counsel in the family court process for the purpose of conducting the family court trial. Applicant's trial counsel's objection was overruled and affirmed, for the most part, on appeal.

As the Court of Appeals correctly determined, the trial judge properly allowed Brannon to serve as a special prosecutor in Applicant's case, and Applicant's contention that Brannon's service as a special prosecutor violated his constitutional rights is contrary to well-reasoned and settled precedent. In State v. Addis, a private attorney who had previously represented the victim's family in a civil claim against the defendant participated in the defendant's criminal trial alongside the solicitor. 257 S.C. 482, 486, 186 S.E.2d 415, 416 (1972). The civil claim was settled prior to trial. Id. In finding no error with respect to the private attorney's participation in the case, this Court found that "traditionally in this State private counsel has been permitted to assist the State

¹¹ These issues of the propriety of Brannon acting as a special prosecutor also arose in a subsequent disciplinary matter opinion from the South Carolina Supreme Court that was shared with this Court. In the Matter of N. Douglas Brannon, Op. No. 27933 (filed Dec. 18, 2019). However, as discussed below, this Court finds Applicant is not entitled to relief on any claims pertaining to Brannon's role as special prosecutor.

in prosecutions." *Id.* at 487, 186 S.E.2d at 417. The Court also stated: "the defendant has no right to complain" where private counsel "participates in the trial of a case and does only what a solicitor should do." *Id.* Finally, the Court held: "We cannot say that the participation of private counsel violates the constitution or any statutory or common law principle. Such ruling would appear to be in keeping with the weight of authority." *Id.* at 487-88, 186 S.E.2d at 417.

In State v. Nichols, a 1997 murder case, the defendant asserted it was unconstitutional to allow the solicitor to use three private attorneys hired by the victim's family to prosecute his case. 325 S.C. 111, 119, 481 S.E.2d 118, 122 (1997). The Supreme Court again rejected this argument, ruling as follows:

Private counsel's participation in a trial to assist the solicitor has been sanctioned in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986); State v. Addis, 257 S.C. 482, 186 S.E.2d 415 (1972); State v. Lee, 235 S.C. 309, 178 S.E.2d 652 (1971); and State v. Gregory, 172 S.C. 329, 174 S.E. 10 (1924).

In State v. Addis, 257 S.C. at 487-88, 186 S.E.2d at 417, we declined to find error in the allowance of a private attorney's participation in a criminal trial. The trial court has discretion to allow the solicitor to have the assistance of counsel employed by the prosecuting witness or other person interested in securing a conviction, with the consent of the solicitor. *Id.* A special assistant solicitor is not automatically disqualified because of his simultaneous representation of an interested party. Disqualification occurs when a special assistant solicitor attempts to use his authority in the criminal action to the advantage of his civil client or otherwise compromises his neutrality in the criminal proceeding. State v. Mattoon, 287 S.C. at 494-95, 339 S.E.2d at 869. There is no evidence the private attorneys who acted as special assistant solicitors here stood to gain an unfair advantage in the civil matter as frowned upon in In re Jolly, 269 S.C. 668, 239 S.E.2d 490 (1977). Further, the solicitor maintained control of the case. We do not find error in the use of private attorneys here.

Id. at 119, 481 S.E.2d at 122-23 (emphasis added).



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The reasoning of Nichols and Addis applies in Applicant's case.¹² The Seventh Circuit Solicitor's Office maintained control of Applicant's case, Mr. Brannon's service in the case was as a "third chair" and assisted with some aspects of the trial, including arguing two motions, examining one witness (the victim's therapist), and presenting the State's closing argument. Even though a "third chair", his role in trial was substantial. Nevertheless and significantly, in Applicant's case, unlike in Nichols, Mr. Brannon did not "simultaneously" represent an interested party; instead, his representation of the victim's mother and adoptive father concluded in October of 2012, more than a year and three months before Applicant's trial. (App. 120). Mr. Brannon stood to gain nothing (other than a sense of personal satisfaction, perhaps) from providing *pro bono* assistance to the State, nor has there been any contention that he attempted to use his authority as a special prosecutor in some improper way.

Applicant's argument on appeal and now in this instant post-conviction relief of action is based on a belief that Mr. Brannon *might* have learned something during his representation of the victim's mother and adoptive father in the past that *might* have been helpful to the defense in this case, and assumes that Mr. Brannon failed to turn such information over to the defense. He further argues that his representation might require him to violate his oath of confidentiality to his former clients. In support of this allegation, Applicant relies on the discovery affidavit and attached email dated April 23, 2012, from Mr. Brannon's family court file, discussing the "unfortunate timing of [the victim]'s disclosure" of sexual abuse just three days after counselor Kimberly Roseborough suggested a co-parenting session to work on reunification of Applicant and the victim. This email heightens this Court's opinion that the private family court matter was of a concern higher than the

¹² This Court in State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), discouraged the practice of appointing private counsel to prosecute criminal cases. The private attorney appointed to prosecute the case in Mattoon was the sole prosecutor and no one from the solicitor's office was present during trial. Mattoon at 494-95, 339 S.E.2d at 868-69. In any event, despite the statement of discouragement in Mattoon, the decisions of our Supreme Court have consistently upheld the use of special private prosecutors when attacked by the defendant. The Nichols case decided about eleven years after Mattoon reiterates this view.

potential criminal allegations. However, this email is cumulative to other evidence already in possession of trial counsel, which is readily apparent as this argument was one of the main defense theories at trial.

Mr. Brannon testified at the evidentiary hearing that he never maintained a criminal file in this matter and did not use his family court file. He testified he reviewed his family court file for this action in accordance with a court order and the sole email was produced out of an abundance of caution although the information was already known to all parties, as was readily apparent at the evidentiary hearing. Moreover, Mr. Brannon was not actively representing the victim's parents at the time of the criminal trial, as the family court action had concluded in late 2012 with the successful termination of Applicant's parental rights. Applicant has failed to meet his requisite burden of proof as to these allegations and this Court denies and dismisses them.

Applicant also argues that trial counsel was constitutionally ineffective for failing to request a ruling on Mr. Spade's contention that the Special Prosecutor, N. Douglas Brannon, was unqualified to serve as a special prosecutor because the Solicitor failed to produce governor's commission pursuant to S.C. Code Ann. § 1-7-470." As with the previous allegation, this issue was raised on direct appeal but found to be unpreserved and/or waived at trial, as trial counsel conceded that the solicitor "does have the right to appoint a special prosecutor." Trial counsel is correct that the Seventh Circuit Solicitor had the authority to appoint Mr. Brannon as a volunteer special prosecutor to assist in this case and accordingly, no objection would have been proper on this basis. This allegation is without merit and should be denied and dismissed with prejudice.

This Court finds Section 1-7-470 is not applicable to Applicant's case, since the Seventh Circuit Solicitor appointed Mr. Brannon as a volunteer special prosecutor for the duration of one trial, rather than as a paid "assistant solicitor" as discussed in the statute. This is further illustrated by reference to sections 1-7-405 and 1-7-406 of the South Carolina Code, which appear in the

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same Article and clearly contemplate a full-time hired assistant solicitor and not a one-time special appointment. The case of State v. Mattoon, 287 S.C. 493, 339 S.E.2d 867 (1986), cited by Applicant on appeal, is distinguishable because, in addition to dealing with a different statutory provision (S.C. Code § 1-7-405), the private attorney in Mattoon was appointed as a "special assistant solicitor" and had an agreement (presumably for pay) to prosecute "a series of obscenity cases" in the county. This Court finds Applicant cannot meet his burden of proof and denies this allegation.

Allegation: "Not only failing to object to the [trial] judge instructing the jurors that their role is to 'search for the truth' and make sure 'justice is done' and the prosecutor embracing this language in the its opening statement, which impermissibly diminishes and shifts the burden of proof, but also adopting that language in Mr. Spade's opening statement and closing argument, thereby diminishing and shifting the burden of proof."

Applicant also argues counsel was constitutionally ineffective for failing to object to the trial court's instruction to the jury that its role was to "search for the truth" and make sure "justice is done," and to the prosecutor's use of similar language in its argument. Additionally, Applicant contends trial counsel also erred when he used similar language in his argument, which compounded the harm caused and shifted the burden from the State and confused the jury.

During its opening comments, the trial court instructed the jury as follows:

Now, we are about to try the case of the State of South Carolina versus Daniel William Spade, who is the defendant in this matter, but before we begin this trial I want to tell you that this trial will probably be different from what you might expect. Many people do not have the chance to attend an actual court session, as you are doing now, and many people believe from watching television or movies or reading books that trials are always full of high drama, intense action and riveting circumstances. Now, while all these things may be true at times, this trial is not for entertainment purposes. This trial is a fundamental part of our democracy - a search for the truth in an effort to make sure that justice is done between the parties before the court. Searching for the truth and making sure that justice is done is often slow, deliberate and repetitive, the opposite of what you may have seen on television or in a movie or read in books. This courtroom is a place of honor dedicated to the protection and preservation of citizen's rights through what many have called the greatest justice system ever created.

The attorneys appearing before you are advocates for the parties they represent, but first and foremost they are officers of this court, sworn to uphold the integrity and fairness of our judicial system and to help you in the search for the truth. You should expect them to be professional, competent and ethical in their representation of their client's interests, and you also are expected to be professional, reasonable and ethical. Again, we thank you for your service as jurors this week.

What I say now is intended to serve as an introduction to the trial to this case. My remarks are not a charge on the law of this case. I will instruct you on the law at the end of the trial before you retire to consider your verdict. My remarks are merely an explanation of the procedure that we will follow in the trial of this case that you may better understand what may be happening.

(Trial Tr. p. 109-11).

During opening arguments, the State referenced the trial court's preliminary charge, stating, "As Judge Kelly advised you, this is a search for the truth. And as representing the State of South Carolina, that's what we are here to do is ask you to listen to the testimony (Trial Tr. 120).

Thereafter, trial counsel addressed the jury and gave the following opening argument.

Good morning, ladies and gentlemen. I want to thank you guys in advance, ladies and gentlemen, for your willingness to come, your participation, your attentiveness, your focus over the next several hours, potentially several days; the testimony, lots of lawyers speaking, and as Judge Kelly said, a search for the truth. The key word in that statement, ladies and gentlemen, is the word search. That means that you have to look for. It's not just handed to you. It's not just thrown at you. You have to find it. Take that into consideration as every witness takes that stand and as every document comes before you. It's a search. You have to look for it.

This case, ladies and gentlemen, is about a man, Daniel Spade, a man who became a father, a man who wanted to become a dad under the most difficult of circumstances. A man, who lives in Virginia, got into a relationship with a woman who lives in South Carolina. She got pregnant. He became a father and he wanted to be a dad. So, as Ms. Leskanic said, Family Court got involved. He wanted to be a dad.

[The victim]'s mom and stepdad wanted to terminate his parental rights. They didn't want him to be a dad, so he fought to be a dad and he got the chance to be a dad. He got to visit with his daughter as a dad. Unfortunately for Mr. Spade his journey to be a dad didn't get to end with a high school graduation, or a college graduation, or a medical school graduation. It didn't get to end with walking his daughter down the aisle at the wedding. It's culminated in a criminal trial. It's culminated in a criminal trial where he is being accused of an awful, awful crime, but as Judge

Kelly has said, and will say again, Mr. Spade, just like any other defendant in this state, is innocent until the State can prove him guilty beyond a reasonable doubt.

So I'll ask you, ladies and gentlemen, over the course of the next several hours, potentially the next several days, to begin that search for the truth, with the understanding that it is the State's responsibility to prove that truth in here.

I submit to you that when this search is over and the State has given you and handed you everything that they want to hand you, the search will lead you to find Mr. Spade is not guilty of the crime that he's been accused of. It's a horrible crime. It's a horrible act, but this isn't about the horrible act. It's about whether Daniel Spade, a man who wanted to be a dad, committed the act. I look forward to the journey for the truth with you. Thank you.

(Trial Tr. 120-23).

Applicant contends that trial counsel should have objected to the trial court's use of truth-seeking language in its opening charge, objected to the prosecutor's reference to the trial court's truth-seeking language in the State's opening argument, and should not have used such truth-seeking language in his own opening argument. Applicant argues such arguments misled the jury into thinking the purpose of the trial was to search for the truth and not to determine if the State had met its burden of proof. Applicant argues because credibility was central in this trial, such truth-seeking references prejudiced Applicant to such a level that he is entitled to a new trial.

Applicant is correct that the trial court's statements and his attorney's statements crossed into the Beatty sphere of improper statements that shift the jury's focus away from the State's obligation of meeting its burden of proof. At the time of Applicant's trial, Beatty had not been decided and its jurisprudence was not universally recognized. Therefore, counsel cannot be deficient for failing to object or making such arguments. Also, given the other arguments made by his attorney and statements of law made by the trial court, this Court finds prejudice was not established.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charged the jury to "search for

the truth” ran the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the “seek the truth” language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge.

Recently, the South Carolina Supreme Court again considered the use of “truth seeking” language by the trial court in State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018). The Beaty Court concluded:

[A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal.

Id. The Beaty opinion signified the first time the Court issued a general and blanket admonishment to the bench and bar that such “truth-seeking” language should be avoided at any point during the trial, but nonetheless found a harmless error analysis applied if such charges or commentary was given by the trial court.

In both Aleksey and Beaty, the South Carolina Supreme Court determined that while the trial court's use of “truth seeking” language was improper, the error was not significant enough to warrant reversal of the convictions. The same holds true in Applicant's case. Initially, it is important to note that at the time of Applicant's trial in 2014, the trial court's opening charge included truth-seeking remarks that were widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. See

Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016); see also Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). Beaty made clear to the trial bench that such language was not to be argued during a trial to a jury even though, as referenced by applicant, State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2013) existed.

Here, when these "truth seeking" comments are viewed in conjunction with the record as a whole, the trial court properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Applicant. Because the jury instructions as a whole were proper, Applicant cannot establish any resulting prejudice. See Brown v. Stewart, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Cl. App. 2001) ("In reviewing jury charges for error, we construe the court's charge as a whole in light of the evidence and issues presented at trial. If the instructions of the trial court, construed as a whole, correctly state the law, there is no reversible error. To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury verdict." (internal citations omitted)).

Additionally, trial counsel repeatedly reminded the jury in his opening argument that the State firmly held the burden of proof and must establish beyond a reasonable doubt that Applicant was guilty. Based on this, in conjunction with the proper jury instructions on the State's duty to prove Applicant's guilt beyond a reasonable doubt, Applicant cannot establish deficiency of counsel or prejudice. In sum, at the time of Applicant's trial, trial counsel was not on notice that such an objection must be made to these introductory comments by the court and solicitor. Similarly, trial counsel did nothing improper by adopting such remarks in his opening statement, wherein he also repeatedly reminded the jury of the State's burden of proof. This Court finds Applicant cannot establish constitutional ineffectiveness and denies relief.

Allegation: "Failing to request a continuance in order to have time to review and evaluate the child's mental health records that were disclosed for the first time four days prior to trial, when those records contained exculpatory information."

Applicant alleges trial counsel was constitutionally ineffective for failing to move for a continuance to allow more time to review additional mental health records from the victim's counseling sessions with Meredith Thompson-Loftis that were not provided to the defense until shortly before trial. Applicant asserts that trial counsel was unprepared for trial based on the late disclosure of these additional records, covering February 2012 through December 2013 counseling sessions of the victim with Thompson-Loftis, and trial counsel should have moved for a continuance to allow extra time for him to review and possibly consult with an expert witness about these additional records. Applicant contends this last batch of counseling records referenced sexual abuse of victim by Applicant's fiancée Cara and mentions abuse occurring in Greenville, South Carolina, both of which should have been explored by counsel and required a continuance to do so. This Court finds that the trial record reflects, however, that trial counsel made numerous objections. Most rulings, unfortunately for Applicant, were not favorable to him. The trial court actually limited the testimony of Thompson-Loftis. This Court can find no error for PCR purposes by trial counsel under our jurisprudence that existed at the time of trial.

In analyzing this allegation, it is important to review the timeline of how the issues pertaining to these records arose before and during trial, including counsel's actions and representations to the trial court concerning the victim's counseling records. Before Applicant's trial, this Court, acting in its capacity as the current Chief Administrative Judge for General Sessions for the Seventh Circuit, filed an order that stated, in pertinent part: "The State shall not be required to turn over any mental health records of the alleged victim from Meredith Thompson Loftis at this time; however, if the State intends to call her as a witness in their case, they must turn over all such records within a reasonable time prior to the trial of this case." (R. p. 3). This

order did not provide for any particular remedy in the event a violation occurred. On February 11, 2014, approximately two weeks prior to Applicant's trial, trial counsel filed a motion to exclude the testimony of Meredith Thompson-Loftis on the ground that the State had not yet turned over all of Ms. Thompson-Loftis' records and that "it is no longer a reasonable time prior to the February 24, 2014 call of the case." (R. p. 8). The motion also requested an in camera review of the issue prior to the admissibility of Ms. Thompson-Loftis' testimony. (R. p. 8).

On February 24, 2014, the day the case was called for trial, trial counsel raised the issue of the earlier order and argued the State violated it by failing to turn over records within a reasonable period of time prior to trial. (R. p. 34-35). Specifically, trial counsel asserted that although the State, on October 31, 2013, turned over records covering the dates of May 17, 2011 through February 16, 2012, it was not until "last week," February 20, 2014, that the State turned over records spanning the dates of February 23, 2012 through December 30, 2013. (R. p. 35, lines 15-21). Trial counsel also stated that no records for any dates after December 30, 2013, had been turned over. (R. p. 35, lines 21-23). Trial counsel argued, "in essence, Your Honor, before this trial was to begin they handed over the last twenty-two months of counseling records. I believe that is contradictory to Judge Hayes' ruling. I don't believe they turned over her records within a reasonable time. Therefore, I would ask that any testimony of Meredith Thompson-Loftis be excluded under the terms of Judge Hayes' order, which were issued and filed with the court on February 27 of 2013." (R. p. 35, line 23 -- p. 36, line 6).

In response, the State responded that "twenty-two months" of records in fact included only twenty-five pages of counseling notes. (R. p. 36, lines 11-14). The solicitor noted that "[i]t was five pages that included some writings and then twelve pages that included drawings." (R. p. 36, lines 17-18). The solicitor also pointed out that the defense had access to the majority of Ms. Thompson-Loftis' records prior to this; that defense counsel personally cross-examined Ms.

Thompson-Loftis in the family court trial that took place in October of 2012; and that the victim had made no new disclosures to the counselor. (R. p. 36, line 19 – p. 37, line 1). The solicitor argued that considering the “un-burdensome” nature of the records turned over four days prior to trial, the records were turned over within a reasonable amount of time. (R. p. 37, lines 2-4). The solicitor further noted that she had requested the records earlier from Ms. Thompson-Loftis, but there were apparently some issues with obtaining the records; however, the State turned over the records the morning after receiving them via fax at 8:06 pm on Wednesday, February 19, 2014. (R. p. 37, lines 10-17).

Trial counsel agreed that these records were turned over upon receipt and stated, “I’m not saying you withheld it.” (R. p. 37, lines 16-21). However, trial counsel argued that the “legibility” of the records was an issue and having to “translate her handwriting in four days.” (R. p. 38, lines 12-15). He also noted that his late receipt of the records prevented the defense “from being able to have any experts, should we have wanted to have an expert look [at] it.” (R. p. 38, lines 18-21).

The trial judge then asked trial counsel if there was anything new or surprising in the records that had recently been turned over. (R. p. 39, lines 3-4). Trial counsel responded that he had learned the “number of appointments this child had with Meredith Thompson-Loftis in the year, plus, since the hearing, but *nothing of major significance* that I could see or that I could translate in the four days that I have had to take a look at it.” (R. p. 39, lines 5-9) (emphasis added). The trial judge responded that the records looked “pretty straightforward” and said that he was able to read Ms. Thompson-Loftis’ handwriting. (R. p. 39, lines 10-14). He also offered assistance with “translating” the records but defense counsel declined. (R. p. 39, lines 15-18). The judge then denied counsel’s motion to exclude the testimony of Meredith Thompson-Loftis. (R. p. 39, line 19). Defense counsel stated, “All right. Thank you, Your Honor.” (R. p. 39, line 20).

Later in trial, after Ms. Thompson-Loftis testified that the victim was still a client of hers to date, trial counsel renewed his motion to exclude. (R. p. 267-68). He stated that if the victim is a continuing patient of Ms. Thompson-Loftis, there must be records dated after December 30, 2013 which had not been turned over. (R. p. 268, lines 17-22). He argued the State was therefore not in compliance with pre-trial order and asked that Ms. Thompson-Loftis be excluded as a witness and that all of her testimony be stricken from the record. (R. p. 268, lines 22-25). The State noted that it was not in possession of any records dated after December 30, 2013. (R. p. 269, lines 2-8). Ms. Thompson-Loftis then told the court she did have records for January 2014. (R. p. 270, lines 1-5). Over trial counsel's objection, the judge ruled that Ms. Thompson-Loftis would not be excluded as a witness but would not be permitted to testify as to anything that occurred with respect to sessions after December 30, 2013, since trial counsel had not been privy to those records prior to trial. (R. p. 270-72).

Trial counsel has been representing Applicant since 2007 in his family court actions involving the same victim and included the same allegation of sexual assault presented in this criminal trial. Trial counsel testified he first learned of the allegations of sexual assault against Applicant in March of 2011, nearly three years prior to Applicant's trial in February 2014. As counsel stated both during Applicant's trial and at the evidentiary hearing, he was well aware the victim had received counseling from Thompson-Loftis and was in possession of the vast majority of her counseling records well in advance of Applicant's criminal trial.

At the evidentiary hearing, trial counsel conceded this last batch of Thompson-Loftis counseling records did not contain any new exculpatory or impeaching information that would have been beneficial to him at trial, although he did perplexingly state he should have moved for a continuance despite having no articulable reason why. Trial counsel's assessment is correct—there simply is nothing in this final batch of counseling notes that would have changed counsel's

preparation for trial or defense. The references to Applicant's fiancée Cara committing sexual abuse against the victim absolutely do not exonerate Applicant as the records could at best be interpreted to show Cara was a witness to or participant in the sexual abuse of Applicant. Moreover, Cara's potential involvement in the sexual abuse had already been vetted by law enforcement, who determined Cara was not involved in any sexual assault, but rather, had tried to comfort the victim with a bath while the victim was visiting their home in Virginia. Thompson-Loftis testified similarly at the hearing, stating she did not interpret the victim's statements regarding Cara to be disclosures of sexual abuse by Cara.¹³

Similarly, Applicant's argument that these records could establish the abuse happened in Greenville are also erroneous. Numerous witnesses all testified the only time Applicant was alone with victim during the period the abuse occurred in South Carolina were in Spartanburg County. Investigator Cantrell testified she investigated whether the allegations occurred in Greenville County or Spartanburg County and all evidence established the sexual abuse occurred at a Holiday Inn Express in Spartanburg County. Thompson-Loftis similarly explained the notation of "Greenville" meant the upstate metropolitan region encompassing both Spartanburg and Greenville.

Counsel also testified that Applicant was eager to get his case resolved as it had been pending for nearly three years and did not want the case continued. He elaborated Applicant was not pleased when the case was continued in November of the prior year to allow additional time to review the latest batch of counseling records. Additionally, counsel testified he would not have called an expert regarding the counseling records such as Dr. Bruck because calling an expert would have required showing the videos of the forensic interviews, which he strategically did not

¹³ From the information presented during the PCR hearing, evidence of Cara's involvement with the victim is inconclusive, and speculative. Nevertheless, no criminal charges were ever brought against Cara. From the PCR hearing, this Court's impression was that Cara may have been a witness hostile to the applicant at time of criminal trial.

want to do because it would have allowed the jury to hear of many more allegations of abuse made by the victim against Applicant rather than the one discrete incident she testified to at trial.

Applicant has not established any deficiency of counsel. As discussed above, there is nothing in this last batch of records that would have or should have altered trial counsel's trial preparation or defense. Upon learning of the additional records from Thompson-Loftis before the trial's originally-scheduled date in November, counsel timely moved for and was granted a continuance to allow him additional time to review these records. When Applicant's case was again called for trial in February, he moved to exclude the testimony of Thompson-Loftis based on the late disclosure of the records, which was denied by the trial court and preserved for appellate review. When Thompson-Loftis then testified as to additional counseling notes that had not previously been disclosed, counsel timely moved to exclude the testimony, which was granted as to the last few months of counseling. Applicant has failed to show how counsel was deficient in his handling of these records or for failing to move for a continuance, particularly when counsel testified Applicant did not want his case continued.

Moreover, Applicant has failed to show any resulting prejudice from counsel's failure to move for a continuance. There is nothing in this final batch of Thompson-Loftis records that would have changed the result of trial or counsel's preparation for trial, which he candidly admitted to the trial court when he moved to exclude the testimony of Thompson-Loftis. These records simply do not amount to any credible evidence that Cara was the perpetrator of any abuse or that the venue was in Greenville County. This Court finds allegations should be denied and dismissed with prejudice.

Allegation: "Failing to call available lay and character witnesses that would have established the unreliability of the child's allegations."

Applicant alleges trial counsel should have presented lay and character witnesses in his defense and was constitutionally ineffective for failing to do so. As discussed above regarding

Applicant's allegation that counsel should have called expert witnesses, this Court finds counsel employed a reasonable trial strategy in not calling witnesses. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis omitted). "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.'" Id. (quoting Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). The decision not to call witnesses, including expert witnesses, can be part of a reasonable trial strategy. Putnam v. State, 417 S.C. 252, 261, 789 S.E.2d 594, 599 (Ct. App. 2016).

"[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998). See also Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (Pieper, Jr., concurring) ("[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined. What motions to file and whether to put on evidence so as to preserve the final word in closing argument are also strategic and tactical decisions to be made by trial counsel." (internal citations omitted)).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320–21, 815 S.E.2d 436, 440 (citing

Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 64-65 (2011) (deferring to trial counsel's strategic considerations); Jackson v. State, 329 S.C. 345, 350, 495 S.E.2d 768, 770-71 (1998) (same); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (same)). "A PCR court's analysis of counsel's strategic decisions must be 'highly deferential' to counsel's judgment, and 'a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.' " Buckson, 423 S.C. at 321, 815 S.E.2d at 440 (quoting Strickland, 466 U.S. at 689)). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id.

In Applicant's case, trial counsel made a sound, well-reasoned strategic decision not to present any lay, character, or expert witnesses. At the evidentiary hearing, Applicant presented his brother-in-law and a close personal friend in support of this allegation. Applicant's brother-in-law, Joshua Trumpower, testified generally about what he perceived to be the victim's anxiety based on his two visits with her. He also testified he observed the victim's adoptive father speak about Applicant in a derogatory manner in front of the victim. He testified the victim's maternal grandmother questioned him regarding Applicant's finances and home-life with his fiancée and their children. Applicant's close personal friend, Michael Mizak, testified generally that Applicant was a good father to his other children, although admitted he had not observed Applicant with the victim. Applicant did not introduce the deposition of his former fiancée, and accordingly, such evidence is not before this Court. Applicant did not produce any other lay or character witnesses in support of this allegation, and accordingly, cannot argue others should have been called if not presented. See Martin v. State, 427 S.C. 450, 455, 832 S.E.2d 277, 279-80 (2019), reh'g denied (Sept. 19, 2019) (reaffirming Applicant must present witnesses or evidence in accordance with the rule of evidence to establish claims for failure to call a witness); Glover v. State, 318 S.C. 496,

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498-99, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

When asked why he did not present lay or character witnesses, trial counsel testified he wanted to preserve his right to the final closing argument and did not want to lose the final argument by presenting lay or character witnesses that he did not think would have any impact on Applicant's case. He also testified he did not want to present character evidence based on the likelihood the State would attempt to introduce its own evidence to rebut Applicant's good character pursuant to Rule 404(a)(1), SCRE. He testified such possible evidence would include instances of domestic violence between Applicant and his fiancée for which Applicant pled guilty in Virginia, as well as possible investigations into sexual abuse of his other children. He also testified he made a strategic decision not to call particular witnesses based on the risk that they would be questioned on cross-examination about things that would be detrimental to Applicant, such as Applicant's father who likely would have been questioned about an incriminating jailhouse conversation of a slip-and-slide game where Applicant informed his father he would bathe with his children and let them slide down his nude body, or Applicant's sister who would likely be questioned about text messages with Applicant discussing how to "clean" a computer. Trial counsel also testified he did not present Applicant's former fiancée Cara as a witness because they were no longer together at the time of Applicant's trial and he believed she would have been a harmful witness to Applicant based on their history of domestic abuse.

Just as with his decision not to present expert witnesses, trial counsel also made a sound, well-reasoned decision not to call any lay or character witnesses. Such witnesses would have likely yielded little benefit to Applicant's case and had the potential to be very harmful by subjecting the witnesses to cross-examination by the State or opening the door to rebuttal evidence of Applicant's


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character under Rule 404(a)(1), SCRE. Trial counsel clearly considered and discussed calling possible witnesses and accordingly was not deficient in his performance. This allegation is denied.

Allegation: "Failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony."

Applicant alleges trial counsel was constitutionally ineffective for "failing to investigate, develop, and present evidence that would have established that testimony about the child's panic attacks were not related to Mr. Spade, which would have led to the trial court excluding that testimony or if the trial court did not exclude that testimony, would have allowed Mr. Spade to confront that testimony." In support of this allegation, Applicant introduced numerous emails between the victim's parents and Applicant discussing the victim's anxiety concerns and the testimony of Applicant's brother-in-law, who spent two occasions with the victim. Applicant asserts trial counsel should have used these emails and presented witnesses such as his brother-in-law to establish there was an innocuous reason for Applicant's panic attacks aside from any sexual abuse by Applicant.

During trial, trial counsel asked and was permitted to proffer testimony from the victim's grandmother about alternative sources of causes of the victim's panic attacks, particularly her adoptive father. (Trial Tr. 221-228). After the proffer, the State moved to exclude such questioning based on third-party guilt. Trial counsel responded,

Your Honor, the difference in this case and the cases that are cited in this brief that I have been handed this afternoon is that the evidence that the defense tried to present in those cases was actual solid evidence that they didn't commit the act in question.

This is a situation where there are allegations that the child is having panic attacks. That panic attacks in and of itself could or could not have anything to do with the fact that my client may have committed this act.


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What we are trying to do is to give potentially other reasons, non-criminal reasons, why the panic attacks are occurring, not necessarily issues that she's having a panic attack to go as to what her biological father did.

We are not establishing third-party guilt. We are establishing explanation for symptoms, which the State of South Carolina is going to argue is a symptom of child sexual abuse and she's having panic attacks because of what her biological father did.

(Trial Tr. 228). The trial court ruled that trial counsel would be able to question witnesses about alternative sources or reasons for the victim's panic attacks so long as he did not mention specific individuals and would permit Applicant to present an expert about the panic attacks if he so desired. (Trial Tr. 228-30).

At the evidentiary hearing, trial counsel testified he did not want to present any of his own witnesses or evidence in order to preserve the final argument before the jury because he believed the panic attack issue was ancillary and not worth losing the final word with the jury prior to deliberations. He reiterated that his theory of defense was that the victim's parents had concocted this sexual abuse and coached victim on the abuse and the panic attack issue was not central to this defense. Moreover, he testified there was nothing to support that Applicant was not at the least a major contributor to the victim's panic attacks, which got significantly worse during the 2012 visitations in the summer and fall and markedly improved once visitation ceased as Kimberly Roseborough acknowledged during the family court trial.

This Court finds Applicant has failed to meet his requisite burden of proof as to this allegation. The emails and witnesses presented at the evidentiary hearing do not establish that the victim's panic attacks were not caused or exacerbated by Applicant. The evidence before the Court establishes that Applicant's panic attacks got significantly worse during the periods victim had visitation with Applicant, particularly solo visitation, and considerably improved once visitation stopped. Applicant has failed to present any evidence that would allow him to succeed on this allegation. This allegation is denied.

Allegation: "Failing to object to and move for a mistrial because of inadmissible testimony that vouched for the child's credibility."

Applicant alleges trial counsel was constitutionally ineffective for failing to object and move for a mistrial in response to various instances of vouching or bolstering by State's witnesses. First, Applicant complains that the victim's counselors, Kimberly Roseborough and Meredith Thompson-Loftis, were improperly qualified as expert witnesses, thereby bolstering the victim's testimony. Next, Applicant contends that although the State did not seek to qualify Tabitha Weber as an expert witness, she was allowed to testify as an expert witness because she was permitted to testify about her qualifications, education, and experience before the jury. These allegations are without merit. This Court agrees that Tabitha Weber's expertise were unnecessary, but it was not improper not to object. Even if Counsel should have objected, no prejudicial error has been established.

"[A] witness may not give an opinion for the purpose of conveying to the jury directly or indirectly—that she believes the victim," Briggs v. State, 421 S.C. 316, 323, 324, 326 S.E.2d 713, 717 (2017); see also State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) (finding the law "clear that no witness may give an opinion as to whether the victim is telling the truth"). While experts may give opinions, they are not permitted to offer an opinion as to the credibility of others. State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015). Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter. Id. (quoting State v. Kromah, 401 S.C. 340, 358-59, 737 S.E.2d 490, 500 (2013)).

This Court finds Applicant's assertions the testimony of Roseborough and Thompson-Loftis violated State v. Anderson, 413 S.C. 212, 219, 776 S.E.2d 76, 79 (2015) are also without merit. Anderson, which came out after Applicant's trial, stated best practice is to use a blind expert but did not make such a practice mandatory. State v. Anderson, 413 S.C. 212, 218–19, 776 S.E.2d 76, 79 (2015) ("The better practice, however, is not to have the individual who examined the

alleged victim testify, but rather to call an independent expert. To allow the person who examined the child to testify to the characteristics of victims runs the risk that the expert will vouch for the alleged victim's credibility."). This Court finds nothing in the testimony of Thompson-Lofis or Roseborough was improper and/or certainly did not warrant moving for a mistrial.

As to the next allegation that Weber's background testimony regarding her education and experience amounted to improper bolster, there is also no merit to the claim Weber vouched for the credibility of the victim because "the prosecution qualified [her] as an expert witness, without actually asking the trial judge to qualify her and[sic] an expert witness." The "qualifications" that Applicant alleges were improper were simply asking Weber to state what type of education, training, or experience she had to qualify her to work at the Children's Advocacy Center, which she replied, "I have a Bachelors Degree in Psychology, a Masters Degree in Social Work, and I'm a licensed independent social worker through the State of South Carolina. And I have extensive training in child development, child abuse, linguistics, developmental delays, pediatric psychotherapy, play therapy. Lots of issues surrounding children, primarily." (Trial Ex. 248). This Court finds that brief background testimony regarding a witness's education and experience is proper and does not amount to the State improperly eliciting expert testimony as Applicant asserts. Courts have consistently held that such introductory questions are relevant and for the finder of fact. See S.C. Dep't of Highways & Pub. Transp. v. E.S.I. Investments, 332 S.C. 490, 495, 505 S.E.2d 593, 596 (1998) ("It is a routine practice in trials for an attorney to ask his witness certain preliminary questions which may not be relevant to the issues being litigated, which may go beyond mere identification and which are designed to show that the witness will be somewhat credible or not biased in favor of the side calling him. For example, the educational background or professional status or employment position of a non-expert witness may be asked, or the witness's lack of prior contact with the side who has called him may be brought out. These questions give

the jury some knowledge of the individual and a more complete perspective in considering his testimony. . . . We conclude that such questions, within reasonable limits, serve the useful purpose of informing the jury about the witness, and thus may be allowed." (internal citations omitted)). See also State v. Jamison, 365 S.W.3d 623 (Mo. Ct. App. 2012) (noting preliminary questions directed toward aiding the jury in setting a proper estimate on the testimony of a witness may be properly asked and it is entirely proper, either by way of introduction or cross-examination, to identify a witness and to inquire into his residence, antecedents, social connections and occupation, particularly as they reflect his credibility either for good or bad.); State v. Summerville, 98 N.C. App. 167, 390 S.E.2d 358 (N.C. Ct. App. 1990) (holding evidence of robbery victim's scholastic achievements which was presented by prosecution during preliminary questioning was not improper; evidence was offered as means of introducing victim to court and to jury and to assist in explaining victim's background, particularly in light of fact that defendant portrayed victim as aggressor.); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442 (N.C. Ct. App. 1988) (noting that on prosecution of defendant for second-degree sexual offense involving his step-daughter, prosecutor's question regarding whether the victim was afraid to sleep in her own bed merely sought to establish background information, rather than elicit crucial testimony of elements of crime charged, and was not prejudicial.); State v. Sports, 41 N.C. App. 687, 255 S.E.2d 631 (N.C. Ct. App. 1979) (holding when a witness has been sworn and takes the stand, preliminary questions are properly put to him as to name, residence, knowledge of the case, et cetera, as the purpose of such questions is generally to introduce the witness to the court and the jury and to show why he is there testifying, and are thereby relevant). This Court finds the information provided by Weber amounted to entirely appropriate background questions intended to introduce the court and jury to the witness and provide context for her testimony. Applicant has failed to cite to any precedent establishing the impropriety of asking a witness basic questions about his or her background before

diving into the substantive portion of the witness's testimony as occurred here. This allegation is without merit and is denied and dismissed with prejudice.

Allegation: "Failing to object to Meredith Thompson-Loftis as a witness, including but not limited to her qualification as an expert witness, her techniques, and the reliability of her testimony. In the alternative, failing to impeach Meredith Thompson-Loftis as a witness, including but not limited to her qualifications as an expert witness, her techniques, and the reliability of her testimony. See, e.g., S.C. Dep't of Soc. Servs. v. Mary C., 396 S.C. 15, 720 S.E.2d 503 (Cl. App. 2011)."

Applicant argues trial counsel was constitutionally ineffective for failing to object to the qualifications of Thompson-Loftis as an expert because her testimony was unreliable. In support of this allegation, Applicant cites to S.C. Dep't of Soc. Servs. v. Mary C., 396 S.C. 15, 720 S.E.2d 503, 507 (Cl. App. 2011), a case where Thompson-Loftis was the counselor working with the child who made sexual assault allegations against her father. In that case, the Court of Appeals noted that Cindy Stichnoch, an independent expert in the assessment and treatment of sexual behavior issues in children, "was highly critical of Ms. Loftis' interviewing techniques, specifically her continuing to have therapy sessions with Anna G. about the sexual abuse allegations until a full assessment was conducted. Ms. Stichnoch stated a child of Anna G.'s age is easily influenced, and repetitive sessions and questions about the allegations could inadvertently and inappropriately reinforce those allegations with the child." Id. Applicant uses this case to assert Thompson-Loftis's methods were unreliable and her testimony should have been excluded.

This Court finds Applicant's use of S.C. Dep't of Soc. Servs. v. Mary C. to support this allegation is improper for several reasons. First, the Court of Appeals does not render an opinion as to the reliability of Thompson-Loftis's methods, but rather, the Court of Appeals merely notes that an independent expert expressed concerns in that particular case to the family court. Second, unlike the minor child in S.C. Dep't of Soc. Servs. v. Mary C., the victim in the present case did not begin therapy with Thompson-Loftis until after disclosures of sexual abuse and her forensic interviews has been completed. Here, Applicant has failed to establish that Thompson-Loftis's

methods were unreliable or that she should not have been qualified as an expert witness. Trial counsel testified he believed Thompson-Loftis was properly qualified as an expert witness and this is why trial counsel did not object. This Court finds these allegations are denied and dismissed.

Allegations pertaining to venue not in Spartanburg County

Applicant alleges trial counsel was ineffective for: "failing to investigate, develop, and present evidence that venue was not in Spartanburg County;" "failing to support the directed verdict motion with evidence that venue was not in Spartanburg County;" and "failing to request a jury instruction on venue."

From a PCR perspective, venue not being in Spartanburg County, at best for Applicant, was speculative. This Court viewed the evidence in this record as substantial that venue was not an issue in the case. If the criminal events happened, as the jury believed they did, they happened in Spartanburg County, or they did not happen at all. Law Enforcement and/or the solicitors did not hide evidence of venue. In the present case venue was in Spartanburg County, or the events did not happen.

All the evidence presented at the evidentiary hearing clearly establishes venue was proper in Spartanburg County. As discussed previously, Investigator Cantrell testified she investigated whether the allegations occurred in Greenville County or Spartanburg County and all evidence established the sexual abuse occurred at a Holiday Inn Express in Spartanburg County. Moreover, the counseling records from Thompson-Loftis that indicate the abuse happened in "Greenville" refer to the Greenville-Spartanburg metropolitan area, as Thompson-Loftis testified, not to a specific jurisdictional area. As Applicant has failed to present any credible evidence to establish venue was not proper in Spartanburg County, this Court finds these allegations must be denied and dismissed.


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Allegation: "Failing to object to the Special Prosecutor's improper closing argument that appealed to the jurors' emotions and improperly vouched for the complaining witness when he recounted a conversation with his daughter discussing how the police arrest 'bad people,' he (as Special Prosecutor) tells the complaining witness' story, and 'the jury takes care of good people.' Tr. 305-07."

Applicant argues trial counsel was constitutionally ineffective for failing to object to the State's closing argument wherein Special Prosecutor Brannon argued the jury takes care of good people. Specifically, Applicant argues Special Prosecutor Brannon's closing argument was "emotionally charged" and asked the jury to convict based on the improper reason that the victim was a "good person." Trial counsel testified he did not believe the closing was objectionable and accordingly, did not object.

In certain situations, this type of argument can be constitutionally improper. The rule is that a solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Improper comments do not automatically require reversal if they are not prejudicial. The argument in the present matter can be argued as wrong because it sought to have the jury view the evidence through an emotional lens rather than factual. More concerning in the present case was that private counsel acknowledged during the PCR that his motives in making the argument was to appeal to the jury's sympathies. Nevertheless, private counsel's argument did not rise to the constitutionally improper level as described in Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010), or Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). When private counsel's argument is viewed as a whole, it appears to be based on a proper analysis of the evidence and the burden of proof; and unlike Simmons, private counsel did not misrepresent the law to the jurors. Counsel's argument was not the type of argument found in Tappeiner v. State, 416 S.C. 239, 250-51, 785 S.E.2d 471, 477 (2016).

In the present case, Applicant has failed to establish the prosecutor's closing argument was improper. The comments did not ask the jury to convict Applicant based on anything other than the evidence presented, which he went through piece by piece with the jury. Special Prosecutor Brannon repeatedly reminded the jury that the State had the burden of proof and that the State had met that burden with the evidence presented. The State's closing argument was proper and certainly did not "so infect the trial with unfairness" as to warrant a new trial. This Court finds this allegation must be denied and dismissed.

Allegation: "Advising Mr. Spade not to present any evidence, including but not limited to his own testimony."

Applicant alleges trial counsel was ineffective for advising him not to present any evidence, similar to his allegation above pertaining to counsel's failure to call witnesses on his behalf.

As an initial note, Applicant failed to take the stand or otherwise offer what his testimony would have been at trial, and, accordingly, cannot establish his burden for failure to present himself as a witness. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

As discussed previously, counsel made a strategic decision not to present any witnesses. Specifically regarding whether Applicant should testify, trial counsel testified he and co-counsel discussed whether Applicant should testify with him numerous times. He testified one major concern with having Applicant testify was the likelihood that Applicant would open the door to possible "unflattering" evidence, such as his aggressive demeanor and comments to law enforcement when interviewed in Virginia, a jailhouse phone call with his father describing the "slip and slide game" discussed previously, and emails and other electronic evidence asking for information on how to "clean" a computer. Trial counsel testified the trial court ruled none of this evidence would be admissible unless Applicant took the stand and opened the door to such

evidence, and accordingly, trial counsel and Applicant were in agreement it was in his best interest not to testify during trial to avoid any risk of opening the door to such information. Moreover, Applicant failed to testify at trial or otherwise present evidence as to what his testimony would have been at trial. This Court finds Applicant cannot meet his requisite burden of proof as to this allegation, which is denied and dismissed.

Allegation: "Excluding evidence from the forensic computer examination that was exculpatory."

Applicant alleges trial counsel was ineffective for excluding evidence from the forensic computer examination that was exculpatory. In his pre-hearing memorandum, Applicant states, "Based on questions asked during Cara Lintner's deposition, Mr. Spade is concerned the State will continue to insinuate his computer was "wiped," despite Ms. Jordan's contrary representation to the trial judge." However, Applicant has failed to set forth what particular information he believes should have been introduced at trial and how counsel was ineffective for excluding it. Moreover, when this issue was addressed during the hearing, Investigator Cantrell testified text messages were recovered between Applicant and his sister providing instructions as to how to "clean" a computer. Trial counsel testified he was concerned the State may try to introduce this information at trial and this was one of the reasons he did not think Applicant should testify. Applicant has failed to set forth with any specificity exactly what "exculpatory evidence from the forensic computer examination" should have been presented to the jury and accordingly has failed to meet his requisite burden of proof.

This Court finds allegations or issues related to the wiping of the Applicant's computer were not at issue in this PCR, there was no proof that the computer was wiped, and it was not mentioned before the jury. This Court finds this allegation is denied and dismissed.


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Allegation: Failure to obtain relevant Department of Social Services Records

Applicant alleges trial counsel was ineffective for failing to obtain, either by subpoena or court order, relevant Department of Social Services (DSS) records for the victim. Prior to the hearing, Applicant was granted leave of Court to conduct discovery and subpoenaed the file from DSS. DSS failed to comply with the subpoena and did not produce the file during the hearing. Following the hearing, this Court ordered DSS to produce its file for in-camera inspection by the Court. After this Court reviewed the file, both parties reviewed the file together in chambers. Thereafter, this Court made a full and complete copy of this file part of the record in this case, under seal. As described above, this Court found the DSS records helpful and presented an unbiased/third party view of the background information and timeline related to the case.

The DSS file caused this Court concern. The file was produced after the present PCR hearing was conducted. This Court received briefing from the attorneys. The file's contents can be read as having supported the underlying narrative offered by both sides. As stated, this Court views the DSS file as unbiased. Based on the briefing presented to this Court, the DSS file can best be characterized as cumulative of the information already known at the time of trial. The new information supported the idea that the family was uncooperative, even with DSS's effort to investigate, by adding factual details to what was presented during the PCR hearing. The file also added to issues which the applicant or his witnesses could have faced on cross examination if character became an issue at trial.

After a thorough review of the DSS file, this Court finds Applicant cannot meet his burden of proof as to this allegation as there is nothing in the DSS file that would have changed the result of his trial. The vast majority of the file contains information that was already readily available to trial counsel through other means and is cumulative. The rest of the file is simply irrelevant to the case or would not have had any impact on the proceedings. Accordingly, this Court finds Applicant

cannot prove that but for counsel's failure to procure a copy of the DSS file, there is a significant likelihood he would not have been convicted.

Allegation: "Failing to move to exclude the testimony of the child complaining witnesses because her testimony was tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony."

Applicant alleges trial counsel should have moved to prohibit the victim from testifying because her testimony was "tainted, unreliable, and inadmissible because of the improper techniques used to obtain the testimony." In support of this allegation, Applicant cites to the testimony of his two experts, Dr. Lamb and Dr. Bruck, to argue the forensic interview conducted by Weber and the counseling conducted by Meredith Thompson-Loftis, tainted the victim's testimony and rendered it unreliable.

In South Carolina, every person—including a minor child—is generally presumed to be competent to serve as a witness unless otherwise stated by statute or rule. Rule 601 of the South Carolina Rules of Evidence states: "Every person is competent to be a witness except as otherwise provided by law." *State v. Lambert*, 276 S.C. 389, 401, 279 S.E.2d 364, 365 (1981) ("[T]here is no age at which an individual must attain in order to be a competent witness."). In fact, even a convicted perjurer is presumptively qualified to testify as a witness in our state. *State v. Needs*, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998). So long as an individual has the ability to perceive an event with a substantial degree of accuracy, remember it, communicate about it intelligibly, and be mindful of the duty to tell the truth under oath, that individual is considered to be competent to testify during trial regardless of his or her age or past actions. *Id.*; see *State v. Green*, 267 S.C. 599, 603, 230 S.E.2d 618, 619 (1976) ("The mere fact that Tommy was but a six year old boy at the time of trial did not in itself make him incompetent to testify."); see also *State v. Karelus*, 28 So. 3d 913, 914 (Fla. Dist. Ct. App. 2010) ("Testimonial competency relates to the capacity of a witness to recollect and communicate facts and appreciate the obligation to tell the truth. It is a test of intellectual capacity, *not veracity*," (emphasis added)). Critically, if a witness is competent to testify, that

witness's testimony can typically be admitted during trial, and it is solely up to the jury to resolve any issues regarding the credibility of the testimony presented. State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977); see Needs, 333 S.C. at 144, 508 S.E.2d at 862 ("[T]he resolution of the credibility of the witness is within the province of the jury."); see also United States v. Scheffer, 523 U.S. 303, 313 (1998) ("A fundamental premise of our criminal trial system is that the *jury* is the lie detector." (internal quotations omitted)).

Applicant failed to cite to any case law that would allow the court to exclude the testimony of the minor victim based on purported concerns over the reliability of the methods used in her forensic interview or subsequent counseling sessions. If counsel had concerns regarding the reliability of the forensic interview or counseling, the proper course of action would be vigorous cross-examination, not moving for the exclusion of the testimony—which Applicant cannot establish would have been granted.

As discussed above, the methods and techniques employed by Weber and Thompson-Loftis were developmentally appropriate and based on proper training, education, and experience. While Applicant's experts were able to provide valuable testimony about their "best practices" and how they believe Weber's methods deviated from those practices, Applicant has failed to establish the techniques used by Weber and Thompson-Loftis yielded "tainted, unreliable, and inadmissible" evidence. This evolution of the victim's allegation was presented to the jury. The jury believed the trial statements of the victim. Applicant has failed to meet his requisite burden of proof as to this allegation, which must be denied and dismissed with prejudice.

Allegation: "Failing to cross-examine witnesses presented by the State to demonstrate to the jurors that the testimony of the child complaining witnesses was tainted and unreliable because of the improper techniques used to obtain the testimony."

Applicant alleges trial counsel should have cross-examined the State's witnesses, mainly Weber and Thompson-Loftis, to establish the testimony of the victim was "tainted and unreliable"

based on their techniques. As discussed in several other allegations, Applicant has failed to establish the methods used by either Weber or Thompson-Loftis were improper or had a high likelihood of yielding "tainted and unreliable" reports of sexual abuse. Counsel testified he had handled child sexual assault cases numerous time before, particularly when he was an attorney for DSS, and had no reason to believe the methods employed by either Weber or Thompson-Loftis were improper or yielded "tainted and unreliable" as Applicant now asserts. Moreover, as discussed previously, such a cross examination would have likely required the introduction of the forensic interviews, which counsel did not want to do based on sound and well-reasoned trial strategy. This Court finds Applicant has failed to meet his requisite burden of proof on this allegation.

Allegation: "Failing to investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigation allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with [the victim]."

Applicant argues trial counsel was constitutionally ineffective for failing to "investigate, develop, and present evidence that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in child sexual abuse perpetrated by Danny Spade with [the victim]. Law enforcement determined these allegations by [the victim] to be unfounded. This ground is based on the deposition testimony of Cara Lintner."

As noted previously, Applicant failed to introduce the deposition of Cara Lintner into evidence, and accordingly, it is not before this Court. Regardless of Applicant's failure to present any evidence to substantiate this claim, this allegation is clearly refuted by the testimony presented at the evidentiary hearing. Thompson-Loftis testified the statements the victim made pertaining to Cara deal with her attempting to comfort the victim, not sexual abuse. Investigator Cantrell testified similarly that law enforcement did not believe there were any allegations of sexual abuse by Lintner and she was never considered a suspect. Moreover, Applicant cannot establish prejudice

as there is nothing to establish an exoneration of wrongdoing by Lintner would exonerate Applicant in the sexual abuse, particularly when the allegation presented at trial was that Applicant had sexually assaulted his daughter during a solo visit to South Carolina. This Court finds Applicant failed to meet this requisite burden of proof as to this allegation, which must be denied and dismissed with prejudice.

Allegation: "Failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing" and "failing to present any information or evidence to the trial judge to mitigate the sentence imposed."

Applicant argues trial counsel was constitutionally ineffective for "failing to object to the trial judge denying Mr. Spade an opportunity to address the Court during his sentencing hearing" and "failing to present any information or evidence to the trial judge to mitigate the sentence imposed." In his pre-hearing memorandum, Applicant argues, "there was virtually no sentencing hearing." 2020 OCT -8 PM 3:55
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When questioned about these allegations at the evidentiary hearing, trial counsel testified he and Applicant had already discussed and decided an appeal would be filed if Applicant was convicted, and accordingly, they did not want Applicant to say anything that could be detrimental on appeal.

As discussed previously, Applicant failed to testify at his evidentiary hearing or otherwise present evidence in accordance with the rules of evidence as to what he would have said to the court during sentencing. Accordingly, this Court finds cannot meet his burden of proof as to this allegation. See Glover, 318 S.C. at 498-99, 458 S.E.2d at 540 ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.").

Moreover, Applicant failed to present any of the evidence he alleges should have been presented to the trial court and fails to establish how the presentation of any such evidence would

have resulted in a different sentence. The trial judge's remarks left little doubt. Accordingly, this Court finds he cannot meet his requisite burden of proof as to this allegation, which must be denied and dismissed.

Allegation: "The cumulative effect of trial counsel's errors denied Mr. Spade his right to a fair trial."

Applicant argues in addition to the numerous individual grounds of ineffective assistance of counsel raised, he is also entitled to post-conviction relief based on the cumulative effect of trial counsel's deficiencies. However, this Court finds this argument fails, as Applicant failed to meet his requisite burden of deficiency for each ground raised.

Traditionally, an applicant must show both deficient performance and prejudice to establish his or her trial counsel was constitutionally ineffective. Strickland, 466 U.S. 668. However, "[w]hen counsel's deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice." Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). "Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina." Id. (citing Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002)).

Recently, in Smalls v. State, the Supreme Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls v. State, 422 S.C. 174, 194, 810 S.E.2d 836, 864 (2018) ("As we have explained, the strength of the evidence must be considered along with the specific impact of counsel's errors."). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger

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

Here, since Applicant has failed to establish any instances of counsel error, this Court declines Applicant's request to conduct a cumulative error analysis. *See Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (recognizing "the threshold to asking the cumulative prejudicial question is to first find multiple errors"). *See also Lorenzen v. State*, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n. 3 (2008) (noting whether several errors, which are independently found not be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina).

Ineffective Assistance of Appellate Counsel

Applicant next argues appellate counsel C. Rauch Wise was ineffective for failing to brief on appeal the trial court judge denying the motion for directed verdict when the failed to present evidence establishing venue in Spartanburg County."

On appeal, appellate counsel filed a merits brief and raised five substantive issues on which he claimed Applicant was entitled to a new trial:

Question I: Did the trial court err in excluding the testimony of Dalo Smith as to the occurrence of panic attacks by the minor child when adult males other than Daniel Spade were present when the occurrence of panic attacks was used by the state to prove Mr. Spade had abused his daughter?

Question II: Did the trial court err in declaring that the attorney for Daniel Spade improperly struck Juror 199 based upon her gender strike when the attorney specifically stated the juror was struck for her age and being retired?

Question III: Did the trial court err in permitting Douglas Brannon, a private attorney, to actively participate in the trial of this case when he had represented the mother and adoptive father of the minor child in the family court case?

Question IV: Did the trial court err in ruling that Doug Brannon had been properly appointed as required by S. C. Code § 1-7-470 when the solicitor failed to produce the commission from the governor as required by the statute?

Question V: Did the trial court err in failing to exclude the testimony of Meredith

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Thompson-Loftis when the state had been ordered to turn over to the defendant the file of Ms. Loftis if they intended to use her as a witness a reasonable time before trial and the state did not turn over substantial portions of the file until four days before trial and portions were not turned over until the day of trial?

(Final Brief of Appellant).

Despite raising five issues on appeal, Applicant claims appellate counsel was constitutionally ineffective for failing to raise the directed verdict issue on appeal. This Court finds this allegation is without merit.

Just as a defendant is entitled to effective representation during his general sessions proceeding, a defendant is also entitled to effective assistance of appellate counsel. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999)). To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice as outlined above. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1992) (post-conviction relief of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

Although ineffective assistance of appellate counsel claims for failure to raise a particular issue on direct appeal can be successful, the United States Supreme Court has reiterated that it is "difficult to demonstrate that counsel was incompetent." Smith v. Robbins, 528 U.S. 259, 288 (2000). While appellate counsel is required to provide 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 dissuade the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our South Carolina Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Smith, 528 U.S. at 288 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

Accordingly, in order to meet his burden of proof, Applicant must establish a reasonable probability that, but for appellate counsel's failure to raise a specific issue on appeal, he would have prevailed on his appeal. Smith, 528 U.S. at 285-86. Based on this standard set forth above, this Court finds Applicant cannot meet his requisite burden of establishing any constitutional ineffectiveness of appellate counsel. The decision as to which issues to raise on appeal clearly rested within counsel's discretion and his strategic decision as to which issues to raise on appeal do not render his performance deficient. Thrill, 302 S.C. at 539, 397 S.E.2d at 526; see also Jones, 463 U.S. at 754 ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would dissuade the very goal of vigorous and effective advocacy.")

Moreover, Applicant cannot establish any resulting prejudice as there is no reasonable likelihood this issue would have been successful on appeal. As discussed above in regards to purported errors made by trial counsel, the State properly established the venue was in Spartanburg County. During Applicant's trial, Investigator Cantrell testified the Holiday Inn Express in question was in Spartanburg County (Trial Tr. p. 126). Trial counsel made a motion for directed verdict on several grounds, including that the victim failed to establish the abuse occurred in Spartanburg County, which trial court properly denied. There is no reasonable likelihood

Applicant would have been successful had this issue been raised on appeal. This allegation must be denied and dismissed with prejudice.

Prosecutorial Misconduct

Applicant argues the State committed prosecutorial misconduct regarding the appropriate venue of the case, its failure to disclose relevant DSS records, and failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and law enforcement found them to be unfounded. This Court finds these allegations do not have merit.

Allegations of Prosecutorial Misconduct Pertaining to Venue

As discussed in regards to ineffective assistance of trial counsel and appellate counsel, this Court finds Applicant failed to establish venue was not in Spartanburg County.

Applicant's assertions that the State committed a Brady violation for failing to disclose evidence that venue was not in Spartanburg County are without merit. Initially, this Court references that Applicant knew of these purported Brady violations at the time of his trial, as he was provided with Thompson-Loffis's notes prior to trial and made a motion for continuance based on the late production of these records, and accordingly, should have raised these issues on direct appeal. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974).

Regardless of the propriety of raising this claim now on post-conviction relief, it is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794 (1989). Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or

known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing United States v. Bagley, 473 U.S. 667 (1985)). "The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.'" Riddle v. Ozmini, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006)

The requirements of Rule 5, as opposed to the constitutional dictates of Brady, are judicially created discovery mechanisms for use in criminal proceedings. State v. Gulledege, 326 S.C. 220, 487 S.E.2d 590 (1997). Rule 5(a)(1)(C) requires:

Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Id.

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The definition of "material" for purposes of Rule 5 is the same as the definition used in the Brady context. Fradella v. Town of Mount Pleasant, 325 S.C. 469, 482 S.E.2d 53 (Cl. App. 1997). In order for Applicant to prevail on a Rule 5 claim, he must show not only an actual violation, but also that he suffered prejudice as a result. State v. Wilkins, 310 S.C. 81, 425 S.E.2d 68 (Cl. App. 1992); State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

This Court finds Applicant cannot meet his burden of proof as to this allegation. As discussed above, there is no evidence that venue was not proper in Spartanburg County. Moreover, Applicant cannot establish that the State elicited or failed to correct false testimony regarding venue. As Investigator Cantrell testified, she determined venue was properly in Spartanburg

County as it was the only hotel where Applicant and the victim were together alone. Simply put, the State did not elicit any false testimony and there was no false testimony to correct. This Court finds Applicant's assertions otherwise are without merit.

Allegation the State failed to Disclose the Relevant Portions of the DSS file

Applicant also alleges that the State committed prosecutorial misconduct by failing to disclose relevant Department of Social Services records obtained by Investigator Cantrell. In support of this allegation, Applicant cites to the transcript of the 2012 termination of parental rights trial in family court wherein Investigator Cantrell mentions she had the DSS records for the victim. At the evidentiary hearing, Investigator Cantrell testified she did not have a copy of the DSS file in this case and likely misspoke when testifying at the family court proceeding because she was called to the stand from the road and did not have her file in front of her. The Court notes the extraordinary efforts it took to obtain the DSS file after the PCR hearing occurred. No evidence was presented to this Court that suggests the State interfered with the production of the DSS file.

This Court finds Applicant has failed to establish the State was in the possession of the DSS file or that anything in the DSS file would have had material information not already known to counsel. Accordingly, Applicant has failed to meet his requisite burden of proof. This allegation must be denied and dismissed with prejudice.

Allegation the State failed to Disclose the Investigation into Cara Lintner

Applicant also the State committed prosecutorial misconduct by "failing to disclose that law enforcement in South Carolina and Virginia investigated allegations that Cara Lintner witnessed and/or participated in the abuse and LE found them to be unfounded." As discussed above, Investigator Cantrell testified Lintner was not considered a suspect. Thompson-Lofitis similarly testified she did not report any allegations of abuse by Lintner to law enforcement because she did not believe the victim's references to Lintner amounted to disclosures of abuse,

but rather, Lintner's attempts to comfort the victim. This Court finds Applicant has failed to meet his burden of proof as to this allegation. This Court denies and dismissed this allegation with prejudice. Additionally, with this Court's understanding that Lintner was hostile to the Applicant's interests at the time of trial and failure to present additional information about Lintner during the PCR hearing, not prejudice was established.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

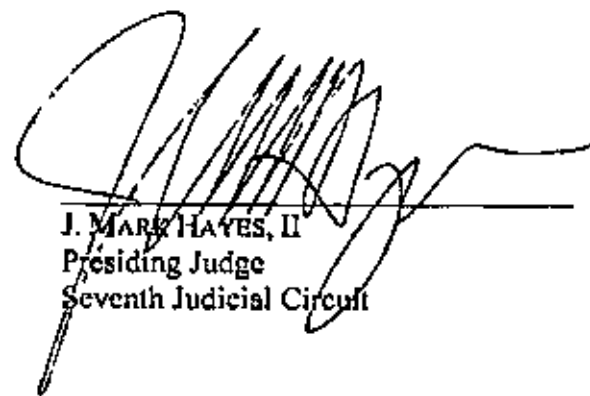
This Court notes that if Applicant wishes to appeal this order, Applicant, though his counsel of record, must file and serve a notice of appeal within thirty days from the receipt of this Order. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedure.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant Daniel Spade shall remain remanded to the custody of the State of South Carolina.

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AND IT IS SO ORDERED this 8th day of October, 2020.



J. MARK HAYES, II
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

FILED
2020 OCT -8 PM 3:55
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX